



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021 No: 194

BETWEEN:

TROY BRIMMER

1st Plaintiff

DEBRA BRIMMER

2nd Plaintiff

And

ROBIN FREDERICK SWAN

Defendant

REASONS

Mortgage Action (RSC O.88) – Application for an Interim Injunction to stay execution of a Writ of Possession and Writ of Execution – Legal Principles applicable to an Ordinary Interim Injunction and Legal Principles application to a stay of execution of judgment under RSC O.47/1

Date of Hearing: Friday 2 July 2021

Date of Reasons: Thursday 15 July 2021

Plaintiffs: Victoria Greening, Resolution Chambers

Defendant: Richard Horseman, Wakefield Quin Limited

Introduction and Relevant Background

1. The Plaintiffs' application for interim injunctive relief was made by way of an *ex parte* Notice of Motion (with notice to Defendant) filed on 2 July 2021 and supported by affidavit evidence sworn by the 1st Plaintiff.
2. The application, unhinged to any originating Court document, was aimed to obtain a Court Order staying the execution of a Writ of Possession and Execution ("the enforcement writ") of the property known as "The Anchorage" located on 81 North Shore Road, Devonshire Parish ("the mortgaged property").

The Mortgage Proceedings

3. The enforcement writ was issued in a separate mortgage action (Case No. 124 of 2020) ("the mortgage proceedings") which was commenced by an Originating Summons filed on 6 March 2020 for relief under Order 88 of the Rules of the Supreme Court ("RSC").
4. The Originating Summons was supported by the affidavit evidence of the mortgagee, Mr. Robin Swan, who deposed on 4 March 2020 that a mortgage agreement ("the mortgage agreement") had been made on 3rd May 2018 between him on one part and Mr Troy Brimmer and Mrs. Debra Brimmer ("Mr. and Mrs. Brimmer" / "the Brimmers") on the other. In Mr. Swan's evidence he stated [5-10]:

"5. By a notice in writing from my attorneys dated 27 February 2020 I made a formal demand for repayment of the Mortgage debt. The Mortgage debt remains unpaid.

6. The Mortgagors have persistently failed to pay punctually, the instalments due under the Mortgage, and has not, in spite of the said demand, paid the Mortgage debt. As at the 2 March 2020 the total debt due was \$1,758, 250.39 with interest accruing thereon at the rate of 9.00% which represents 7.00% interest and 2.00% delinquency fee, per annum.

7. *The Defendants are in possession of the Mortgaged Property.*

8. *The state of the account as at 2 March 2020 was as follows:*

a. *Principal sum due* \$1, 719,663.96

b. *Accrued interest* \$38, 586.43

Total sum due as at 2 March is \$1,758, 250.39

9. *I can confirm that I have not received payment of the sums set out in paragraph 8 above.*

10. *Under the circumstances I ask this Honourable Court to grant the relief sought, as set out in the Originating Summons, namely an Order for Possession and sale of the Mortgaged Property and for monetary judgment.”*

5. Mr. Swan exhibited a copy of the mortgage agreement which contains a contractual term defining the monthly mortgage payments in the sum of \$11,642.79. Further under the mortgage agreement, there is an express term providing for any failure to make payment on the monthly payments in addition to a clear term on the position as to costs [5b] and [5e]:

“5(b). If the Borrower fails to make any of the payments under the terms of this mortgage as and when the same became due, or fails to fully and properly comply with any of the covenants made by the Borrower herein or if the Borrower is otherwise in default hereunder, then and in such case:

(i) *It shall be lawful for the Lender to sell the Property without any consent of or notice to the Borrower; and*

(ii) *It shall be lawful for the Lender, in addition to the power of sale, to appoint a receiver to receive the rents (if any) or any other income from the Property at any time during the Payment Term. Any receiver so appointed shall be deemed to be an agent of the Borrower and the Borrower shall be responsible for his acts and defaults. The receiver*

shall collect the rents and any other income from the Property or any part thereof and comply with the Borrower's obligations as lessor. The costs of any such compliance and the fees of the receiver in so acting shall be deducted by him from the sums received and the balance remaining shall be paid by him to the Lender and applied towards all sums due from the Borrower under the terms of this mortgage;

5(e). The Borrower shall be responsible for all legal fees, costs, stamp duty and expenses incurred in connection with the granting of this mortgage or incurred by the Lender in any way in giving its consents as required hereunder or in enforcing the Borrower's obligations hereunder in exercising the power of sale or power of appointment of a receiver and the costs of obtaining possession of the Property..."

6. On 26 August 2020, Mr. and Mrs. Brimmer entered a Memorandum of Appearance via their then Counsel of record, Mr. Tyrone Quinn of DV Bermuda Limited. At some point prior to 17 March 2021, Mr. Quinn ceased to represent the Brimmers and was replaced by Mr. Jaymo Durham of Amicus Law. (Neither Mr. Quinn nor Mr. Durham appear to have filed formal notices with the Court to confirm the change of attorney.)
7. The Plaintiff's Originating Summons was listed for a substantive and final hearing on 17 March 2021. The facts asserted before the Court by the Brimmers in advance of the 17 March hearing were deposed in affidavit evidence from Mr. Brimmer sworn on 28 October 2020. There Mr. Brimmer suggested that he and his wife were current with their mortgage payments prior to the Covid-19 pandemic. Mr. Brimmer said [6-12]:

"6. It was only once the Pandemic took place that we had ran into difficulties, which is no different than the other persons with a mortgage. In fact banks have allowed grace periods for those during these times. Unfortunately for us we have not been given this same opportunity.

7. Prior to us being served papers we had decided it would be best to get funding elsewhere as we know the plaintiff to be difficult.

8. *Therefore our application for mortgage is with 2 institutions and we are awaiting their response.*

9. *We are aware our lawyer, Mr. Quinn had asked the plaintiff's lawyer if we can have 3-6 months maximum to secure funding so that the plaintiff would be make whole [sic].*

10. *We humbly ask the Courts to grant us the 3-6 months max to secure the funding to buy the property outright. We have put our hard work, sweat and tears into this building. We find it unfair and unjust that we should lose this property without giving us the chance to secure funding from elsewhere. Especially when we have submitted applications.*

11. *We also find it unfair that those whose mortgage at a bank was given a grace period and that we were not simply because it is a private financing deal. We believe that there should be one standard given to all who chose to enter the mortgage or property lending arena.*

12. *We believe it is wholly unreasonable to the plaintiff to not grant us the 3-6 months that we asked for to secure funding especially when we have applications submitted. Therefore we humbly pray that the Courts grant us the 3-6 months to secure funding so we can keep our building."*

8. In Mr. Swan's reply affidavit evidence sworn on 6 November 2020 he produced a schedule of the payments received and the payments missed. Additionally, he exhibited various letters sent to the Brimmers setting out their delinquency and his notice to them of the appointment of a receiver for collection of their rents.

9. Shortly prior to the start of this hearing at 9:10am, Mr. Horseman for the Plaintiff emailed to the Court and to Mr. Durham a written outline of the Plaintiff's submissions for the hearing ("the Plaintiff's Speaking Note"). The Plaintiff submitted:

"1. The Plaintiff sold the property to the Defendants for 2 million dollars on the 27th February 2018.

2. *The Plaintiff agreed to offer the Defendants financing of \$1,750,000.00 in order to complete the purchase...*

3. *The Defendants agreed to pay \$11,642.70 per month. They are in serious default on the mortgage and the current amount owing now is \$1,885,783.77.*

4. *This was the Plaintiff's primary asset and the sale of the property was meant to finance the Defendant's retirement. The Plaintiff is now 73 years of age and he has been without any meaningful income from the property since December 2019 when the Defendants stopped making regular payments.*

5. *The Defendants made one payment in 2020 of \$8,000.00 which was made on the 14th August 2020. In 2021, they made one payment of \$5,800.00 two days ago.*

6. *On the 20th January 2021 the Plaintiff exercised his right to appoint a receiver to collect the rent from the restaurant operating on the site, Seaside Grill, who was paid the Defendants' rent for the entire 2020 except for ½ month break they received during the pandemic. See Wakefield Quin's letter the dated 20th January 2021...*

7. *The First Defendant's affidavit does not dispute the rent is in arrears. The First Defendant wrongly states in evidence that the Defendants were current with the payments until the pandemic hit. That is not true. The payments stopped in December 2019. This is despite the Defendants operating a store on the property and receiving rents for the entire 2020 year save for one ½ month rent deduction to the tenant.*

8. *The Defendants' position as outlined in Mr. Brimmer's affidavit dated the 28th October 2020 is that they want 3 to 6 months in which to try to secure funding from elsewhere. It has now been 5 months since the filing of the affidavit and it is clear the Defendants cannot obtain funding elsewhere.*

9. *The Defendants say it is unfair that those who obtained a mortgage through the bank were given a grace period. Unfortunately, the Plaintiff is not a bank. This situation would maybe be different if the payments were current at the time of the pandemic, which they were not, and if the Defendants had made regular payments since the lockdown was lifted, which they haven't.*

10. *It is more egregious here where the Defendants collected rents from the property and continued to operate a store on the property and but [sic] have not made 1 full payment over the course of the last 13 months leaving the Plaintiff and the wife to suffer.*

11. *To put things in perspective [blank]*

12. *The Plaintiff asks for immediate possession and for judgment.”*

10. The 17 March 2021 hearing was originally scheduled to proceed remotely via Zoom hearing. However, Mr. Durham and Mr. Brimmer together with a gentleman who introduced himself to the Court as Mr. Brimmer's accountant appeared in Commercial Courtroom #2 in person. Accommodating their personal appearances, Mr. Horseman left the Zoom hearing platform and attended Commercial Courtroom #2 where the hearing proceeded.

11. On 17 March the Court was informed by Mr. Horseman that an agreement had been reached between the parties. Mr. Horseman outlined each of the agreed terms in the visible and audible presence of Mr. Durham, Mr. Brimmer and his accountant. Accordingly, judgment was entered by consent (“the Consent Judgment”) which, *inter alia*, granted Mr. Swan possession of the mortgaged property, a right of enforcement by sale of the mortgaged property and judgment in the sum of \$1,885,783.77. The Consent Judgment was stayed for a period of 60 days on the condition that the Plaintiffs pay Mr. Swan a sum of \$40,000.00 on or prior to 19 March 2021.

12. Given the contentious narratives of this hearing and the making of the Consent Judgment, I note (in transcript style) the following relevant portions of the 17 March 2021 hearing:

Mr. Horseman: *Well the good thing is that we are not going to keep you long, it looks like we have an agreement...*

....

I would like to record the Order now, um basically because I don't want to end up in a position where we're not- you know where something happens, and then having to come back to Court...

...So first thing that there be judgment in favour of the Plaintiff in the amount of- it would be ... \$1,885,783.77 together with contractual interest.

Court: *Yes*

Mr. Horseman: *at 9% until payment- I mean it's delinquent and-*

Mr. Durham: *Yeah it's the seven plus two*

Mr. Horseman: *Yeah, two, that the Plaintiff be at liberty to enforce the mortgage dated the 3rd of May 2014 by way of sale.*

Three, that the Defendants do deliver the Plaintiffs possession of the Property and what I would say within 60 days of the Order.

Um, the Defendants pay the costs of this application which I would cut down but because of agreement be summarily assessed at \$7,500.00-

[Court intervenes on the issue of costs]

That's fine My Lady, I can just say that the Defendant pay the costs of the action pursuant to the terms of the mortgage, which is the standard Order.

...

Then we've agreed a stay provision, My Lady, to give, um the Brimmers an opportunity to try with one last opportunity-

Court: *I'm sorry, who am I looking at..?*

Mr. Durham: *Mr. Brimmer*

Court: *You're Mr. Brimmer? Mr. Troy Brimmer?*

Mr. Troy Brimmer: *Yes*

Court: *And Debra Brimmer is not here?*

Mr. Troy Brimmer: *Yes, that's my wife...*

Court: *Yes, this [Order] is as against both*

Court: *And you are sir?*

Male person sitting beside Troy Brimmer: *"Cavone Steede, the accountant for Mr. Brimmer"*

Court: *Okay, that's fine, you're just observing.*

And this Order is joint and severally against both [of] the Defendants

Mr. Horseman: *Yes because they're both [inaudible]*

Court: *stay provision for what period of time?*

Mr. Horseman: *This Order would be stayed for 60 days but it's on the condition that the Defendant, the Defendants pay to the Plaintiff the sum of \$40,000.00 on or before the— [addressing Mr. Durham]: what's the- Friday is the 19th?*

Mr. Durham: *Yeah*

Mr. Horseman: *the 19th May- no March 2019- no 2021 sorry, I'm having trouble with my dates*

Mr. Durham: *[addressing Mr. Horseman] [inaudible]*

Mr. Horseman: *So, you can see that the thrust is that they have offered to pay \$40,000.00 now, which obviously we apply towards the balance, My Lady.*

Court: *And these are all agreed terms?*

Mr. Durham: *They are My Lady*

Mr. Horseman: *So, we will file it in the form of a Consent Order for Your Ladyship*

Court: *Alright, so I confirm those terms, unless you need for me to read through them again*

Mr. Horseman: *I think I have them My Lady and we will agree the [drafting of the] terms of the Order in any event... I just wanted the Court to have it, so there is no coming back so to speak*

Court: *Alright, unless there is anything further, thank you very much*

Mr. Horseman: *Nothing further, thank you My Lady*

Court Associate: *Court rise*

13. The agreed terms outlined for the Court on 17 March 2021 accord with the terms of the perfected Consent Judgment which bears my signature and the seal of the Court.
14. On 21 May 2021 (some 65 days after the Consent Judgment was made) the enforcement writ was issued for the Provost Marshall General to take possession of the mortgaged property together with any other property of Mr. and Mrs. Brimmer for the purpose of satisfying the relief granted under the Consent Judgment.
15. However, on 1 June 2021 a Notice of Change of Attorney was filed by Ms. Angelita Dill of AAA Law Company Limited as Mr. and Mrs. Brimmer’s new attorney of record. Ms. Angelita Dill filed a summons application weeks thereafter on 18 June 2021 (“the 18 June Summons”) seeking “*an extension of 180 days to secure refinancing of the loan and stay on the consent*”

order dated 27 March 2021". This application was supported by an affidavit sworn by Mr. Brimmer on 7 June 2021 which in its material parts provided:

"I am the lawful owner and mortgagor of "The Anchorage" 81 North Shore Road, Devonshire FL03 (the "Premises"), it consists of 5 apartments, a nightclub, restaurant, and wholesale store.

In 2010, I started renting space in the lower floor [of] the said building for BKS Wholesales business from Mr. Robin Swan.

While renting the Premises, Mr. Swan was residing between Atlanta and the Dominican Republic.

I contacted Mr. Swan on many occasions for repairs of the Premises, however he stated that he did not intend to invest any money in repairs.

I started to repair the Premises myself to operate my business. The repairs included the outside bar, sea wall deck fixed cracks in the building to stop water leaks, replaced water pumps and air conditioning units.

On June 2016, I opened a night club known as Inferno Lounge 2 which is located in the same building referred as Premises.

In 2016, I informed Mr. Swan that I was interested in purchasing the building once I raised the funds for deposit.

On May 2018, I purchased the building from Mr. Swan using my retirement funds and savings.

The purchase of the building was done through Progressive Realty Company owned by Tyrone Quinn. Furthermore, Mr. Quinn was my legal representative for the purchase.

Mr. Quinn was introduced to me by my accountant, Cavan Steede.

I was always up to date with my mortgage payments of \$11,695.00. However, on March 2020, I tried to make the mortgage payment via online transfer, but the payment was not accepted.

I requested for Mr. Quinn to contact Mr. Swan or his lawyer to request updated banking information.

Mr. Quinn advised me to deposit the monthly mortgage payments to his law firm bank account and he undertook to transfer the funds to Mr. Swan via his lawyer.

On May 2020, Mr. Steede and I had a meeting with Mr. Quinn, I requested for him to request to Mr. Swan's lawyer to reduce the mortgage payments to \$5,800.00.

On 20 May 2020, I started depositing the mortgage payments of \$5,800.00 to Mr. Quinn's firm bank account each month, with the understand[ing] from out [sic][our] attorney that Mr. Swan was accepting of this new arrangement.

On March 2021, I was notified that the mortgage payments made to Mr. Quinn's firm bank account had not been transferred to Mr. Swan's lawyer.

On May 2021, I filed criminal charges against Mr. Quinn and notified the Bermuda Bar Association.

For the years of 2018 and 2019, Larry Brangman contractor, Sherwin Burgess electrician and Action Services assessed the premises and said that the exterior walls have salt water in them, the windows, the doors are leaking and were cracked all over. The [sic] [There] was need for extensive repairs to the building because of the erosion, making the building unusable for its purposes. The walls had to dry out and to be sealed to repair the damage.

Furthermore, due to COVID-19, my businesses which are now my only source of funds were forced closed, and since January 2020 income was very intermittent due [to] closure of both the Bar and the BKS Wholesales by Government order of Island-wide closures and limitations.

Over the years, I have invested an estimated amount of \$375,000.00 in building repairs both as a Tenant and the Property Owner.

On 17th March 2021, I transferred the amount of \$40,000.00 to Mr. Swan towards my Mortgage arrears. Furthermore, since January 2021 Mr. Swan's lawyer seized my monthly rental income of \$2,500 from my commercial tenant Sea Side Grill and has failed to account for those rents as partial Mortgage Payments.

The amount of \$42,000.00 was transferred to Mr. Quin between May 2020 and March 2021. The misappropriated of [sic] funds has had a detrimental impact on us, because Mr. Swan did not receive the funds and therefore it is not reflected in the Consent Order [the Consent Judgment]. Mr. Swan's attitude working out a reasonable arrangement to repay the Mortgage Payment arrears and loan is spent.

Since the last Court Hearing, we have reduced the arrears by \$57,500.00. The total outstanding principal is now \$1,820,283.77.

I am seeking to refinance the loan, considering our economic times and pandemic 30 days is insufficient.

I pray for the court to give us an extension of 180 days to secure refinancing of the loan and stay the on the [sic] consent order dated 27 March 2021 [the Consent Judgment]."

16. On Thursday 1 July 2021 the parties appeared before me on the Brimmers' 18 June summons which was robustly opposed by Mr. Horseman who relied on *Junos v Bank of Bermuda (HSBC)* [2011] Bda LR 38 and submitted that his client's contractual rights entitled Mr. Swan to possession of the property and an enforcement of the mortgage by way of sale since it had

been shown that Mr. and Mrs. Brimmer were delinquent in the discharge of their obligations to make payments under the mortgage agreement.

17. Ms. Dill relied on the affidavit evidence of Mr. Brimmer and emphasized that the Brimmers had been the victim of Mr. Quinn’s dishonest representation and absconding of the mortgage sums paid to him by her clients in good faith. She also pointed to Mr. Brimmer’s evidence that he was unaware that Mr. Swan never agreed to reduce his monthly mortgage obligations.

18. Having heard from both sides on Thursday 1 July 2021 I refused the 18 June summons extemporaneously.

The Present Proceedings

19. On the following day, Friday 2 July 2021, Mr. and Mrs. Brimmer appeared before the Court, having again secured new Counsel, namely Ms. Victoria Greening of Resolution Chambers.

20. The present application was filed under a new action and Court case number seeking substantially the same relief which I declined to grant on the day prior in the mortgage proceedings, only this time the relief sought was in the form of an urgent interim injunction staying the execution of a Writ of Possession and Execution.

21. Having been heard on Thursday 1 July 2021 on his affidavit evidence sworn on 7 June 2021, Mr. Brimmer’s new Counsel filed further affidavit evidence from Mr. Brimmer deposing to the following:

“ ...

1 ...

2 THAT this affidavit is in support of my application for ex parte injunctive relief in relation to the possession of the property known as “The Anchorage” 81 North Shore Road, Devonshire Parish, In the Islands of Bermuda (“the Anchorage”).

- 3 *THAT on 3rd May 2018 a mortgage was executed between myself, the Second Plaintiff and the Defendant to secure repayment of the principal loan of BD\$1,750,000 and payment in the meantime of interest at a rate of 7% per annum variable in accordance with the covenants for repayment.*
- 4 *THAT I instructed attorney Mr. Tyrone Quinn of DV Bermuda Ltd (“Mr. Quinn”) to advise me in relation to the mortgage. The Defendant was represented by Mr. Richard Horseman of Wakefield Quin Ltd (“Mr. Horseman”). I transferred my portion of the stamp duty to Mr. Quinn to forward on my behalf, which I later discovered was not done as requested and expected.*
- 5 *THAT I met all of my obligations in relation to the monthly payments.*
- 6 *THAT in February 2020 my monthly mortgage payment bounced back. I contacted and asked Mr. Quinn to ask Mr. Horseman if the Defendant had changed bank details and to provide the correct details to me. In any event, I had made overpayments that would cover the payments until March 2020 so I was not worried about default at that time.*
- 7 *THAT Mr. Quinn advised me to make payments into his firm’s trust account moving forward, which I did. I paid BD\$56,000 into Mr. Quinn’s trust account over the coming months assuming that this was being forwarded to the Defendant.*
- 8 *THAT I later came to find out that only \$8,000 of the \$56,000 [sic] I transferred to Mr. Quinn was forwarded to the Defendant. I have made a formal complaint to the Bermuda Police Service about this.*
- 9 *THAT despite repeated attempts to contact Mr. Quinn thereafter, I could not reach him. I came to find out that he had been arrested on unrelated matters and that my file (along with all of his other files) had been passed to Amicus Law Chambers.*

10 THAT I attempted to contact attorneys at Amicus Law Chambers and eventually met with Mr. Jaymo Durham (“Mr. Durham”) on 17th March 2021. I did not give any instructions to Mr. Durham to act in this matter at that time ever [.] In particular, Mr. Durham did not say anything to me about a Consent Order but I later came to find out that he and Mr. Horseman had put together a Consent Order and signed it without my knowledge, let alone agreement.

11 THAT when I attended court with my accountant on 17th March 2021, I asked Mr. Durham over and over again to see the Consent Order that was being filed, and for an assurance from him that the Consent Order was limited to an agreement to give me more time to pay the arrears that were incurred as a result of Mr. Quinn’s theft of my funds. He gave me that assurance, but to date, I have not seen a copy of the Consent Order. For the avoidance of doubt, I cannot agree to what is contained in the Consent Order because I was never made aware of it, never gave instructions on it, never saw it or signed it. I would not have agreed to the terms that I am now starting to understand are contained within. I have since collected my file from Mr. Durham and there is no copy of the Consent Order in it, so I have still not seen it.

12 THAT now I have had the opportunity to read my file, I also see that there is an affidavit purporting to be mine and signed by me, that I have never seen and did not sign. I assert there is a fraud on the face of this.

13 THAT I respectfully request that my application be granted as sought.”

22. The 2 July 2021 hearing proceeded remotely via Zoom. Ms. Greening confirmed that she was accompanied by Mr. Troy Brimmer who was visible during the hearing. In answer to the Court’s query as to why the Plaintiff had not instead filed an application to set aside judgment, Ms. Greening advised that her client would do so but would need sufficient time to secure expert evidence for an in-depth accounting on the sums owed in arrears. On that basis, Ms.

Greening opined that an urgent fixture for a one-week return day would not provide sufficient preparation time for the making of any such application.

23. It was plainly accepted by the Plaintiffs at the 2 July hearing that there was no dispute that the Plaintiff remained in arrears on the mortgage sums. The Plaintiff's clear but unsubstantiated contention was that the Plaintiff's calculations on the outstanding sums owed under the mortgage agreement were flawed.

24. At the close of the 2 July 2021 hearing I refused the application and stated that I would provide the reasons herein.

Analysis and Findings of the Court

25. The application before the Court is for injunctive relief. The general powers of the Court to grant an interlocutory injunction are statutorily conferred by section 19(c) of the Supreme Court Act 1905 which provides:

"...an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just..."

26. Procedurally, an application for injunctive relief is made pursuant to RSC Order 29/1:

29/1 Application for injunction

1 (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

(2) *Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.*

(3) *The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.*

27. The test applicable to an application for an ordinary interlocutory injunction is prescribed by English common law. This was settled by the House of Lords in *American Cyanamid v Ethicon Ltd [1975] A.C. 396* where Lord Diplock's leading judgment was unanimously agreed by their Lordships. Now well-established law, the Court will consider the following factors before deciding whether to grant an interim injunction:

- (i) whether there is a serious question to be tried;
- (ii) whether damages would be an inadequate remedy;
- (iii) whether the balance of convenience lays in favour of the injunction being granted; and
- (iv) whether it is just and convenient in all the circumstances to grant the order sought.

28. It follows that as a starting point, I had to determine whether there was a serious issue to be tried. In the context of the present case, I was duty-bound to avoid allowing a claim which is frivolous or vexatious on its face to be treated as a serious issue for trial. This is less burdensome than the *prima facie* test. (See *Cayne v Global Natural Resources [1984] 1 ALL E.R. 285 Plc Per Eveleigh LJ at page 4*). While I accept that damages would be an adequate remedy in a mortgage case where the sums in question are quantifiable, in this case the real question was whether the balance of convenience was in favour of the injunction being granted and whether it was just and convenient in all the circumstances to grant the order sought. This, in very simple terms, means that the Court must be careful to avoid making an order which leads to a greater risk of injustice than not.

29. The boundaries of the Court's power to grant leave for the issuance of a writ of possession is provided for under RSC O.45/3(1)-(3). Both RSC O.45/3(4) and RSC O.47/3(2) permit a writ of possession of land to include a provision for enforcing the payment of any money judgment made under the same judgment or order in which the Plaintiff was granted leave to issue the writ of possession.
30. Under RSC Order 47/1 the Court is empowered to stay execution of judgment for the payment of money on either one of 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.

31. RSC O.47/1 expressly requires “special circumstances which render it in-expedient to enforce the judgment or order” or “that the applicant is unable from any cause to pay the money”.

32. In *Island Construction v Phillips and Phillips* [2019] Bda LR 92 I described the meaning of “special circumstances” 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.”

33. The Plaintiffs’ application for a stay of the enforcement writ (i.e. both the writ of possession and the writ of execution) was not advanced on any ground of inability to pay the money from any cause. That being said, I am reminded that the Brimmers’ application before the Court in the mortgage proceedings on 1 July was pleaded on the basis that the Plaintiff will be in a position to obtain special funding in the near future, hence the request for a 180 day extension to secure refinancing under the Brimmers’ 18 June summons.

34. Notwithstanding, the Plaintiffs’ case before this Court was that the Consent Judgment was fraudulently obtained and that Mr. Quinn absconded with the monies paid by the Plaintiffs to

make good their mortgage obligations. I have proceeded on the basis that these are the special circumstances relied on by the Brimmers for the purpose of any assessment of a stay application in accordance with the principles applicable to RSC O.47/1.

35. Having outlined the 17 March hearing which proceeded before me in Commercial Court #2, I found that Mr. Brimmer's averments that he did not consent to the judgment entered against him were frivolous on their face. Mr. Brimmer was made well aware that the hearing fixture was listed for the purpose of substantively resolving Mr. Swan's claims under the Originating Summons against him for judgment on the money sums owed; delivery of possession of the property and an order confirming Mr. Swan's contractual right to enforce the mortgage by sale.
36. Mr. Brimmer attended the hearing in company with his accountant and was present to witness the reading out of the full terms of the Consent Judgment made by the Court. Such terms were not only audibly made but were sufficiently clear and simplistic for a person without professional legal training to comprehend. The relief ordered was also consistent with the relief prayed in the Originating Summons and it is clear from the affidavit evidence that Mr. Brimmer understood the pleaded case against him. In any event, Mr. Brimmer and his wife were represented before the Court by Mr. Durham.
37. Mr. Brimmer never protested against the making of any of the terms openly described to the Court to be agreed between he and his wife and Mr. Swan. The same terms which were read out in Mr. Brimmer's presence were confirmed in the signed Order of the Court dated 17 March 2021, i.e. the Consent Judgment.
38. Mr Brimmer deposed in his evidence that he and his wife were the victims of Mr. Quinn's theft of monies paid to his firm for the purpose of paying down on the mortgage. However, those monies, on Mr. Brimmer's evidence, came to an approximate total of \$42,000.00. This hardly puts a dent in the overall debt owed on the mortgage and the fact of these missing monies was known to the Plaintiffs prior to the 17 March hearing when judgment was made by consent. More so, the Plaintiffs accept that they have contractually defaulted on their mortgage obligations by failure to pay sums which far exceed the allegedly stolen money.

39. It ought not to be ignored that the evidence currently before the Court establishes a strong *prima facie* case of Mr. Swan's contractual entitlement to possession and enforcement of the mortgage by sale. So, the Plaintiff's case that he did not actually consent to judgment does not assist his cause for a stay in the absence of a defence showing probable success in answer to Mr Swan's Originating Summons in the mortgage proceedings. Put more plainly, it seems that judgment would have been entered in favour of Mr. Swan whether or not the Brimmers had consented.
40. For these reasons, I was bound to find, as I did, that the claim for a stay the writ of possession and execution was frivolous on its face and short of qualifying as a serious issue to be tried. Additionally and/or alternatively, the balance of convenience was not in favour of the Brimmers and a serious injustice would have occurred if the interlocutory relief sought were to be granted.

Conclusion

41. The application for injunctive relief is refused.
42. This Ruling does not prevent the Brimmers from making application in the mortgage proceedings to vary judgment in respect of the monies owed to Mr. Swan under the mortgage agreement.
43. Unless either party files a Form 31TC in the next 7 days, the Defendant shall have his costs against the Plaintiffs pursuant to paragraph 5(e) of the mortgage agreement.

Dated this 15th day of July 2021

**THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT**