Civil Appeal No. 3 of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MR. JUSTICE MUSSENDEN
CASE NUMBER 2018: No. 315

Sessions House
Hamilton, Bermuda HM 12

Before:

SIR CHRISTOPHER CLARKE, PRESIDENT
SIR ANTHONY SMELLIE, JA
SHADE SUBAIR WILLIAMS, JA (Acting)

Between:

DENISE PRISCILLA TREW

Applicant

- v -

(1) MOLLY WHITE
(2) STEPHEN WHITE

Respondents

Appearances: Mr Michael Scott, Browne Scott, for the Applicant
Mr Kim White, Cox Hallett Wilkinson Limited, for the Respondents

Date of Ruling: 15 August 2025

RULING

Application for Leave to Appeal against refusal to grant legal or equitable relief against forfeiture – guiding legal principles on the Court's power to grant a stay of execution of an order for possession of mortgaged property

SHADE SUBAIR WILLIAMS, JA (Acting)

1. At the close of the 5 June 2024 hearing before us, we issued directions for the determination of this written application brought by Mrs. Denise Trew (the "Applicant"/ "Mrs. Trew") for leave to appeal.

2. Following on material received pursuant to those directions, this is our decision in respect of leave to appeal against the 23 July 2021 decision of Mussenden J (now Chief Justice) refusing to grant the Applicant legal or equitable relief against forfeiture by way of a stay of an order for possession of mortgaged property which had been executed. The possession order was made in mortgage proceedings commenced under Order 88 of the Rules of the Supreme Court ("RSC").

3. This decision also concerns Mrs. Trew's application for leave to appeal against Mussenden J's refusal to consolidate this matter with another action in which she is the Plaintiff against HSBC Bank Bermuda Limited ("HSBC") and Mr. Dennis William Dwyer, as executor of the estate of Robert Allen Trew, Mrs. Trew's late husband, who died on 20 January 1999 In this Ruling I refer to those proceedings as the "HSBC action".

The Proceedings at First Instance

4. Mussenden J's 23 July decision was made in answer to Mrs. Trew's summons of 25 September 2019 for a stay of the judge's 25 October 2018 order granting Molly White and Stephen White (the "Whites") a possession order, a declaration that they had a power of sale under the mortgage entered into with Mrs. Trew, and a money judgment. Ultimately, Mrs. Trew wanted the judge to stay the execution of the judgment pursuant to RSC Orders 45/10 and 47/1 until the final disposal of the HSBC matter. Mrs. Trew also sought an Order providing for her re-entry to the mortgaged property, which was the subject of the possession order, located at Warwick Lane House, 20 Warwick Lane, Warwick Parish (the "Property").

5. The basic relevant facts are not in contention between the parties. In the Judge's ruling, it is recorded that the Property had been conveyed to Mrs. Trew in 2004 by way of a vesting deed from the Trustees of Mr. Trew's estate. During that same year, Mrs. Trew conveyed by way of mortgage the Property to the Whites to secure their advancement to her of a $450,000.00 loan.

6. The Judge outlined the terms of the 14 December 2004 interest-only mortgage agreement between Mrs. Trew and the Whites. In doing so, he stated that Mrs. Trew was liable for 35 monthly interest payments of $2,625.00. However, on inspection of the Mortgage Agreement, there appears to be a conflict between the number of interest payments required under the Sixth and Seventh Schedules of the Mortgage Agreement. The Sixth Schedule refers to a total of 36 interest payments while the Seventh Schedule provides for payment of 35 interest-only payments of $2,625.00 followed by one payment of $450,000.00 to satisfy the principal sum fixed by the First Schedule.

7. The conflict between the Schedule references to the total number of interest payments to be made by Mrs. Trew is capable of being resolved by a mathematical analysis. The rate of interest set under the Second Schedule of the Mortgage was 7%. The Eight Schedule marked the first Interest Payment to be 14 January 2005. The final interest payment, as prescribed by the Ninth Schedule, was fixed for 14 December 2007. Monthly payments in accordance with that stipulated period yields a total of 36 payments. A requirement for 36 monthly payments is also mathematically consistent with the $2,625.00 figure required by the Mortgage Agreement for the monthly sum payments due. Applying the agreed annual interest rate of 7% against the principal sum of $450,000.00: 7% of $450,000.00 is $31,500. That sum of $31,500 divided by 12 equals $2,625.00. It is therefore evident that Mrs. Trew was in fact responsible under the Mortgage Agreement for a total of 36 interest payments totaling $94,500.00.

8. On the findings recorded by the Judge, it is not immediately clear to what extent Mrs. Trew paid against this mortgage debt. In Mussenden J's judgment, he stated at [5] that Mrs. Trew "*failed to pay the interest and principal for a period of time*". However, it is plain from the Judge's Ruling of 25 October 2018 that he proceeded on the basis that Mrs. Trew (1) failed to pay the entirety of the principal sum and (2) accrued up to $78,375.98 in outstanding interest payments, as at 14 September 2018. That position was consistent with the loss pleaded in the Originating Summons before him and the affidavit evidence [para 4] of Mrs. White of 10 September 2018.

9. Over the course of the following year, the outstanding interest balance increased. The Judge referred to the second affidavit of Lt. Col White whose evidence was that as at 1 October 2019 the interest owed by the Defendant had increased to the sum of $86,483.57. That sum was independent of the other costs envisaged on Lt. Col. White's evidence in relation to the removal of Mrs. Trew's possessions in addition to costs associated with the repair and sale of the Property. This means that, as 1 October 2019, the total of the principal and the accruing interest was $536,483.57 plus $3500 in legal fees. 123

10. Mrs. Trew in her affidavit of 16 October 2019 referred to the "*judgment creditors judgment debt of $540,276.77*" and deposed, "*I do not dispute the claim and never adjudicated to contest the claim and my stance throughout has been to repay the debt in full*…" It is evident from the affidavits and the pleadings before the Judge that

although Mrs. Trew had made some payments towards the mortgage debt prior to the start of the proceedings, no further payments were made since at least 21 March 2018 when the Whites demanded repayment of all outstanding monies. At that stage, the final monthly interest payment deadline had passed approximately 10 years prior on 14 December 2007.

11. Notwithstanding this evidence, the fuller question as to the extent to which interest accrued from the mortgage period onwards was not readily apparent from the papers originally filed before this Court.

12. I pause here to note that the Court encountered considerable and prolonged difficulty in obtaining the underlying documents in the action. This application proceeded without an agreed bundle of relevant documents being placed before the Court. As a result, the Court was made to laboriously grapple with files and duplications of documents from different sources. These issues were communicated to Counsel in writing by email correspondence sent by the Acting Registrar on 20 December 2024. Under that correspondence, the Court issued directions for the filing of agreed bundles. However, inadequate steps were taken by Counsel to comply with the directions of the Court. What followed were months of tedious efforts by the Court to secure a full set of the pleadings and evidence which were before the Judge at the hearing at first instance. Additionally, the Court was drawn into protracted correspondence with Counsel in search of factual clarification on Mrs. Trew's interest payment history. These issues significantly delayed the delivery of this Ruling.

13. Responding to the Court's enquiries on Mrs. Trew's interest payment history, law firm Cox Hallet Wilkinson Limited on behalf of the Whites submitted a 25 June 2025 letter (the "CHW letter") providing an overview of the annual totals paid by Mrs. Trew against her mortgage interest obligations. By email to the Court dated 10 July 2025, Mr. Michael Scott confirmed Mrs. Trew's agreement with the payment summaries outlined in the CHW letter; so no factual dispute arises on the figures provided.

14. According to the CHW letter Mrs. Trew made various payments from the date of the mortgage in 2004. From that date until August 2014, she paid the interest due. Thereafter she paid some, but not all,of the interest due. The amount of interest said to have been paid between January 2015 and December 2017 and the amount unpaid thereafter was as follows:

Year	Paid	Unpaid
2015	$ 18,375	$ 13,125
2016	$ 15,750	$ 15,750
2017	$ 10,500	$ 21,000
2018	Nil	$ 235,750 down to 24.6.25

TOTAL $ 285,265

15. On 25 October 2018 judgment was entered for the money sums prayed for, namely $450,000.00 (principal) $78,375.98 (interest) and $3,500.00 (legal fees) making $ 531,375.98 and the judge granted the possession order in addition to the declaratory relief sought in respect of the power of sale. The judge suspended the Order such that it was made to take effect following a 90-day period from its making.

16. On 11 March 2019 the Court issued the writ of possession to the Provost Marshal General. The possession order provided for the removal and levying of Mrs. Trew's possessions up to the value of the money sums ordered on 25 October 2018.

17. On 9 April 2019 a bailiff entered the Warwick Property and endorsed the writ of possession with a note confirming the absence of Mrs. Trew. The bailiff also noted that the locks were changed and that the Warwick Property was secured with all its contents.

18. The judge quoted from the terms of the writ of possession in his judgment which provided, *inter alia*: "*…AND WHEREAS the Defendant has failed to vacate the said property known as 21 Warwick Lane, Warwick as ordered after the passage of 9* [90] *days*".

19. It is stated in the 23 July Ruling [9] that Mrs. Trew moved out of the property but left behind a number of her personal possessions. However, it is unclear from the judgment[1] when Mrs. Trew took residence elsewhere. One may, however, readily infer that this would have occurred after 25 October 2018 when the possession order was made but by no later than 9 April 2019 when the bailiff secured the Property.

20. Mrs. Trew's ambitions to obtain a money judgment in the HSBC action, significant enough to eradicate her debt to the Whites, propelled her application for a stay of the further execution of the possession order in these proceedings. Her stay application effectively sought for the judge to bring a standstill to any steps which might be taken by the Whites, as judgment creditors, to have Mrs. Trew's remaining items removed or to have the Property refurbished and sold. Mrs. Trew's application also included an application for her to be permitted to re-enter and reside at the Property so to avoid leaving it from becoming a wasted asset during the continuance of the litigation before the Court.

21. The Judge provided an extensive reiteration of Mr. Scott's submissions which were made in support of Mrs. Trew's application for a stay. Promoting the Bermuda Constitution as a foundational approach to Mrs. Trew's application, Mr. Scott pointed to section 13, submitting that mortgage enforcement is restricted to cases where it is reasonably justifiable in a democratic society. Mr. Scott also invited Mussenden J to

[1] At paragraph 9 Mussenden J stated: "*On [date tbc by counsel] the Defendant moved out of the Property*."

find persuasive value in UK statutory provisions and corresponding English case law affording special protections for mortgage defaulters. Also, on Mr. Scott's arguments, Mussenden J ought to have exercised the Court's broad and unfettered discretionary powers, in both law and equity, to stay the possession order on the basis that it would otherwise be unfair for the Whites to enforce their strict legal rights on account of Mrs. Trew's default on the mortgage.

22. On Mr. Scott's arguments, a stay would also enable the Court to properly consolidate these proceedings with the HSBC action. This was put on the footing that the two cases are related on both the law and their facts to the extent that Mrs. Trew is entitled to lean on her late husband's estate, which through its executor is the second respondent in the HSBC action, to assume coverage of all of her mortgage obligations. Mr. Scott submitted that a proper application of the Overriding Objective would stand in favour of the proposed consolidation of cases. As Mr. Scott put it before Mussenden J, a stay would be both time and costs saving which was of particular importance to Mrs. Trew, who is a litigant of limited means.

23. Having rejected the application for a consolidation of the matters and a stay of the execution proceedings, Mussenden J subsequently directed on 8 August 2019 that Mrs. Trew be given a 7-day opportunity to clear the property of her remaining goods, after which the Plaintiffs were to be free to remove and dispose of the contents in any way they saw fit. It is understood, however, that she did not take any such steps.

The Legal Test for the Granting of Leave to Appeal

24. In *Credit Suisse Life (Bermuda) Ltd v Mr. Bidzina Ivanishvili* [2020] BM 2020 SC 43 this Court distinguished between the test applicable to applications for leave to appeal in accordance with the current English Civil Procedure Rules and the test which previously governed leave to appeal applications under the former English procedural rules. Under the old procedural rules, the threshold for a successful leave application was grounded on the question of whether the applicant had established an 'arguable' case by way of appeal. However, from 26 April 1999 when Lord Woolf's reforms were implemented in the form of the CPR, the test changed. Part 52 of the CPR introduced a stricter standard for obtaining permission to appeal. CPR 52.6 provides:

> "*Permission to appeal test – first appeals*
> ***52.6***
> (1) *Except where rule 52.3B* (appeals from Court of Appeal to the Supreme Court), *rule 52.7* (second appeals) *or Rule 52.7A* (contempt proceedings where an appeal lies from the Court of Appeal to the Supreme Court) *applies, permission to appeal may be given only where—*
> *(a) the court considers that the appeal would have a real prospect of success; or*
> *(b) there is some other compelling reason for the appeal to be heard.*"

25. CPR 52.6, however, has no application under our procedural law. So, any reliance on that provision to promote the 'real prospects of success' test under Bermuda law would be flawed in principle. How the "real prospects of success" and the "arguable" tests diverge was regrettably misconceived in *Apex Fund Services Ltd v Matthew Clingerman (as Receiver of a segregated account of Silk Road Funds Ltd)* [2020] Bda LR 12. In that case, sitting as a first instance judge, I erred in stating that there is no meaningful distinction between the "real prospects of success" test and the "arguable" test. That was plainly incorrect.

26. The 'arguable' test set by the former English rules did not pin an applicant so firmly against the wall. All that was required was for the applicant to demonstrate that the case on appeal was arguable, otherwise put as "reasonably arguable" or "arguable prospects of success" (see *Dobie v Interinvest (Bermuda) Ltd and Black* [2010] Bda LR 25, per Kawaley J.)

27. The 'arguable test' has long been recognized by Bermuda Courts as having been seeded by the then Master of the Rolls, Lord Donaldson of Lymington, in *Credit Commercial de France v Iran Nabuvat* [1990] 1 WLR 1115.The English Court of Appeal in that case was concerned with what was then a new amendment to Order 59 rule 14(2) which, effective 1 October 1989, provided for an *ex parte* application in writing setting out the reasons why leave should be granted. The rule further outlined that the Court would either grant or refuse the application or direct that the application be renewed in open Court either *ex parte* or *inter partes*. Under that same amendment, an applicant was entitled to renew his application on an *ex parte* basis in open Court within 7 days of being refused leave. Where the application was granted, notice was to be given to the other party who was given the opportunity to apply to have the grant of leave reconsidered in an *inter partes* hearing in open Court.

28. The application before the Court of Appeal in *Iran Nabuvat* was made pursuant to the amended provision. Leave to appeal having been granted by Lord Justice Bingham on the papers, an *inter partes* application was made by the other party seeking reconsideration of the granting of leave to appeal.

29. The threshold arguments for the granting of leave to appeal on the 'arguable' test appear in the following note in the 6th cumulative supplement to the Annual Practice. The note is quoted in the judgment as follows:

> "*Since the single Lord Justice will (prior to granting leave to appeal) have seen and considered the draft grounds of appeal, a transcript or note of judgment appealed against and (where the application was made out of time) the reasons for the delay, it is envisaged that respondents will not apply for grant of leave to set aside unless there are cogent grounds for believing that there is some point which was not before the single Lord Justice and which renders the appeal so weak as to justify the rescinding of the grant of leave to appeal.*"

30. Battling against the use of the arguable-threshold, Counsel in ***Iran Nabuvat*** submitted that leave to appeal should only be granted where there is a probability or a reasonable likelihood that the judge was wrong. That argument advocated for a strong bias against the granting of leave, particularly in respect of discretionary decisions. This approach was flatly rejected by Donaldson LJ who set out the position stated in the Annual Practice note. The Court unanimously determined that bias must always be towards allowing the full court to consider the complaints of the dissatisfied litigant. This did not ignore the Court's duty to consider any resulting unfairness to a respondent required to defend the appeal, or to other litigants waiting in line to be heard on their matters, nor did the Court ignore the potential for an appellant to be in need of saving from his or her own folly.

31. Donaldson LJ pointed out that if the Court were to employ the 'probability' or 'reasonable likelihood' test, it would be bound to consider the merits to the degree required by what would be very close to an actual hearing of the appeal. This was the foundational analysis to his reasoning when he said, as famously quoted by Kawaley CJ in *Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd* [2007] Bda LR 81:

> "*…no one should be turned away from the Court of Appeal if he had an arguable case by way of appeal" and "That is really what leave to appeal is directed at, screening out appeals which will fail*."

32. Donaldson LJ also said:

> "*That leads one on to the question of whether there is an arguable case in these particular circumstances. Again, for my part, if a Lord Justice of Appeal, having studied the matter on paper, is satisfied that there is an arguable case and grants leave, I think it would require some very cogent reasons for disagreeing with his decision, and it certainly would not be a reason that the court which was asked to reconsider his decision did not itself think that the matter was arguable.*
> *It is certainly within my experience, and I do not doubt within the experience of every member of the Court of Appeal, that, having pre-read an appeal, one member of the court will say, "I really think this is unarguable", and other members of the court will say, "I do not know, I really think there is a point here which needs looking at seriously". In the end, you may get a dissenting judgment or it may be that they will all come to the conclusion that the appeal is arguable or even that it should succeed.*
> *But the point that I am making is that, if one Lord Justice thinks that an appeal is arguable, it is really necessary, in my view, for anybody seeking a reconsideration of that to be able to point fairly unerringly to a factor which was not drawn to the Lord Justice's attention because, perhaps, it did not feature in the documents which had been studied, or to the fact that he has overlooked some statutory provision which is decisive, or some authority which is decisive, in the sense that the appeal will inevitably fail. That is really*

> *what leave to appeal is directed at, screening out appeals which will inevitably fail*."

33. In the commentary provided in the White Book 1999, it was observed that the test is more prone to favour the granting of leave rather than a refusal. Additionally, it was recognized that leave may be granted where the appeal raises the need for the establishing of a general principle or where a question of importance needs to be decided for the advantage of the public. At [59/14/18] the following appeared:

> "*Circumstances in which leave will be granted- The general test which the Court applies in deciding whether or not to grant leave to appeal is this: leave will normally be granted unless the grounds of appeal have no realistic prospects of success (Smith v Cosworth Casting Processes Ltd (Practice Note) [1997] 1 WLR 1538; [1997] 4 All ER 840, CA). The Court of Appeal may also grant leave if the question is one of general principle, decided for the first time (Ex p Gilchrist, Re Armstrong(1886) 17 QBD 521, per Lord Esher MR t 528) or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage (see per Bankes LJ, in Bubkle v Holmes[1926] 2 KB 125 at 127).*"

34. As stated in the White Book [59/14/27] under the commentary addressing applications by a respondent who seeks to have the grant of leave rescinded, the English Court of Appeal in *First Tokyo Index Trust Ltd v Morgan Stanley Trust Co*. (1995) The Times, October 6, CA confirmed its decision in the *Iran Nabuvat* case.

35. The Bermuda law position on the granting of leave to appeal aligns with the development of these principles culminating in the 'arguable' threshold. That was confirmed by this Court in *Credit Suisse v Ivanishvili* where clear judicial endorsement was given to this approach to applications for leave to appeal.

The Application for Leave to Appeal

36. In a Notice of Motion for Leave to Appeal, dated 30 December 2021, Mr. Scott sought to advance various grounds[2] of complaint against Mussenden J's 23 July Ruling.

37. Grounds 1, 2, and 6 are collectively addressed as they engage the judge's refusal to consolidate these proceedings with the HSBC action. Grounds 3 and 5 challenge the judge's refusal to grant equitable relief against forfeiture; so, these two grounds are also addressed together. Ground 7, the final substantive ground pleaded, is addressed on its own as it takes issue with the judge's application of the Rules of the Supreme Court ("RSC") in refusing to grant a stay of execution of judgment.

[2] On the numbering of the proposed grounds of Appeal, a Ground 4 is omitted.

Grounds 3 and 5 (The Equitable Relief Claim):

38. It is convenient to start with Grounds 3 and 5 because the question of consolidation raised by Grounds 1, 2 and 6 relates to the merits of the complaints made against the judge for having refused to stay or suspend the continuance of the execution proceedings under the possession order. On these grounds Mr. Scott essentially submits that Mussenden J should have exercised his equitable powers to stay the possession order. On Mr. Scott's submissions the Whites were unfairly permitted to enforce their strict legal rights, notwithstanding Mrs. Trew's default on the mortgage payments.

39. Section 13(1) of the Bermuda Constitution, as flagged by Mr. Scott, provides a general protection from deprivation of property. Subsection (2)(a)(iii), however, exempts the taking of possession of property pursuant to mortgages from this general protection so long as the law, which makes provision for the taking of possession or the acquisition of any property, interest or right, or anything done under it, is "*reasonably justifiable in a democratic society*".

40. The duty of the Court to act fairly in granting relief is established not only from the Constitution but also from its equitable jurisdiction. Section 18 of the Supreme Court Act 1905 requires law and equity to be administered concurrently in every civil cause or matter. It states that the Court "*shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as seem just, all such remedies or relief whatsoever, whether interlocutory or final as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively …and in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail*."

41. The equitable relief sought by Mrs. Trew, in the form of her application for a stay, is grounded in the Court's equitable jurisdiction to grant relief from forfeiture. Mussenden J, accepting that he had jurisdiction to grant such equitable relief, said [43]:

> "*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 (sic) equity being based on factors including the applicant's conduct, "in particular whether his default was willful, 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". 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.*"

42. In *Cukurova v Alfa Telecom* [2013] UKPC 20 the Privy Council was concerned with an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court which had reversed the decision of Bannister J sitting as the first instance trial judge in the British Virgin Islands ("BVI"). The appellants in that case were corporate entities, one of which was a BVI company known as Cukurova Finance International Ltd ("CFI") and the other was Cukurova Holding AS ("CH") which owned CFI. CFI and CH effectively borrowed US$1.352B from Alfa Telecom Turkey Limited ("ATT") which formed part of a substantial Russian conglomerate referred to as the Alfa Group.

43. Pursuant to a Facility Agreement the US$1.352B loan was secured by charges by way of equitable mortgages over CFI's 51% shareholding in a BVI incorporated company called Cukurova Telecom Holdings Limited ("CTH") and CH's 100% shareholding in CFI. The equitable mortgages were governed by English law. Clause 17 of the Facility Agreement provided for "Events of Default" and its first 17 sub-clauses identified what constituted such events. Clause 17.2(A) referred to non-compliance by CFI. Clause 17.2(B) expressly afforded CFI the opportunity to remedy a non-compliance within five business days of notice of non-compliance from ATT or of CFI becoming aware of the non-compliance. Nearly two years after the charges were made, ATT alleged numerous events of default against CFI and demanded immediate repayment of the full sum extended under the facility agreement. It also formally requested to be registered as the owners of the charged shares.

44. That is but a brief summary of the relevant background to the action which was commenced by ATT in the Eastern Caribbean Supreme Court (the "ECSC") in the BVI. ATT's first claim was for a declaration that it was entitled to accelerate repayment of the debt, and its second claim was for an order compelling CFI and CH to comply with ATT's registration requests. The legal issues of interest to the present case arise on CFI's tender of $1.45B made eight days after its formal notice of repayment to ATT. CFI's tender, however, was contractually belated as it surpassed the 5-day remedy period provided by clause 17.2(B). Steadfast in its averments of default, ATT rejected the tender and asserted its entitlement to exercise its security rights over the shares. Aggrieved by ATT's refusal, CFI and CH commenced proceedings in the ECSC for an order compelling ATT to accept the sum tendered and to redeem the security.

45. The issues before the ECSC called into question whether, as a matter of construction, an event of default had been established in breach of the Facility Agreement and whether ATT was precluded from enforcing its rights of acceleration and appropriation of the shares on the ground of bad faith or improper purpose. A determination was also required to resolve the following two issues:

- Whether the Court had jurisdiction to grant CH and CFI relief from forfeiture.
- Whether relief from forfeiture should be granted; and
- If relief from forfeiture is granted, on what terms it should be granted

46. At first instance, Bannister J found that ATT had failed to establish any events of default and held that ATT had wrongly rejected the tender. He also stated (*obiter*) that had he ruled that there was a default on which ATT could rely, he would have rejected the bad faith arguments advanced by CFI and CH as a means to prevent enforcement. On appeal, the Court of Appeal reversed Bannister J's decision and found that default had been established and that the charged shares had been properly appropriated. The claim for relief from forfeiture was not addressed in the leading judgment of the Court of Appeal. It was, however, considered in the supporting judgment of Kawaley JA who found that CFI's and CH's claim for equitable relief could not succeed as they had failed on their arguments based on bad faith and improper purpose. The Judicial Board, however, determined that the claim for relief from forfeiture was freestanding and not contingent on the success of the appellants' case that ATT had acted in bad faith or were driven by an improper motive.

47. The first point to be made from the Privy Council's analysis of the equitable doctrine is that its application is wide-ranging in the sense that the Court has jurisdiction to apply the doctrine in the exercise of its general equitable jurisdiction. In citing *Shiloh Spinners Ltd v Harding* [1973] AC 691,722 the Judicial Board recognized that the Court's jurisdiction to grant relief from forfeiture is not confined to any particular type of case, albeit that the commonest instances concerned mortgages which give rise to the equity of redemption and leases which often contained re-entry clauses. That said, the unlimited application of relief against forfeiture arises only in cases where the application is for protection against the transfer of proprietary or possessory rights (see Snell's Equity 30th Edition [para 36-14]). As the Board stated at [94] " ...*relief from forfeiture is available in principle where what is in question is forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, regardless of the type of property concerned*."

48. Whether the Court's equitable jurisdiction is also derived from the particularity of claims for relief from forfeiture in mortgage actions is unanswered by the Judicial Board. This is unexplored in the judgment because the Board reasoned that that question was of academic interest only (see Lord Neuberger's concurring judgment at [para 69]). For the present case, the distinction is equally immaterial because it is unquestionable from the Privy Council's judgment in *Cukurova Finance v Alfa Telecom* that the Court has the jurisdiction to grant such equitable relief in mortgage actions.

49. In *Cukurova Finance v Alfa Telecom* the forfeiture against which relief was sought was in respect of the charged shares and no dispute arose on the charges being properly

described as mortgages. The Board approached the facts with a view that it was a conventional case of borrowing on security. Having found that there was jurisdiction to grant relief from forfeiture on the facts of the case before the Board (subject only to the effect of 2003 Regulations), the Board moved on to consider the relevant factors for deciding whether relief from forfeiture should be accorded. At paragraph 116, Lord Clarke, giving the judgment of the Board, said:

> "*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".*"

50. The legal principles governing the terms on which relief from forfeiture may be granted were examined by the Board. This largely entailed a review of the historical development of English statutory provisions which were enacted as a means of shaping the scope of an order granting such equitable relief. As a matter of Bermuda law, no corresponding enactments apply to limit or expand the Court's equitable jurisdiction. However, the Bermuda Legislature's refrain from disturbing the equitable rules on relief from forfeiture means that the equitable rules apply here in an untramelled manner. Indeed, even had there been legislation such as applied in England, the outcome would be the same as determined by the Board in *Cukurova Finance v Alfa Telecom* because the Board expressly found at [124] that:

> "*The purpose of the various statutory interventions in the property field was self-evidently not to alter the court's fundamental approach to the grant of relief against forfeiture*."

51. This was the reasoning behind the Board's embrace of equity's approach to the granting of a claim for relief from forfeiture which requires consideration of the following:

    (i) Whether the mortgagor's default was wilful;

    (ii) The gravity of the mortgagor's default; and

    (iii) The disparity between the value of the property of which forfeiture is claimed as compared to the value of the arrears and money sums owed as a result of the mortgagor's default

52. In Snell's Equity 30th Edition [para 36-14] the authors reaffirm the position as follows:

> "*The principle is that in appropriate and limited cases courts of equity will grant relief against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result and the provision for forfeiture is added as security for the production of that result* (citing *Shiloh Spinners Ltd v Harding*). *In determining whether a case is appropriate for relief the court considers the conduct of the applicant for relief (and in particular whether his default was wilful), how grave the breaches were, and what disparity there is between the value of the property forfeited and the damage caused by the breach* (citing *Shiloh Spinners Ltd v Harding*). *In general, equity granted relief only where the forfeiture in substance was merely security for payment of a monetary sum* (footnote omitted) *as where the contract for sale of land makes provision for payment of the price by instalments and confers on the vendor a right in the event of default to rescind the contract and retain the moneys already paid*…"

53. These are the principles which were approved by the Privy Council in *Cukurova Finance v Alfa Telecom* and are thus binding under Bermuda law.

54. At paragraphs 43-46, Mussenden J reasoned his refusal of Mrs. Trew's application for a stay of the possession order as follows:

> *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. …*

> *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.*

Whether the mortgagor's default was wilful

55. Mussenden J found that Mrs. Trew defaulted on payment from 2004 to 2019 and that such default was of a wilful character. In his Ruling he held [46]:

> "*…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…*"

56. The Judge is criticized for having failed to take account of the interest payments made by Mrs. Trew from the date of the mortgage. In his Order of 25 October 2018 he declared [6] that the outstanding interest as at 14 September 2018 was $78,375.98. However, this did not clarify whether the $78,375.98 represented the total sum of interest that accrued from the start-date of the loan or whether it is a residual sum which accounts for partial payments that were made by or on behalf of Mrs. Trew. In the judge's words [44] "*…the Defendant defaulted on repayment of any of the loan principal of $450,000 as well as interest which continues to accrue.*" This leaves an impression that Mrs. Trew made no payments whatsoever and was thus void of hands clean enough for equity's rescue. This is the heart of the complaint made under Ground 5 where the Applicant complains that Mussenden J "*took no or insufficient or any account of the fact that the applicant made many payments against the mortgage…*". If the judge indeed erred in overlooking interest payments made by Mrs. Trew or if he proceeded on a flawed factual basis that Mrs. Trew made no payments on the interest portion of the short-term loan, he arguably erred in his assessment and finding that the default was wilful.

57. The exact basis upon which the Judge proceeded is unclear. He did not have the CHW letter and appears to have thought, at any rate at one stage, that nothing had been paid from 2004. (It is possible that 2004 was a misprint for 2014, which would tally with the evidence in the CHW letter that the interest due was paid until August 2014). At the

same time the Originating Summons of 20 September 2018 had sought an order that $ 450,000 was due by way of principal and $ 78,175.98 by way of interest; and by his Order of 25 October 2018 the Judge had so declared. And in the second affidavit of Lt Col White to which the Judge referred at [3] the interest owed had increased to the sum of $ 86,483.57.

58. It is also not clear why, if the amount unpaid by way of interest as at 24 June 2025 was $ 285,625 no claim was made in the Originating Summons for anything like that amount.

59. However, I find it impossible to accept that the judge proceeded on the basis that no interest payments were ever made by Mrs. Trew. He recorded in paragraph [6] that he had declared that the sum of $ 78,375.98 was due as at 14 September 2018, and since the total amount of interest payable over the 3 years from 14 December 2004 was, as a matter of mathematics, $94,500.00, undoubtedly, the Judge would have understood that, even if the figures that were put before him assumed that interest was only claimable for a 3 year period, then prior to the start of the proceedings some payments must have been made..

60. The ultimate question for this Court at this vetting stage is whether it is arguable that the judge was wrong, in the exercise of his discretionary powers, to have refused to grant Mrs. Trew equitable relief from forfeiture in the form of a stay of proceedings. Mr. Scott submitted that Mussenden J did so err and that the error made by the judge is rooted in a wrongful finding that the Applicant's default was wilful.

61. Supposing there was no wilful default, the next question is whether it is arguable that the gravity of the default was minimal enough to support the granting of equitable relief.

62. Given that the figures in the CHW letter are agreed it seems to me that we should approach the case on the footing of those figures.

<u>The gravity of the mortgagor's default</u>

63. The gravity of the default is, at least in part, measurable by the extent of the sums unpaid to satisfy the loan total. On the papers before us, it is apparent that the position before Mussenden J was this: The entire principal sum remained unpaid together with at least $78,375.98 in interest. It is also undisputed that the failure to repay the principal had not been remedied for what was at the date of 25 October 2018 ruling over 10 years beyond the due date for the final payment (14 December 2007); and the interest had not been paid in full for some 3 years (2015-2017) and not at all since January 2018. And since then, over a further five years have elapsed bringing the outstanding sum owed in interest to a total of $285,625.00 as at 24 June 2025. These are relevant factors in assessing the question of gravity of the default on the sum of money owed. It is also relevant that sums owed are not being claimed by a highly resourced financial

institution but instead by civilians prosecuting their contractual rights. As I see it, the gravity of the default on these undisputed facts is – beyond argument - high, even if it were to be determined that the evidence before Mussenden J did not support a finding that the default was wilful.

64. Mr. Scott also invited this Court to factor into its consideration the short duration of the loan extended by the Whites and the large sum required to be paid by the Applicant over only a 3-year period. However, the last payment made by Mrs. Trew was in 2017, now over 7 years ago. For that reason, this submission has no hope of success given the extensive time period which has elapsed without any payment on the loan made. In fact, the point amasses more favour for the Whites as it demonstrates the extent of the delay endured in their efforts to recuperate the debt owed to them.

Disparity between the value of the Property of which forfeiture is claimed and the damage caused by the breach

65. In citing *Alfa Telecom v Cukurova* Mussenden J accepted that the Court was also required to have regard to any disparity between the value of the property of which forfeiture is claimed as compared to the damage caused by the breach. Such an analysis is another key component of a judge's consideration as to whether equitable relief is justified.

66. The Judge stated in his ruling [10] that on 20 May 2019 the Property was valued by a local real estate company in its then current state at $685,000.00. By a simple exercise of mathematics, the total sum which, in October 2018 was accepted to be owed on 14 September 2018, as a minimum, was $531, 875.98. That sum represents the total of $450,000.00 in principal plus $78,375.98 in interest plus $3,500.00 in legal fees claimed. The disparity consideration calls for that total figure of $531,875.98 (the "damage caused") to be measured against the valuation sum of $685,000.00 on the Property, the difference being $153,124.02 on those figures. Of course, a more updated analysis would account both for the interest which has accrued up to the current date and any increase or decrease in the value of the property. Again, this consideration plugs into the larger question as to whether the Applicant has established an arguable case that the judge failed to or wrongly assessed the question of disparity and that in doing so, he wrongly deprived the Applicant of equitable relief.

67. However, this is not a case where the sums constituting the default (or damage) are so comparatively low as against the value of the property to be seized that equitable relief should be granted. On the contrary, the minimum sums outstanding as at October 2018 account for no less than 77% of the May 2019 valuation sum. This does not assist the applicant's claim for equitable relief to any degree. And it is apparent that, if the interest figures are those in the CHW letter, the value of the Property would probably be less than the total debt.

Need for certainty in mortgage cases

68. Mussenden J also stated in his ruling that he "should *place considerable emphasis on the need for certainty in mortgage cases".* This wording is lifted from the Privy Council's quoting of the commentary in Snell's Equity (32nd Edition) [13-105]. However, this passage referred to forfeitures arising in a commercial context rather than residential mortgages. The commentary provided on relief against forfeiture is as follows:

> "*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*."

69. Mussenden J's reference to this passage is, thus, arguably flawed to the extent that Snell's Equity did not promote, as a means of preserving certainty, a heightened scrutiny for claims of equitable relief from forfeiture in all mortgage cases. On the observations made by the authors of Snell's Equity, the Courts' emphasis on the need for certainty applies to commercial-type forfeitures. At the same time an agreement for a mortgage on a house of nearly $ 500,000 could be regarded as a deal of a commercial nature involving freely negotiated terms, albeit it was not one between two commercial enterprises; and may have been the subject of little negotiation. I therefore do not regard the Judge's reliance on this passage as in any way invalidating his reasoning.

Whether English Statutory Law is relevant to Bermuda Court's Equitable Powers

70. At the hearing before Mussenden J, Mr Scott invited the judge, in considering his equitable powers, to be persuaded by English case law applying section 36 of the UK Administration of Justice Act 1970 (the "UK 1970 Act") by which additional powers are given to English Courts to allow defaulting mortgagors in claims for possession (but not foreclosures) to repay their debt or otherwise remedy their breach of obligation under the mortgage. These powers are exercisable by an English Court in circumstances where it appears to the judge that the mortgagor is likely to be able within a reasonable period to pay the outstanding sums. Section 36(2) confers discretionary powers on the Court to, *inter alia*, adjourn the proceedings, stay or suspend execution of the judgment or order or postpone the date for delivery of possession for such period as the Court considers reasonable. Any of these orders available to an English Court may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the Court thinks fit. The Court may also vary or revoke any such condition imposed.

71. The judge expressly declined to pay any regard to the provisions of the UK 1970 Act and the correlating English case law.

72. Section 15 of the Supreme Court Act 1905 establishes and governs the extent to which English law applies in Bermuda. It provides:

> "…*the common law, the doctrines of equity, and the Acts of the Parliament of England of general application which were in force in England at the date when these Islands were settled, that is to say, on…* [11 July 1612], *shall be, and are hereby declared to be, in force within Bermuda*."

73. The subordination of Bermuda Courts to English Courts is exiguous in that binding law only emanates from decisions of the Judicial Committee of the Privy Council on matters of Bermuda law or the House of Lords where issues of shared common law were settled. This long-established hierarchical structure was confirmed by this Court in *Crockwell v Haley & Haley* [1993] Bda LR 7. In the judgment of da Costa JA., P. (Acting) he quoted from the judgment in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.ELR* (1986) AC 80, 108 where Lord Scarman said:

> "*It is, or course, open to the Judicial Committee to depart from a House of Lords' decision in a case where, by reason of custom, statute, or for other reasons peculiar to the jurisdiction where the matter in dispute arose, the Judicial Committee is required to determine whether English law should or should not apply. Only if it be decided or accepted (as in this case) that English law is the law to be applied will the Judicial Committee consider itself bound to follow a House of Lords' decision*."

74. Persuasive law, from the Bermuda law perspective, is not vested in English enactments but rather in the decisions of superior English Courts where such decisions arise on a statutory footing similar to the Bermuda statutory position. Indeed, the position is trite.

75. That being the case, it would have been of no real or material effect on the correctness of the judge's approach, had he strayed and tackled the claim for relief by applying the approach promoted under the UK 1970 Act. That is simply because, as observed by the Privy Council in *Cukurova Finance v Alfa Telecom*, English statutory law does not alter the Court's fundamental approach to the grant of equitable relief against forfeiture.

Decision on Leave to Appeal under Grounds 3 and 5 (Equitable Relief):

76. In my judgment the Applicant has failed to establish an arguable case on the question of equitable relief from forfeiture. While it is arguable that the judge was not justified in finding that the default was wilful, the uncontested facts support a finding that the default was of a grave character, unmitigated by the modest disparity between the value assigned by a realtor to the Property in 2019 and the outstanding sums owed.

77. Even if equitable relief was warranted on an analysis of the default, the relief is not available to mortgagors who remain unable to remedy their default. It is clearly the case

that Mrs. Trew is in no position to make good any terms for payment of principal, interest and costs to be made without substantial further delay.

78. The reality, regrettable as it is, is that the Applicant has entirely failed to establish her ability or any viable plan timeously to satisfy the long outstanding debt, which is not a modest sum, notwithstanding her invested optimism in the HSBC claim.

79. For these reasons, I find that the application for leave to appeal Mussenden J's refusal to grant equitable relief against forfeiture is plainly hopeless as it fails the 'arguable' threshold which applies.

Grounds 1, 2, and 6 (The Consolidation Application):

80. Mussenden J's reasoning for his refusal to consolidate the White and the HSBC matters is clear from the following passage of his Ruling [40]:

> "*40. …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*."

81. The procedural rule governing the consolidation of two or more matters in the Supreme Court is contained in RSC Order 4/10. Rule 10(a)-(b) envisages the exercise of the Court's discretionary power to consolidate Court matters where there is a common question of law or fact arising in both or all of the matters or where the rights to relief claimed relate to the same transaction or a series of transactions. A broader and unfettered discretion is given to the Court under Rule 10(c) where it empowers the

Court to consolidate matters for a reason other than the two reasons set out in paragraphs (a) and (b).

82. The principle of fairness and a just approach is implicit throughout RSC Order 4/10 and is expressly stated in relation to the setting of any terms for a consolidation order. This appears in the concluding portion of the 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*."

83. Moving beyond the valid procedural objections arising from the Applicant's failure to provide notice to the Whites by way of a formal application for the consolidation of these matters, the judge addressed his mind to the question as to whether any common questions of law and fact emerged between the two matters and whether any such commonality justified a granting of the requested consolidation.

84. On these grounds it is argued that Mussenden J erred in his analysis of the connecting factors between the two matters. Mr. Scott argues that Mrs. Trew's asserted entitlements to have all of her mortgage obligations financed by the estate of her late husband is a sufficient basis for a consolidation order. On Mr. Scott's argument, the Whites should be brought into litigation with HSBC and the Executor of Mr. Trew's estate on the strength of Mrs. Trew's claim that HSBC Defendants are legally obliged to indemnify her for her mortgage obligations to the Whites.

85. Mr. White, on the other hand, distinguished and defended the rights of legal mortgagees to execute their rights. His clients' position is that any obligation that the defendants in the HSBC matter have to Mrs. Trew is factually and legally distinct from Mrs. Trew's mortgage obligations to them. Sparking retort on Mr. Scott's submissions, Mr. White added that the Whites have no knowledge of the HSBC matter, particularly on the subject of the quantum of damages being sought.

86. Mr. White further referred to the extensive period of delay which had occurred in the HSBC matter, in order to dispel any notion that the HSBC matter was proceeding at any efficient pace, in any event. He submitted as follows [13]:

> "*…The Respondents are not party to that Action, an action which from the papers appears to have commenced back in 2019 in which there appears to be a lack of progress by the Applicant. It took 18 months to get the Ruling in the White matter dated 23 July 20212 from which the White matter Leave to appeal is being sought. We are now 34 months from that hearing in the HSBC matter of the Ruling being appealed which was given on 28 July 2021. All the while the Respondents have been "deprived of the fruits of their litigation, and locked up funds to which prima facie he is entitled" The Annot Lyle (1886) 11P.114*."

87. It is plainly the case that no relevant legal or factual nexus exists between the two matters. In entering the mortgage agreement with Mrs. Trew, the Whites made a $450,000.00 loan to her. So, there is a clear transactional relationship between mortgage security and the $450,000.00 loan. However, there is no transactional proximity between the mortgage and loan on one part and Mr. Trew's estate on the other. This is no less true even if it were to be discovered that Mrs. Trew was entitled to fruits from the estate which would ultimately benefit the Whites.

88. The Whites have no legal interest or involvement in Mr. Trew's estate. The possibility of a successful claim which would hold the HSBC defendants responsible to Mrs. Trew has no bearing on the Whites. The fact that a separate legal relationship exists between Mrs. Trew and the Whites is equally unrelated to the HSBC defendants. To look at it from another angle, the Whites have no right of action against the HSBC Defendants for payment of Mrs. Trew's debt. That is simply because the Whites have no interest in the 'where' of the source of Mrs. Trew's funds from which she would make good her debt to them, but rather in her obligation to make good the debt.

89. These reasons would stand whether or not Mrs. Trew's claim in the HSBC action was wrongly struck out by Mussenden J, the subject of a different application to this Court.

90. For these reasons, I find that these grounds are wholly without merit to the point of being unarguable.

Ground 7:

91. Ground 7 is pleaded as follows:

> "*The Learned Judge erred and misapplied the Rule 47/7 RSC "appropriateness of relief" having considered the above Rule at paragraph 24 of his Ruling applied the rule disproportionately in his finding that he seek not to deny the Plaintiff the fruits of her litigation any longer, while not balancing that finding against the other and equally vital part of the rule namely of any appeal being rendered nugatory*…(citing *Wilson v Church* No 2 1879 12 Ch D)…"

92. The first observation to be made about this ground of complaint is that it conflates the equitable concept of "appropriateness of relief" against forfeiture with a power conferred on the Court by a statutory rule providing for the stay of execution of a Court judgment by a writ of *fieri facias*. As I have addressed the equitable claim, my focus is now on the judge's decision not to order a stay of execution pursuant to RSC Order 47.

93. Before addressing his powers to stay execution under RSC Order 47, Mussenden J referred to RSC Order 45/11 and Plowman J's High Court decision in *London*

Permanent Benefit Building Society v de Baer [1967] 1 Ch. 321. At [42] Mussenden J stated:

> "*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*."

94. The judge was properly drawn into a construction exercise of RSC Order 45/11 and the question of whether he had the power to order a stay of execution under the rule which states:

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

95. In his approach to O.45/11, Mussenden J leaned on Plowman J's conclusions in *London Permanent Benefit Building Society v De Baer* where the rule was construed as falling short of a general power to stay the execution of a possession order. Plowman J found:

> "*…I have reached the conclusion that R.S.C., Order 45, r. 11, under which the present application is made, does not, on its true construction, confer any power to grant a stay of execution on an order for possession made in favour of a legal mortgagee or a charge made by way of legal mortgage. The power conferred by that rule to grant relief is a power to do so, and I quote, "on the ground of matters which have occurred since the date of the judgment or order."*
>
> *It is implicit in the rule that the matters referred to are matters which would or might have prevented the order being made, or would or might have led to a stay of execution if they had already occurred at the date of the order…*"

96. In short, Plowman J found the rule to operate only as a remedial means of nullifying a possession order which ought never or would never have been made, or might never

have been made, had the Court been able to foresee the facts as they subsequently unfolded. As is explained in Plowman J's judgment Order 42 r.27 is the predecessor to Order 45 r. 11, which came into force on 1 October 1966. Order 42 r.27, when it was in force, provided:

"*No proceeding by audita querela shall hereafter be used; but any party against who judgment has been given may apply to the court or a judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the court or judge may give such relief and upon such terms as may be just*."

97. It is apparent from Plowman J's judgment in *London Permanent Benefit Building Society v De Baer* that Order 42 r.27 was never regarded by mortgagors as an opportunity for them to seek a stay of a possession order against them. The general position was that once a possession order was made, an English Court had no power to suspend its operation. That general position was confirmed by Russell J's decision in *Birmingham Citizens Permanent Building Society v Caunt ELR* [1962] 1 Ch 883, a decision which provided long-awaited clarification of the effect of a Practice Direction[3] which in its relevant part provided:

> "…*When possession is sought and the defendant is in arrears with any instalments due under the mortgage…and the master is of opinion that the defendant ought to be given an opportunity to pay off the arrears, the master may adjourn the summons on such terms as he thinks fit*…"

98. Of that Practice Direction, Russell J said the Court has no jurisdiction, despite its purport to the contrary, to decline to make a possession order in circumstances where the entitlement to possession arises for a legal mortgagee.

99. When Order 45, r. 11 replaced Order 42, r.27 wide judicial consideration was given to the effect of the transition. Plowman J described the former rule as being "much wider". The material wording in Order 42 r.27 was "…*upon the ground of facts which have arisen too late to be pleaded…*". When Order 45 r. 11 came into force, that wording *was* replaced with "*on the ground of matters which have occurred since the date of the judgment or order*". This lends some better understanding to how Plowman J and other esteemed judicial minds reconciled that Order 45 r. 11, although drafted more widely than its predecessor rule, did not serve to suddenly empower the Court to derail an entitled legal mortgagee in exercise of an unfettered discretion to grant a stay of execution on an order for possession. This also elucidates Plowman J's reckoning that the power is implicitly limited to matters occurring after the making of the possession order which would or might have prevented the order being made, or which would or

[3] Annual Practice (1938-1966) made under RSC Order 55, r.5A

might have led to a stay of execution if they had already occurred at the date of the possession order.

100. This Court, having previously considered the question of the Court's jurisdiction to stay a possession order under RSC O. 45/11, applied the same construction as the English High Court did in *London Permanent Benefit Building Society v De Baer*. In *LAEP Investments Ltd v Emerging Markets Special Solutions 3 Ltd* [2015] Bda LR 38, Bell JA stated:

> "*10. RSC Order 45 rule 11 provides that a party against whom an order has been made may apply to the Court for a stay of execution of that order 'on the ground of matters which occurred since the date of the … order'. Accordingly, the Court has power to grant a stay of execution of any judgment or order made, in the event of some relevant subsequent event. As the judge pointed out in paragraph 17 of the Ruling, this means that the facts must be such as would or might have prevented the judgment or order being made, or would or might have led to a stay of execution, if the matters in question had already occurred at the date of the judgment or order.*
>
> *…*
>
> *32. While the judge correctly identified the basis upon which an application for a stay might be made, in paragraphs 16 and 17 of the Ruling, we have no doubt that he fell into error by considering the principles applicable to the grant of a stay in the context of applications for a stay following judgment, pending the outcome of an appeal. …*"

101. In *Clarien Bank Ltd v Da Costa and Vieira* the plaintiff obtained a possession order which was consensually stayed for approximately three and a half months in order to allow the judgment debtors an opportunity to obtain refinancing to discharge the mortgage debt in full. The judgment debtors failed to make good payment. This led to the plaintiff's issuance of a writ of possession and a subsequent *ex parte* application by the judgment debtors for a stay of execution. Kawaley CJ granted a stay of the possession order for a period of 7 days on acceptance of the defendants' assurances that they would obtain the financing within that period. However, on a further application for a stay, Counsel for the entitled mortgagee submitted that the Court had no jurisdiction to stay the possession order against its will.

102. Kawaley CJ found that the Court's jurisdiction to impose a stay of a possession order was very limited in scope. He held [7]:

> "*7. I accept the submission of the Plaintiff's counsel that the scope of the jurisdiction possessed by this Court to adjourn an application for a possession order and, by extension, to grant a stay of execution in relation to a possession order already obtained, absent the mortgagee's consent, is very limited indeed. As Russell J stated in Birmingham Citizens Permanent Building Society v Caunt ELR [1962] 1 Ch 883 at 912;*

> *"… in my judgment, where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgage in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth."*"

103. Kawaley CJ was concerned with RSC O. 45/11. In quoting from Russell's J judgment in *Birmingham Citizens Permanent Building Society v Caunt ELR* Kawaley CJ endorsed the principles established under the predecessor rule to Order 45, r.11 as did Plowman J who was also concerned with Order 45, r.11. That is because, fundamentally, the rule never changed, notwithstanding the shift to a more broadly drafted rule.

104. The narrow exception described by Kawaley CJ can only refer to either (a) the Court's equitable jurisdiction to grant relief from forfeiture in limited cases where relief is appropriate on the equitable principles explored further above and where the mortgagor is positioned to remedy the default; or (b) the Court's inherent jurisdiction to adjourn on a proper basis. The Court's inherent jurisdiction to adjourn in mortgage proceedings where a possession order has been granted was also explained by Russell J *Birmingham Citizens Permanent Building Society v Caunt ELR* as follows [891]:

> "*…a court in exercise of its inherent jurisdiction for proper reason to postpone or adjourn a hearing might by adjournment for a short time afford the mortgagor a limited opportunity to find means to pay off the mortgagee or otherwise satisfy him if there was a reasonable prospect of either of those events occurring*."

105. This limited scope for which the Court may exercise its inherent jurisdiction is rooted in the pre-1936 era when a mortgagee's suit for possession was brought as a common law claim as opposed to a summons filed in the Chancery Division of an English High Court. Casting back to these origins, Russell J said that he found no trace of any right during this period which would allow a Court to deny a mortgagee's right to a possession order. This, he considered, was unsurprising given that a legal mortgagee does not necessarily require the assistance of a Court to assert his right to possession. After all, section 30 of the Conveyancing Act 1983 confers a statutory power of sale which is implied in all mortgages, unless a contrary intention is shown from the mortgage agreement between the parties. This means that a mortgagee has a statutory power, once the mortgage money has become due, to sell the mortgaged property,

subject to various impediments provided for under section 31. (See Ground J (as he then was) in *BDC Limited v Brown and Brown* [1994] Bda LR 35).

106. This portrait of the law affirms the starting point that a legal mortgagee is entitled to a possession order and the execution of that order. The exceptions to that general position are restrictive and limited to a mortgagor who is in a position swiftly to remedy the entire sum of the debt owed to the mortgagee. That exception might take the form of equitable relief from forfeiture where it is appropriate or as an exercise of the Court's inherent jurisdiction to adjourn in limited circumstances consistent with the rights of the legal mortgagee. Where an application for a stay is brought under RSC Order 45/11, those legal principles are substantially unaltered, and the mortgagor is given no advantage or special ability to trample over the rights of a legal mortgagee. Under Order 45/11, a mortgagor is merely given an opportunity to establish, on facts which occurred after the making of a possession order, that the Court would have never made the possession order in the first place, had the judge been able to know how such matters would have subsequently unfolded.

107. In my judgment, there is no arguable case that Mrs. Trew is entitled to any such relief, having regard to all of the factors examined further above and specifically to the fact that she is now delinquent on her mortgage debt by many years without any viable prospect of settling the debt in a short timeframe. For those reasons I find that any appeal which indirectly engages a challenge to Mussenden J's refusal to exercise his powers under RSC O. 45/11 is plainly unarguable.

108. I now turn to RSC Order 47 which provides:

> ***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.*

109. Order 47, firstly, applies to money judgments. It does not engage the subject of possession of the property in question. Thus, in the context of mortgage proceedings, under Order 47, the Court would only be concerned with the money sums owed in arrears to the mortgagee. The power assigned to the Court under this rule is the power to stay any form of execution of a money judgment by writ of *fieri facias*.

110. In this case, much like many others, the possession order also provided for the removal and levying of the Applicant's possessions up to the value of the debt. So, in bringing an application for a stay under Order 47, the judge, without regard to the issue of possession, was asked to suspend any payment to the Whites of the debt owed. Such an order could have only been made if Mussenden J was satisfied that there were either special circumstances which rendered judgment enforcement inexpedient or if he, the judge, found that Mrs. Trew was entirely unable pay to the money, whether by deposit, by a leverage of goods, or otherwise. The latter does not apply in this case as it has never been Mrs. Trew's case that she is wholly impecunious. Rather it is her case that she is entitled to be indemnified for her mortgage obligations out of the estate of her late husband. In any event a sale of her mortgaged property would pay off much of the debt. So, the relevant ground in this case falls squarely on the question of "special circumstances".

111. In *Island Construction v Phillips and Phillips* [2019] Bda LR 92, sitting as the judge at first instance concerned with an application for a stay pending appeal, 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*."

112. In this case, the special circumstances relied on are those which were advanced by the Applicant before Mussenden J when an order was sought for a stay under the other provisions of law. So, the Applicant's prospects of success under RSC O.47/1 can hardly be expected to show any better promise. It is difficult to envisage any circumstances which would be sufficiently special to qualify for a stay under Order 47

but which otherwise flatly fail to establish grounds suitable for equitable relief or a stay under RSC Order 45/11.

113. The Applicant, determined to obtain a stay under any provision of law offering her an opportunity for reprieve from her debt, holds on to the hope that the Court will eventually declare that liability to pay the Whites belongs to the defendants in the HSBC action. While that is Mrs. Trew's ultimate pursuit, her application for leave to appeal in relation to RSC Order 47 challenges the judge's decision to refuse a stay pending appeal. However, Mrs. Trew's non-payment of her mortgage debt to the Whites is not premised on any concern that payment would render a successful appeal nugatory. This is simply not a case where the debtor is holding on to the judgment sum in fear that the judgment creditor will abscond or dissipate those monies depending on the outcome of the appeal. To the contrary, the effect of full payment would likely establish a basis for discharging the possession order and alleviating the need for appeal proceedings. However, Mrs. Trew has shown no basis for finding any realistic prospect of payment being made without delay upon an unsuccessful appeal.

114. The judge dealt with this application at [47-49]:

> "…*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*…[quoting paragraphs 23-24]
>
> *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*."

115. In my judgment, the judge's reasoning is unimpeachable in the circumstances of this case and leaves no room for an arguable appeal against his refusal to stay the execution of judgment pending appeal or otherwise.

116. For all of these reasons, the application for leave to appeal must fail.

SIR ANTHONY SMELLIE JA

117. I agree.

SIR CHRISTOPHER CLARKE P

118. I, also, agree. The application for leave to appeal is dismissed. The Applicant must pay the Respondents their costs of and occasioned by the application on the standard basis to be taxed by the Registrar if not agreed.