In The Supreme Court of Bermuda

CIVIL JURISDCITION

2016 No: 83

BETWEEN:

CLARIEN BANK LIMITED

Plaintiff/Judgment Creditor

and

MICHAEL JOHN SCOTT

Defendant/Judgment Debtor

CHAMBERS RULING

Application for Stay of Execution of Writ of Fieri Facias
(Rules of the Supreme Court, Order 47)

Date of Hearing: 30 April 2018
Date of Ruling: 21 May 2018

Mr Richard Horseman, WQ Limited, for the Plaintiff
Michael Scott, In Person

RULING of Acting Registrar Alexandra Wheatley

Introductory

1. This matter is in relation to the default of the repayment terms of a mortgage made between the Defendant and the Plaintiff on 31 July 2006 ("the Mortgage"). The Mortgage provided the Defendant with a principle sum of $315,000, secured against the

plot of land known as "Lot 6 off Sound View Road, Sandys Parish in the islands of Bermuda" ("the Mortgaged Property").

2. The parties entered into a Consent Order dated 23 November 2016 (erroneously dated as 23 January 2016 on the Court file) ("the Consent Order") which, *inter alia*, entered a Judgment against the Defendant and included terms of repayment of the said Judgment Debt as follows:

> "*1. Judgment be entered against the Defendant for the sum of $223,109.17, together with interest accruing at the contractual rate of 7.75%.*
>
> *2. The Defendant is to refinance through alternative US Dollar funds in the amount of $150,000.00 and pay the Plaintiff these funds which are to be applied towards the judgment sum of $223,109.17 on or before 31 January 2017.*
>
> *3. The Defendant is to pay the sum of $2,500 monthly thereafter to the Plaintiff on the first day of each month beginning 1 January 2018 until the judgment debt is paid in full..."*

3. The Defendant failed to comply with the terms of repayment as per the Consent Order which consequently initiated the Plaintiff filing a Writ of *Fieri Facias* on 11 April 2017 ("the Writ of *Fi. Fa.*"). The Writ of *Fi. Fa.* sought to execute *"…the goods, chattels, and other property of Michael John Scott of 79 Mangrove Road, Sandys Parish…."*. Thereafter, the Plaintiff filed an additional application which, *inter alia*, sought liberty to sell the Mortgaged Property and possession thereof to be provided forthwith. The application heard before the Honourable Registrar Subair Williams on 11 May 2017 and an order was granted in those terms.

4. The Writ of *Fi. Fa.* was served on the Defendant on 26 August 2017. As a consequence, the Defendant filed an application on 6 September seeking a stay of execution of the Writ of *Fi. Fa.* "*due to irregularity*" and "*if deemed just, Setting Aside*" the Writ of *Fi. Fa.* ("the Stay Application"). Mr Scott filed an affidavit in support of the Stay Application which was sworn on 6 September 2017 ("Affidavit in Support").

5. The Defendant's Stay Application was first listed before the Honourable Registrar Subair Williams on 5 October 2017 at which time an interim stay was granted as well as further directions being given in relation to the filing of Affidavits. The matter was also set down at this time for 27 November 2017. Parties did not make submissions at this time, it was merely a first appearance where directions were given.

6. On 27 November 2017, the Stay Application was before Assistant Justice Duncan at which time the hearing was adjourned for a date to be fixed by the Registrar. For reasons unclear, the hearing was not relisted. However, the Plaintiff subsequently filed an application on the papers for the Defendant to be examined as to his means which was granted by the Honourable Chief Justice on 16 February 2018 ("the Examinations of Means"). The Examination of Means was subsequently listed for hearing on 18 April 2018 before me and a Notice of Hearing was sent to the parties on 21 February 2018.

7. The parties attended before me on 18 April 2018 on the assumption the hearing was listed for the Stay Application rather than for the Examination of Means. Mr Horseman and Mr Scott both agreed the Stay Application should be determined first, particularly due to many months which had passed since the first return date. Both parties also conceded the application was not bound to be heard by Assistant Justice Duncan, despite the Order made by him on 27 November 2017. I indicated my availability to hear the application on 20 April 2018 in order to avoid any further delay and both parties were grateful for the matter to be disposed of expeditiously in this manner.

8. Due to unavoidable circumstances, the matter had to be relisted from 20 April 2018 and the Stay Application was heard on 30 April 2018. Both parties had filed written submissions prior to the hearing. The Plaintiff confirmed at the date of the hearing the Judgment Debt, inclusive of interest to that date was $248,216.18. This sum did not provide for costs orders previously granted against the Defendant.

The Facts

9. Mr Scott confirmed he made a proposal for the repayment of the Judgement Debt by way of $2,000 monthly payments. Mr Scott conveyed given he has made an offer for payment by instalments against the Judgment Debt; this should be considered reason to grant the Stay Application.

10. Mr Scott also submitted the Mortgaged Property is currently for sale and the sale proceeds would be applied against the Judgment Debt. He further asserted the sale proceeds of the Mortgaged Property would be applied directly against the Judgment Debt which was averred would cover the majority of the Judgment Debt as it is valued at $225,000. Mr Scott's main concern in this application is that should the Plaintiff proceed with the execution of the Writ of *Fi. Fa.*, his residence located at The Perch, 79 Mangrove Bay Road, Sandys Parish ("The Perch") will be sold by the Plaintiff. Mr Scott did not, however, provide any evidence in relation to The Perch or even confirm the circumstances of its current occupation; i.e. does he reside there by himself, himself and others, etc.

11. In relation to the $2,000 monthly payments, Mr Scott provided what appears to be an email from James Davis dated 17 April 2018 stating Mr Scott will receive an income of $5,715 per quarter for being a board member (the name of the board not being cited). Mr Scott submitted this evidences his ability to make the proposed instalments and further indicated these payments would commence forthwith. In response, Mr Horseman noted $2,000 per month only covers monthly interest payments plus a small portion of the principal sum owing; this would result in the principal being reduced by just, approximately $7,000 per annum.

12. Mr Horseman further reminded the Court Mr Scott has failed to make any payments whatsoever in accordance with the Consent Order. When Mr Scott gave evidence as to why the terms of the Consent Order were not complied with, he stated "*there was no real prospect to pay*". Indeed, this is stated in paragraph 4 of his written submissions. Mr Horseman, understandably, raised his concern as to why Mr Scott had entered into the

Consent Order in those terms in the first place if there was no ability to pay in accordance with the terms of the Order. Mr Scott did not answer this.

13. Mr Scott relied on a payment of $440,000 made to Clarien Bank which he asserted should be taken into consideration. Mr Horseman's response being that this was a payment made prior to the proceedings issued in relation to a separate Mortgage and in separate financing with the Plaintiff. As such, Mr Horseman submitted it is irrelevant to these proceedings. When I asked Mr Scott to clarify when the payment of $440,000 was made, he did confirm it was made prior to these proceedings.

14. Upon review of the valuation Mr Scott relied on for the Mortgaged Property's value, it was clear the appraisal was remarkably outdated. The $225,000 valuation completed by Rego Relators was on 23 May 2013. Mr Horseman also referred me to the First Affidavit of Patrice James which was sworn on 27 October 2017 ("the Plaintiff's Responding Affidavit") and was filed in response to the Defendant's Affidavit in Support. At page 1 of the exhibit to the Plaintiff's Responding Affidavit is a property appraisal from Fulcrum Property Consultants Limited dated 14 June 2016 ("the Fulcrum Valuation"). The Fulcrum Valuation estimates the value of the Mortgaged Property to be $140,000. Mr Scott did not provide any valuation evidence to contradict the Fulcrum Valuation.

15. Mr Scott's provided evidence (copy of an e-mail) of an offer for $115,000 (all payable in cash with no financing required) being made on the Mortgaged Property on 11 October 2017. Mr Scott confirmed this offer was not accepted as it was considered to be too low. When I asked Mr Scott how long the Mortgaged Property had been listed for sale he confirmed "*it has been listed with Brian Alkon since October 2017*". However, in Mr Horseman's reply submissions, he drew my attention to page 12 of the exhibit to the Plaintiff's Responding Affidavit which evidenced the Mortgaged Property being listed with Watford Real Estate Limited (Ms Isabella Hall) since 11 September 2014. Such an omission by Mr Scott, who is experienced, senior Counsel, is of grave concern. I raised my concern with Mr Scott who nonchalantly responded it had been too long he could not remember dates.

16. I do not accept Mr Scott did not remember when the Mortgaged Property was initially listed as his Affidavit in Support at paragraph 11 made clear reference to the Mortgaged Property being listed with "*Isabella Hall*"; i.e. Watford Real Estate Limited; albeit, no date was referred to in paragraph 11. The listing agreement was purported to be exhibited to the Affidavit in Support paragraph 11, but this was absent from the exhibit. Moreover, whilst Mr Scott averred to have family members interested in purchasing the Mortgaged Property, no evidence was submitted to support this being a real prospect.

The Law

17. Order 47, Rule 1 of the Rules of the Supreme Court 1985 ("the RSC") provides the Court the jurisdiction to hear an application for the Stay Application. O47, R1 (1) states as follows:

"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." [Emphasis added]

18. Counsel accepted I have a wide discretion to grant a stay; the terms of which can amount to an unless order. The question for me to determine is as to whether there are "*special circumstances which render it in-expedient to enforce the judgment*" in accordance with O.47, r.1 (1) (a).

19. I invited Mr Scott to confirm what "*special circumstances*" I should be taking into consideration, but he was unable to highlight any additional facts other than which were submitted in relation to his proposal for repayment and from a lump sum payment from the proceeds of sale of the Mortgaged Property. Mr Scott relied (as did Mr Horsemen) on The Supreme Court Practice 1999 Volume 1 ("The White Book") at pages 818 to 820 for provisions in relation to the powers of the Court to stay execution under O.47, r.1 (these rules mimic the RSC). Mr Scott drew my attention to the following wording at page 819:

    "***Effect of rule -*** *....*

    It should perhaps be emphasized that the Court has the power to order a stay of execution by writ of fi. fa. Either absolutely or for such period and subject to such conditions as the Court thinks fit. If the debtor is the owner of premises the Court has power there and then to impose a charging order absolute on the premises provided the judgment debtor agreed, so that the judgment creditor need not go through the elaborate machinery of obtaining such a charging order absolute under O.50, and in the absence of such agreement the Court should endeavor as far as possible to maintain a fair and proper balance between the needs of the judgment debtor to be granted a stay of execution and the needs of the judgment creditor to obtain due and prompt satisfaction of his judgment debt." [Emphasis added]

20. Mr Scott's interpretation of the above being that I need to consider both his (as the Judgement Debtor) needs and the needs of the Plaintiff. Mr Scott alleged the Plaintiff's needs are minimal due to its position as a banking institution which was disputed by Mr Horseman. Mr Horseman again reminded the Court of Mr Scott's failure to comply with the terms of the Consent Order. Nonetheless, whilst I do not accept the above direction

from The White Book is relevant to the facts of this case as it relates to O.50 in England at that time (which is not relief available to the Plaintiff under the RSC), I do accept the needs of both parties should be considered when exercising discretion under O.47, r.1.

21. Applying the facts to the law, I do not find the Defendant has presented any "*special circumstances*" which support his application for a stay. Neither has the Defendant presented any evidence whatsoever as to his "*needs*" which should be considered to be balanced with the "*needs*" of the Plaintiff.

22. I would have been more sympathetic for the Defendant had he been compliant with the terms of the Consent Order, but for Mr Scott to state in the face of the Court he had no prospect of paying at the time he entered into the Consent Order is alarming. Moreover, the fact Mr Scott (particularly taking into account he is senior Counsel) made no efforts subsequent to the signing of the Consent Order to negotiate amended payment terms with the Plaintiff or to make an application varying the terms of the Consent Order, in my view speaks volumes. Undoubtedly, a proposal now for repayment of the Judgment Debt in very similar terms to that of the Consent Order is unhelpful for the Defendant's position. Likewise, I accept there is a slim prospect of the sale of the Mortgaged Property given the length of time is has been on the market and just one low offer being made. Had the Defendant been compliant with the terms of the Consent Order or at the very least provided evidence supporting a change in financial circumstances which rendered him unable to make payments, I would have been more easily persuaded to grant a stay (a ground which the Defendant did not rely on in any event).

23. In terms of the "*needs*" of the Plaintiff, given the Defendant's assertions at the hearing he had no prospect of complying with the terms of the Consent Order, I am extremely empathetic. I have little doubt, had the Plaintiff known the Defendant would not make any payments as agreed in the Consent Order, a different route would have been taken at that time. Now the Plaintiff is in a position some eighteen months later where the Judgment Debt has not been reduced in any way since entering into the Consent Order.

24. The Plaintiff should also not be held hostage waiting for a potential sale of the Mortgaged Property where no evidence has been presented which alludes to a sale in the foreseeable future The Mortgaged Property has been on the market for nearing four years with the only offer being made of approximately half of listed price. Notably, Mr Scott has not reduced the listing price of the Mortgaged Property throughout this period and did not provide the Court with any evidence as to an attempt at negotiations when the one offer was made in October 2017.

25. For the avoidance of doubt, Mr Scott asserted during the hearing that his Stay Application was not made due to his inability to pay in accordance with O.47, r.1 (1) (b), but rather on the basis set out in O.47, r.1 (1) (a). As such, I have not made any findings in accordance with O.47, r.1 (1) (b). It is of note that, had Mr Scott relied on this provision and provided the Court with evidence of his inability to pay, his application may have had more teeth.

Conclusion

26. In all of the circumstances, the Stay Application is refused and the Plaintiff is granted leave to proceed with execution of Writ of *Fi. Fa.* Further, the hearing for the Examination of Means shall be listed for 19 June 2018 at 2:30 p.m. and the Defendant shall submit all documents as per the Order dated 16 February 2018 on or before 15 June 2018.

27. Whilst Mr Scott's Stay Application sought alternative relief of setting aside the Writ of *Fi. Fa.*, no submissions were made in this regard. It is apparent from previous appearances before the Court since the Stay Application was filed, Mr Scott purported the Writ of *Fi. Fa.* to be invalid due to the claim for costs therein being defined as being on an indemnity basis. However, for the sake of completeness, I find that there are no grounds for the Writ of *Fi. Fa.* to be set aside. I accept Mr Horseman's interpretation set in his submissions that costs were awarded in the Consent Order as being "*…in accordance with the terms of the Mortgage*".

28. Paragraph 3 (h) and 4 (iv) of the Mortgage state as follows:

> "*3…*
>
> *INDEMNITY*
>
> *(h)* *Keep the Mortgagee indemnified from and against all actions proceedings claims costs and damages occasioned by any breach of any of the covenants or stipulations hereinbefore contained.*
>
> *…*
>
> *4.* *IT IS FURTHER HEREBY AGREED AND DELCARED as follows:-*
>
> *…*
>
> *(iv)* *LEGAL PROCEEDINGS*
>
> *In the event an action is commenced to enforce payment of the principal sum and interest and other monies due by these presents it is hereby declared that the Courts of Bermuda shall have jurisdiction to hear any such action and further that service of any documents proceedings or pleadings shall be adequately served if left at 79 Mangrove Bay Road Sandys Parish MA 01 in the Islands of Bermuda FURTHER that all costs associated in the recovery of any monies due hereunder will be a charge against the said land."* [Emphasis added]

I therefore accept the terms of the Mortgage entitle the Plaintiff to be awarded indemnity costs as these proceedings (which includes enforcement of the Judgment Debt) is as a direct result of the Defendant's breach of the terms of the Mortgage. There was no irregularity in the Writ of *Fi.Fa.*

29. In relation to costs, I see no reason to depart from the principle of costs following the event; therefore, costs are awarded to the Plaintiff on an indemnity basis, to be taxed if not agreed.

30. Counsel are invited to draw up an Order for my consideration and signature.

21 May 2018

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ALEXANDRA WHEATLEY
ACTING REGISTRAR OF THE SUPREME COURT