

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2023/CLE/gen/00781

IN THE MATTER of the Indenture of Mortgage made on the 4th day of October, A. D., 2000 between R & R Holdings Limited as Mortgagors and Scotiabank (Bahamas) Limited as Mortgagee and now of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 8705 at pages 432 to 444

AND IN THE MATTER of the Conveyancing and Law of Property Act, Chapter 138 of the Revised Statute Laws of the Commonwealth of The Bahamas

AND IN THE MATTER of a Mortgage Action pursuant to Part 62 of the Civil Procedure Rules

GATEWAY ASCENDANCY LIMITED

Claimant

AND

R & R HOLDINGS LTD.

Defendant

RULING

Before: The Honourable Mr. Acting Justice Raynard S Rigby KC

Appearances: Mrs. Sharlyn Smith along with Ms. Angelique Dennis for the Claimant/Applicant
Mr. Damian Gomez KC for the Defendant/Respondent

Hearing Dates: Heard on the papers

Submissions: 13 and 16 July 2026

Practice and procedure – Leave to appeal – Final or Interlocutory Order – Stay of Proceedings – Foreclosure Order Absolute – Whether the Court properly exercised its discretion to reopen Foreclosure Order Absolute – Whether the action is statute barred – Limitation Act 1995 – Court of Appeal Act, sections 10 and 11

HELD: Granting the application for leave to appeal and stay pending appeal

Rigby J. (Actg.):

Introduction

- [1.] By Notice of Application filed on 3 July 2026 and an Amended Notice of Application filed on 15 July 2026 the Claimant, Gateway Ascendancy Ltd., applied for leave to appeal this Court's Ruling made on 29 June 2026 to reopen the Foreclosure Order Absolute dated 17 April 2025 and striking out the action on the grounds that the claims therein are statute barred pursuant to the provisions of the Limitation Act, 1995 ("the Strike Out Order").
- [2.] The Claimant's application is supported by the Affidavits of Brittany McKenzie filed on 3 and 15 July 2026.
- [3.] The Defendant, R & R Holdings Limited, opposes the application.
- [4.] I do not find it necessary or warranted to address the history of the matter and the procedural steps taken in the action. I will rely on the terms of my earlier Ruling, the subject of the instant application, which sets out in detailed the procedural chronology and the facts in this action.

Grounds of appeal

- [5.] The intended grounds of appeal are best grouped broadly as follows:
 - (i) The Court wrongly decided to expand the 'limited' jurisdiction to reopen the Foreclosure Order;
 - (ii) The Court was functus officio because the Foreclosure Order Absolute was perfected;
 - (iii) The Court had no regard to the Emergency Powers (Covid) (Special Provisions), 2020 which suspending and extended the limitation period;
 - (iv) The Court wrongly determined that the mortgage debt was extinguished under the provisions of the Limitation Act; and

- (v) There was no evidence to show that the Defendant was in continuous occupation of the mortgaged property to bar the Claimant's title.

Leave to appeal

- [6.] In the Claimant's written submissions, it deems the Strike out Order to be interlocutory requiring it to seek leave to appeal and to file a Notice of Appeal Motion in the Court of Appeal in 14 days in compliance with Rule 11 of the Court of Appeal Rules, 2005. The Claimant relies on **Farmer & Ors. v Security & General Insurance Company Limited SCCivApp No. 93 of 2011** where Dame Allen P. (as she then was) discussed the jurisdiction under section 23 for the Court of Appeal Act as to leave to appeal to the Judicial Committee of the Privy Council and discussed whether an order is final or interlocutory. I deem the jurisdiction under section 23 to be distinct from that under section 10 of the Court of Appeal Act.
- [7.] The question however of whether an order of this Court is final or interlocutory has serious implication for the time period to lodge an appeal to the Court of Appeal. If it is a final order the period is 6 weeks and the Claimant will have sufficient time to file a notice of appeal motion. However, if it is an interlocutory order the period is 14 days from the date when the order was pronounced, being the 29 June 2026.
- [8.] A good starting place is to set out the jurisdiction of the Court of Appeal to hear appeals from this Court, which is set out in sections 10 and 11 of the Court of Appeal Act.

10. Appeals from Supreme Court in civil proceedings. Subject to the provisions of this Part of this Act and to the rules of court, the court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court given or made in civil proceedings, and for all purposes of and incidental to the hearing and determination of any such appeal and the amendment, execution and enforcement of any judgment or order made thereon, the court shall, subject as aforesaid, have all the powers, authority and jurisdiction of the Supreme Court.

11. Restriction on civil appeals. No appeal shall lie —

- (a) from any order allowing an extension of time for appealing from a judgment or order;
- (b) from an order of a Justice of the Supreme Court giving unconditional leave to defend an action;
- (c) from any decision of the Supreme Court where it is provided by the Constitution that such decision is to be final;
- (d) from any order absolute for the dissolution or nullity of marriage in favour of any party who, having had time and

opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree, except upon some point which would not have been available to such party on such appeal;

(e) without the leave of the Supreme Court or of the court, from an order made with the consent of the parties or as to costs only where such costs are by law left to the discretion of the Supreme Court;

(f) without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court except —

(i) where the liberty of the subject or the custody of infants is in question;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;

(iv) in the case of an order in a special case stated under the Arbitration Act;

(v) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Act in respect of misfeasance or otherwise; or

(vi) in such other cases to be prescribed as are in the opinion of the authority having power to make rules of court, of the nature of final decisions.

[9.] Rules 10 and 11 of the Court of Appeal Rules, 2005 are also instructive. I set them out below:

10. (1) An appeal to the court shall be by way of rehearing and shall be brought by notice of motion in Form 1 in Appendix A (in this Part referred to as “notice of appeal”).

(2) A notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below and every such notice shall specify the grounds of the appeal and the precise form of the order which the appellant proposes to ask the court to make.

(3) Except with the leave of the court, the appellant shall not be entitled on the hearing of an appeal to rely upon any grounds of appeal, or to apply for any relief, not specified in the notice of appeal.

11. (1) Every notice of appeal shall be filed and a copy thereof served by the appellant upon all parties to the proceedings

in the court below who are directly affected by the appeal —
(a) in the case of an appeal from an interlocutory order, fourteen days;
(b) in any other case, six weeks, calculated from the date on which the judgment or order of the court below was pronounced or made.
(2) In the case of an appeal from an award or determination by an arbitrator, tribunal or such other authority, a notice of appeal shall be filed and a copy thereof served by the appellant upon all parties directly affected by the appeal within six weeks from the date on which the award or determination was made.

[10.] The starting premise for any litigant seeking to an appeal is to first decide if the Order, the subject of the intended appeal, is final or interlocutory. In **Old Fort Bay Property Owners Association Limited v Old Fort Bay Company Limited; Matthew Chance Hudson and Zsuzsanna Marta Foti v Old Fort Bay Company Limited and New Providence Development Company Limited; Old Fort Bay Company Limited v Old Fort Bay Property Owners Association Limited 2014/CLE/gen/773 consolidated with 2014/CLE/gen/0889 and 2017/CLE/gen/00014**, Charles J. (as she then was) addressed this issue of whether an Order is final or interlocutory. I set out below paragraphs 39-42 of her decision:

“[39] Section 11 of the Court of Appeal Act, Part III deals with the appellate civil jurisdiction. Section 10 references appeals from the Supreme Court in civil proceedings and section 11 places six restrictions on civil appeals. Section 11 (f) provides:

No appeal shall lie –

(f) without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court except –

(i) where the liberty of the subject or the custody of infants is in question;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;

(iv) in the case of an order in a special case stated under the Ch. 181 Arbitration Act;

(v) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Ch. 308 Companies Act in respect of misfeasance or otherwise; or

(vi) in such other cases to be prescribed as are in the opinion of the authority having power to make rules of court, of the nature of final decision.”

“[40] The test for determining whether an order is final or interlocutory was set out by Lord Esher MR in *Salaman v Warner* [1891] 1 QB 734 as follows:

“The question must depend on what would be the result of the decision of the Divisional Court assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.”

[41] Our Court of Appeal in *Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd* [2014] 2 BHS.J. No. 73 has adopted Lord Esher’s application test expounded in *Salaman v Warner and Others* [1891] 1 QB 734. At paragraph 24, the Court of Appeal determined that:

“...[I]f the decision whichever way it is given will, if it stands, finally dispose of the matter in dispute, it is final. If, on the other hand the decision if given one way will dispose of the matter in dispute, but if given in the other, will allow the action to go on, then it is interlocutory.”

[42] This Court was confronted with the same question in *Findeisen and another v The Wahoo Resort foundation and another* [2014] 3 BHS J No 62 as to whether an order was final or interlocutory for the purpose of determining whether leave to appeal was required under 11 (f) of the Supreme Court Act. There, the Court applied the *Salaman* test and found that the judgment finally disposed of all of the matters. The decision was affirmed by the Court of Appeal.”

[11.] I deem the Strike Out Order as a final order. The Strike Out Order for all purposes finally disposes of the matter in dispute. It is a “final decision”. There is no aspect of the matter arising from the Strike Out Order that will allow the action to go on. The action will come to an end in this Court as no further steps can be taken in the action. I therefore do not deem the Strike Out Order to be an interlocutory order.

[12.] Mr. Gomez KC did not advance any arguments on this issue and therefore I will not dismiss the leave to appeal application on this premise. In the event that I am wrong that the Strike Out Order is a final Order, I will however accede to the application for leave to appeal because in substance I deem it to satisfy the test to grant leave – viz - **it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying**". I also do not deem the appeal to be hopeless or frivolous.

[13.] Mr. Gomez KC in his opposition to the leave to appeal application argues that the Claimant's intended appeal has no prospects of success. That is not the sole criteria for the grant of leave to appeal. In **Gregory Cottis (as Executor of the Estate of Raymond Adams) v Robert Adams (a beneficiary of the Estate of Raymond Adams) SCCiv App No. 23 of 2021**, Evans JA set out the law on a leave to appeal application (see also **Miller Enterprise Limited & Anr. v. Shundra Strachan & Ors. SCCivApp No. 79 of 2025**):

11. In Smith v Cosworth Casting Processes Limited (1997) 4 All ER 840 Lord Wolff, opined as follows:

(1) "The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.

(2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying."

12. In Keod Smith v Coalition to Protect Clifton Bay (SCCivApp No. 20 of 2017), Isaacs JA adopting the guidance from Lord Wolff noted at paragraph 23 of the Judgment:

"The test on a leave application is whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying: per Lord Woolf in Smith v Cosworth Casting Process Ltd [1997] 4 All ER 840."

[14.] The issue of the Court's jurisdiction to re-open a Foreclosure Order Absolute is a matter in my judgment that requires further examination by the Court. In my view

it is also in the public interest to have that issue examined by the Court to determine the scope and extent of the jurisdiction. It is also a point of law that requires clarification.

- [15.] For a mortgagee seeking to exercise its rights under a mortgage deed, it must also know the state of the law.
- [16.] In arriving at the Strike Out Order I deem the Court's jurisdiction not to be limited to the usual four conditions, chief of which is the right of the mortgagor to redeem the mortgage. The facts in this matter are unique which in my view justifies appellate consideration on the Court's jurisdiction to re-open a Foreclosure Order Absolute in circumstances where the Court may find that a limitation defence is available to a borrower. In such novel situations the public interest demands that the law be argued and tested at all levels so that certainty of the law is ascertained and achieved. I therefore have no hesitation in granting leave to appeal.

Stay application

- [17.] I also accede to the stay application.
- [18.] The grant of a stay pending appeal is a discretionary remedy under section 16(3) of the Supreme Court Act.
- [19.] The Claimant seeks a stay in the circumstances because the Strike Out Order **"affects possession, control and proprietary rights in land, and not merely payment of a money judgment. Refusal of a stay would risk changing the practical position and an important legal position before the Court of Appeal has determined whether the Order was properly made"**.
- [20.] On the other hand, the Defendant argues that the Claimant has **"not establish that [it] will face ruin if a stay is refused. At its highest, the affidavit speaks to business disruption, relocation, employees, renovations and commercial inconvenience. Those matters are not equivalent to ruin"**.
- [21.] In **Miller Enterprise Limited & Anr. v. Shundra Strachan & Ors. SCCivApp No. 79 of 2025 Charles JA** (as she then was) addressed the discretionary jurisdiction at paragraph 29:

29. A stay pending appeal is a discretionary remedy and is not granted as of right. The general principle is that a successful party is entitled to the fruits of its judgment, and a stay will only be granted only where the justice of the case so requires: Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887 (CA) and Hammond Suddards Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065. An applicant must demonstrate that the appeal is arguable and

not frivolous. Where leave to appeal has been refused on the basis that no realistic prospect of success exists, that factor weighs heavily against the grant of a stay. The applicant must further show that, absent a stay, the appeal would be rendered nugatory, in the sense that irreparable prejudice would be suffered which could not be adequately remedied if the appeal ultimately succeeds: *Wilson v Church (No 2)* (1879) 12 Ch D 454.

[22.] A further elucidation of the jurisdiction was addressed by the Court of Appeal in *David Cummings et. al. v Sumner Point Properties Limited* SCCivApp. No. 18 of 2016 in respect of an application for the imposition of a stay of committal proceedings pending an appeal. Isaacs JA (as he then was) made the following statements at paragraphs 14 to 16:

14. The principles for granting a stay pending appeal have been enunciated many times before. It is, I think, accepted by the parties that the Court has the jurisdiction to grant a stay of the proceedings whilst an appeal against it is pending. It is a discretion that should be exercised where a failure to grant a stay would result in the appeal being rendered nugatory. In *Wilson v. Church (No 2)* [1879] 12 Ch D 454 at 458-459, Cotton LJ stated:

‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory.’

15. And per Brent LJ at page 459:

‘This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise the judicial discretion that where the right of appeal exists...the Court as a general rule ought to exercise its best discretion in a way so not to prevent the appeal, if successful, from being nugatory.’

16. Further guidance was given by the English Court of Appeal in *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474 (per Potter LJ at para 13):

“The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is least likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt the answer may well depend on the perceived strength of the appeal...”

[23.] There is no dispute between the parties on the Court’s jurisdiction to grant a stay. The issue is how that jurisdiction should be exercised on the facts before me. I am

guided by the approach that favours what is best to accord with the interests of justice. In my judgment the best course is to grant a stay of the Strike Out Order pending the determination of the appeal. The balance tilts in that favour and the interest of justice are best served with a stay, and therefore I so order.

Conclusion & Disposition

[24.] For any avoidance of doubt, whilst all the submissions raised by the Claimant and the Defendant were not expressly highlighted in this Court's brief ruling, the submissions in their entirety were fully considered and proved to be of assistance to the Court.

[25.] In light of the matters set out above, I accede to the application by the Claimant and grant leave to appeal. I also accede to stay the Strike Out Order to await the determination of the appeal.

DATED the 20 day of July 2026



Raynard S Rigby KC
Acting Justice