



**IN THE SUPREME COURT OF BERMUDA**

**CIVIL JURISDICTION**

**2016: No. 138**

**CLARIEN BANK LIMITED  
(formerly Capital G Bank Limited)**

**Plaintiff**

**-v-**

**(1) ELIZABETH CRISTINA PEREIRA VIEIRA DACOSTA  
(2) NANCY LYNN VIEIRA**

**Defendants**

**RULING ON STAY APPLICATION**  
(in Chambers)

*Mortgagor's application for stay of enforcement of writ of possession -governing principles for granting stay*

Date of hearing: May 12, 2017

Date of Ruling: June 13, 2017

Mr. Kai Musson, Taylors, for the Defendant

The 1<sup>st</sup> Defendant did not appear

The 2<sup>nd</sup> Defendant appeared in person

**Introductory**

1. On November 8 2016 and by consent, the Plaintiff obtained a Possession Order under a mortgage over property owned by the Defendants ("the Property"). The Possession Order was consensually stayed until February 24, 2017 to afford the Defendants an opportunity to obtain refinancing from another source to discharge the mortgage debt in full. This they failed to do and the Plaintiff issued a Writ of Possession on March 1 2017. The Bailiff was scheduled to take possession of the Property on April 28, 2017

and the Defendants applied for an ex parte stay of execution. I granted a seven day stay on April 28, 2017 on the grounds that the Defendants expected to be able demonstrate that they had obtained financing within that period.

2. By Summons dated May 11, 2017, issued returnable for May 12, 2017, the Defendants sought a further stay on the grounds that it was now clear that a realistic prospect of their obtaining refinancing now existed. The documentary evidence in support of the application was highly ambiguous but with family property at stake, Ms Vieira poignantly played on the heart strings of the Court. She sought a further 21 days to be able to satisfy the Plaintiff that its mortgage could indeed be refinanced.
3. Mr Musson submitted that the Court had no jurisdiction to grant a stay and accepted my invitation to file written submissions on the jurisdiction issue, to clarify the position for future similar cases, with a view to clarifying the law. I accordingly ordered on May 13, 2017:
  - reserving judgment, that the Plaintiff should take no steps to enforce its Writ of Possession until judgment;
  - that the Plaintiff’s counsel should file written submissions on the jurisdiction issue within seven days.
4. The Plaintiff filed its written submissions on jurisdiction on the afternoon of May 22, 2017. The Defendants have, by a side-wind (and as was contemplated might occur at the hearing), received the benefit of the 21 days they sought. It was in this context that I did not invite the Defendants, who in any event were not legally represented, to file their own legal submissions on the jurisdiction issue.

### **The Plaintiff’s submissions on the law**

5. Mr Musson’s submissions on the law may be summarised as follows:
  - a mortgagee is generally entitled to take possession of the mortgaged property “before the ink is dry on the mortgage”: per Harman J in *Fourmaids Ltd-v-Marshall (Properties) Ltd* [1957] 2 All ER 35 at 36, cited by Bell J (as he then was) in *Piper and Others (as Trustees of the Kwanza Trust)-v- First Bermuda Securities Group Limited* [2006] Bda LR 24 (at paragraph 9);
  - a possession order should not be refused or postponed without the mortgagor’s consent save for “a short time” to enable the mortgagor to repay the debt in full or otherwise satisfy the mortgagee. However, this should only be done where there is “a reasonable prospect of this occurring”: per Russell J in *Birmingham Citizens Permanent Building Society-v- Caunt* [1962] 1 Ch 883 at 912;

- the limited scope of the jurisdiction to decline to grant a possession order to which a mortgagee is in principle entitled was broadened in England by the Administration of Justice Act 1970, section 36, “*but not in Bermuda*”: per Ground J (as he then was) in *BDC Ltd.-v-Brown and Brown* [1994] Bda LR 35 (at page 10).

### **The Plaintiff’s submissions on the facts**

6. Mr Musson essentially submitted that the Defendants’ evidence, in the form of the 2<sup>nd</sup> Defendant’s Affidavit and correspondence from Butterfield Bank, was insufficiently concrete to form the basis for a finding that there was a reasonable prospect of the mortgage debt being repaid.

### **Findings**

#### **Governing legal principle**

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* [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.”*

#### **Factual findings**

8. The evidence adduced by the Defendants in support of their second stay application suggested the possibility that refinancing might be obtained but fell short of demonstrating a “reasonable prospect” of that occurring. I made it plain to the 2<sup>nd</sup> Defendant that in light of the further stay she was obtaining by default due to my decision to reserve judgment on the jurisdiction issue, it was inconceivable that any further stay would be granted over the Plaintiff’s objections after the present judgment was delivered.

9. In the event I find that, this Court lacked any jurisdictional basis to grant a non-consensual stay of enforcement of the Possession Order based on the material relied upon by the Defendants at the May 12, 2017 hearing of their May 11, 2017 Summons.
10. The Defendants were required to demonstrate a reasonable prospect of being able to repay or otherwise satisfy the Plaintiff within the 21 day stay period which they sought. This they were unable to do against a background of having:
  - obtained a consensual stay of enforcement of more than 3 months and failed to satisfy the Plaintiff;
  - sought and obtained on April 28, 2017 (two months later) a seven day stay of enforcement to demonstrate their ability to refinance and failed to do so a further 14 days later.

### **Conclusion**

11. For the above reasons, the Defendants' application for a stay of enforcement of the Writ of Possession herein is refused.

Dated this 13<sup>th</sup> day of June, 2017 \_\_\_\_\_  
IAN RC KAWALEY CJ