COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
No. 2021/CLE/gen/00091

IN THE MATTER of a Transfer of Mortgages dated 30th October 2014 made between Bank of The Bahamas Limited ("the Transferor") and Bahamas Resolve Limited ("the Transferee")

AND

IN THE MATTER of the Properties comprised in multiple agreements Debentures and Mortgages made between Bank of The Bahamas Limited ("the Bank") as Mortgagee and DLC Investments Limited ("the Mortgagor") and Donald Cooper ("the Guarantor")

AND

IN THE MATTER of a Mortgage Action pursuant to Order 77 of the Rules of the Supreme Court

AND

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

B E T W E E N:

BAHAMAS RESOLVE LIMITED

Plaintiff

AND

DLC INVESTMENTS LIMITED

First Defendant

AND

DONALD COOPER

Second Defendant

Before:	The Honourable Mr. Justice Loren Klein
Date of Hearing:	7 May 2023; additional submissions laid over 6 June 2023.
Appearances:	John F. Wilson KC with D'andra Johnson for the Plaintiff Jairam Mangra with Ron Pinder for the First and Second Defendants

RULING

KLEIN, J.

Mortgage Action—Rules of The Supreme Court (R.S.C. 1978, Order 77—Application for Vacant Possession—Transfer of Mortgage—Notice— Whether Order for vacant possession final or interlocutory—Applicable test—Leave to appeal—Court of Appeal Act—Civil Appeal—Whether leave required—Principles governing grant of leave to appeal—Grounds of Appeal—Whether Realistic Prospect of Success—Stay of Execution pending appeal—Principles

INTRODUCTION AND BACKGROUND

[1] This is an application for leave to appeal an Order of this court granting vacant possession of commercial property held by the defendants as borrowers after they defaulted on a series of loans advanced by the Bank of the Bahamas Ltd. ("BOB" or "the Bank") between 2005 and 2012. In 2014, the Bank transferred the mortgages to a company called Bahamas Resolve Ltd. ("BRL"), which is the plaintiff in the action for vacant possession.

[2] One of the key issues to be decided for the purposes of the leave application is the recurrent theme of whether an order for vacant possession is an interlocutory or final order: if interlocutory, leave is required, subject to certain exceptions; if a final order, no leave is required. There are also issues raised relating to the transfer of the mortgages although, for reasons that will emerge, these do not impact directly on the resolution of the application which is before the court.

Essential Factual and Procedural Background

[3] Before turning to the application and grounds of appeal, it is necessary to set out some essential factual and procedural background.

[4] By way of a series of mortgages, debentures and agreements, the Bank advanced to the first defendant, DLC Investments Ltd. ("DLC"), a total of some $4.85 million (exclusive of interest). The total loan was amassed by a series of five transactions as follows: (i) a loan to DLC to secure premises on Shirley Street ("the Shirley Street Property") with a mortgage of $1.1 million on 26 July 2005; (ii) a supplemental debenture and further charge dated 28 February 2006 between DLC and BOB for $350,000; (iii) a supplemental debenture and further charge dated 22 September 2006 between DLC and BOB for $152,000; (iv) a commitment letter dated 23 December 2011 to DLC from BOB increasing the credit facility to $3.9 million; and (v) an up-stamping of the debenture and mortgage dated 21 November 2012 in the amount of $958,000.

[5] On 29 July 2005, the second defendant, who was also president of the first defendant, guaranteed the debts and liabilities of DLC Ltd. with BOB up to $3.9 million.

[6] Significantly, the 23 December 2011 agreement provided for the restructuring of the credit facilities held by DLC and the granting of a new demand loan to it for $3.9 million. This was to be repaid over a period of 10 years, with interest at 3% above the Nassau Prime Rate (then 4.75%), and was secured by the debenture and legal mortgage and the supplemental debentures. The terms of the repayment were for monthly interest-only payments for six months from the date of the restructuring (until 30 June 2012) of $32,016.99, followed by blended payments of $43,494.30, until the maturity of the loan, with periodic lump sums payments to ensure payment in full by 31 December 2021.

[7] The commitment letter contained, among others, the following (usual) terms: that the Bank has the right to demand full repayment of the credit facility in the event of a material adverse change in the financial condition of the borrower and/or guarantor and that the credit facility is payable on demand.

[8] A demand for payment was made by the plaintiff on the first defendant, as borrower, and the second defendant, as guarantor, on 3 October 2019, demanding payments respectively in the amounts of $4,965,330.02 and $3,900,000.00, as the amount guaranteed by the second defendant.

[9] By a Deed of Transfer dated 30 October 2014, BOB transferred certain of its commercial loans to a company called Bahamas Resolve Limited ("BRL"), for a consideration of $100,000,000. These transfers included the loans made to the first defendant and guaranteed by the second defendant. It is not necessary to delve into any issues related to the transfer of those commercial loans for the resolution of these proceedings, as the validity of that transfer was not seriously impugned by the defendants. However, the defendants did raise issues as to whether they were given proper notice of the transfer. For completeness, it should be stated that Bahamas Resolve Ltd. is a private limited liability company, whose directors at the time were the Financial Secretary and the Treasurer. The entity describes itself in promotional material online as being "*...wholly-owned by the Government of The Bahamas and controls a limited portfolio of commercial loan assets from the Bank of The Bahamas Limited.*"

The Order 77 application

[10] By an originating summons filed 3 February 2021, the plaintiff sought the following reliefs against the defendants, pursuant to Order 77 of the Rules of the Supreme Court (R.S.C.) 1978:

> "(1) Delivery by the Defendants to the Plaintiff of vacant possession of the said mortgaged properties held as Collateral and specifically described in the Schedule hereto.
>
> (2) The sum of BSD$4,965,330.02, being the balance owing to the Plaintiff by the First Defendant under the various agreements Debentures and Mortgages made between the Plaintiff and the First Defendant.
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> (3) The sum of BSD$3,900.00.00 or such some (*sic*) as would remain outstanding and due to the Plaintiff by the Second Defendant and being a portion of the sum set out in 2 above pursuant to a Guarantee dated 29th day of July, A.D. 2005.
>
> (4) All interest due thereon.
>
> (5) Costs. "

[11] There were three properties set out in the Schedule, labelled as "A-C". Property "A" described a parcel of property located on Shirley Street on which a service station is situated; Property "B" described a parcel of unoccupied land adjoining the service station; and Property "C" described Lot No. 18 of the Port New Providence Subdivision.

[12] The application was supported by the affidavit of Knijah Knowles, filed 3 February 2021, the affidavit of Charles Barnett, manager of the Plaintiff, filed 21 April 2021, and several affidavits of service. The defendants filed three affidavits by Janet Johnson, the manager of the first defendant, as follows: 12 April 2021 (first affidavit); supplemental affidavit of Janet Johnson filed 19 April 2021; and an affidavit filed 22 April 2021.

[13] The application was heard over three days (15, 19, 22 April 2021), and the Court made an Order in the following terms:

> "Unless the First and Second Defendant within 21 days of the date hereof (i.e., on or before the 21st day of May, 2021) pay to the Plaintiff the amount of four million nine hundred and fifty-five thousand, eighty-six dollars and seventy-two cents (BSD $4,955,086.72) in the currency of the Commonwealth of The Bahamas secured by mortgages and charges specifically described in Schedule 1 hereto (being the total of the principal sum of $3,900,000.00 plus interest) the First and Second Defendants shall give vacant possession of the properties specifically described in Schedule 2 hereto within 28 days from the date hereof (i.e., on or before the 1st June, 2021)."

[14] The Order was perfected on 11 May 2021.

The Application and Grounds of Appeal

[15] The defendants filed a summons and supporting affidavit of Janet Johnson on 10 November 2022 seeking leave to appeal the order of the Court. The defendants further sought a stay of the Order, a stay of the execution of the said Order and that the Order be set aside. For completeness, I will set out the grounds as they appear in the draft Notice of Motion for Leave to Appeal attached to the defendants' summons.

> "1. The Learned Judge erred in making the Order dated 22 April 2021 where there was a serious material irregularity affecting the fairness of the proceedings and the hearing of the Originating Summons by the Learned Judge adversely prejudiced the Intended Appellants; notwithstanding, that it was brought to the attention of the Learned Judge that there was/is an earlier Action between the Intended First Appellant and the Bank of The Bahamas who had transferred its interests to the Intended Respondent, and that the subject matter raised and the question in issue on the indebtedness of the Intended Appellants in both Actions were essentially the same.
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> 2. The Learned Judge erred in hearing the Originating Summons and making the Order against the Second Intended Appellant who at the time of the hearing in the Supreme Court was out of the Jurisdiction of the Commonwealth of The Bahamas and who had not been served with the proceedings and was unrepresented by Counsel.
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> 3. The Learned Judge erred in hearing the Originating Summons on the basis of the Affidavits filed in the case and not allowing the evidence to be tested where there was a serious dispute as to the facts and issue in question to be decided by the Court.
>
> 4. The Learned Judge, to the prejudice and detriment of the Intended Appellants, erred in proceeding to hear the Originating Summons as a matter of urgency when there was no reasonable or compelling evidence to justify the hearing as a matter of urgency.
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> 5. The Learned Judge erred by failing to adequately consider all of the evidence and failed to state his findings or gave reason(s) for making the Order as he did.
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> 6. The Order made by the Learned Judge is unreasonable and unfair in all the circumstances of the case.
>
> 7. Any other ground to be settled upon receipt of the Transcript of the hearing/proceedings of the matter before the Learned Judge in the Supreme Court

[16] Interestingly, the defendants filed a Notice of Appeal in the Court of Appeal ("the C.O.A") on the 13 May 2021, two days after the Court's Order granting vacant possession was perfected, appealing the order and seeking a stay. However, the defendants sought leave to withdraw that appeal before a single Justice of the COA, which was granted on 7 June 2021. The grounds of appeal before the COA are materially similar to those in the application before this court.

Relevant Law and Legal Principles

[17] The procedural requirements in respect of appeals emanating from the Supreme Court are set out in the Court of Appeal Act, Ch. 52. Of material relevance is section 11, which provides as follows:

> "11. 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 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."

[18] As intimated, the determination of the leave application depends on an antecedent legal inquiry ("the Preliminary Question"), which is whether the order sought to be appealed from was final or interlocutory in nature, as the answer to that question determines whether or not the leave of this court is required.

Principles governing the grant of leave to appeal

[19] The general test applied by first instance courts in deciding whether to grant leave is that leave will only be given where there are grounds with a realistic (not fanciful) prospect of success (*Swain v Hillman* [2001] 1 All ER 91, at pg. 92-j). Failing this, the matter must raise issues which ought to be examined in the public interest, or where the law is unclear: *Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments (*1999) WLR 2; *Smith v. Cosworth Casting Processes Ltd.* (1997) 4 All ER 840.

[20] The *Cosworth* principles were cited with approval in *Rosina Smith v Fidelity Bank (Bahamas) Limited [2021] 1 BHS J. No. 189,* a case which does double duty, as it also speaks to the issue of the nature of an order for vacant possession. The relevant part of that Ruling bears setting out in some detail, as follows:

> "29. The principles on which an application for leave to appeal may be granted are well known. They are encapsulated in the oft-cited dictum from the judgment of Lord Woolf, MR in *Smith v. Cosworth Casting Processes Ltd* [1997] 1 WLR 1538 and are applied in

this jurisdiction in the Supreme Court, as well as at the level of the Court of Appeal. [See for example: *Sumner Point Properties Limited v. Cummings* [2015] 3 BHS J. No. 35; and *AWH Fund Ltd (In Compulsory Liquidation v. ZCM Asset Holding Company Bermuda Limited* [2014] 2 BHS J. No. 53]

30. The relevant portions of Lord Woolf's guidance at paragraph 37 of *Cosworth Casting* (which we wholeheartedly adopt) are extracted below:

> '1. The court will only refuse leave if satisfied that the applicant had no realistic prospect of succeeding on the appeal. The 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.
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> 3. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. Where leave is granted, reasons may be given which are intended to identify for the benefit of the parties and the court hearing the appeal why it was thought right to give leave. There may be only one issue that the judge or judges giving leave felt it was necessary to draw to the attention of the parties and the court hearing the appeal. It is a misconception to assume that because only one aspect of the proposed appeal was mentioned in any reasons which were given, leave was granted under a misapprehension that there were not other issues to be determined on any appeal unless the reasons make this clear.
>
> 4. When leave is granted, the applicant does not need to know more than that he has the leave which he needs and therefore that he is entitled to proceed with the proposed appeal. The intended respondent has no entitlement to receive reasons as to why the application has been granted, in the same way that he does not normally have any right to be heard on the application which is usually made ex parte…'. [Emphasis added]

[…]

33 As I see it, notwithstanding the 8 intended grounds, the only real issue in the intended appeal is whether the learned judge was correct when she ruled that she was *functus officio* and had no jurisdiction to set aside the perfected order of 30 March 2017; or to rehear the mortgage action since the only proper course by which Miss Smith could pursue her various complaints about the propriety of the perfected order was by way of an appeal to the Court of Appeal.

[...]

38 In *Palms of Love Beach Building B Management Company et al v. Love Beach Properties Ltd et al* 2010/CLE/gen/001673, the Plaintiffs obtained judgment on 12 November 2012 for outstanding condominium fees due and owing in respect of certain units situated at Love Beach in New Providence together with an order for the delivery up of vacant possession to the Plaintiffs and costs. The Order was duly perfected and filed on

14 February 2013 and thereafter the Plaintiffs then took steps to enforce the judgment and in particular, obtained a Writ of Possession to enforce the order of 12 November 2012.

39 The Second Defendant filed two Summonses seeking, *inter alia*, a stay of all further proceedings, an order setting aside all previous proceedings and the dismissal of the Originating Summons; and an order vacating, dismissing and discharging the Writ of Possession and all other orders affecting the condominiums on the basis that the Writ of Possession had been issued in error against the Second Defendant and as such the entire proceedings were an irregularity.

40 In an unreported written Ruling handed down on 20 December 2013 Sir Michael Barnett CJ (as he then was) dismissed both applications and refused the relief sought. Noting that there had been no appeal from the Order of 12 November 2012, Sir Michael stated:

"19. In my judgment, as the Second Defendant has not appealed that Order it cannot be heard on applications which in effect seek to negate that Order made. That, in my judgment, is what the applications of the 29th July, 2013 and 29th November, 2013 seek to do..."

41. Although Sir Michael may not have expressly adverted to it in his Ruling, it is evident that the common law principle (outlined in the cases just discussed) is the guiding principle which undergirded the Ruling in the *Palms of Love Beach* case. Quite simply, once the order of 12 November 2012 had been perfected and filed (as it was on 14 February 2013) he was *functus* in relation to it and had no jurisdiction to set it aside or to discharge it or vary it in any way. In short, as Sir Michael correctly found, the Second Defendant's only recourse was by way of direct appeal to the Court of Appeal, which it failed to pursue."

ANALYSIS AND DISCUSSION

The Preliminary Issue: Whether Order is Interlocutory or Final

Parties' Submissions

[21] At the close of the hearing of the application, the Court invited the parties to file additional submissions on the preliminary point. Both the plaintiff and the defendants provided the court with additional written submissions.

[22] The defendants contend that the Order pronounced by the Court was an interlocutory order as opposed to a final order, which would have required the leave of the Court to appeal. As has been mentioned, the defendants in fact had filed an appeal to the Court of Appeal on 13 May 2021, which was withdrawn on 7 June 2021. In their affidavit in support of leave, the defendants indicate that the application for leave was withdrawn after the COA "*alluded to the fact that it viewed the Supreme Court's Order for vacant possession...as an interlocutory and not a final order*". However, the Order of the Court of Appeal simply remarks that the appeal was withdrawn.

[23] Not surprisingly, the plaintiff contends that the order granting vacant possession of the commercial properties was a final order, such that the application for leave to appeal was (and is) unnecessary.

[24] Both the plaintiff and defendants cited similar authorities to the Court with respect to the relevant test to determine whether an application is interlocutory or final. In this regard, both

parties cited the Court of Appeal Case of *Peace Holdings Limited v First Caribbean International Bank (Bahamas) Limited [2014]* 2 BHS J No. 73, in which the COA adopted the "application" test expounded by Lord Esher in *Salaman v Warner and Others* [1981] 1 QB 734. There the Court said:

> "...[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."

[25] In *Peace Holdings Limited*, the appellant appealed from an order of sale made pursuant to s. 27 of the Law of Property Act after the respondent defaulted on payments under a debenture. The respondent sought to strike out the Notice of Appeal on the basis that leave had not been obtained from the Supreme Court pursuant to s. 11(f) of the COA Act. The Court held that leave was not required to appeal and the order for sale was final, as it disposed of any question of the respondent's right to sell the property under the debenture. The Court further said that the nature of the order for sale under s. 27 was to bring finality to mortgage actions in exceptional circumstances and where the Court was satisfied that the mortgagor would continue to act unreasonably.

[26] The plaintiff also relied on the case of *Kozy Harbour v Cyril Ezekiel Minnis 2019/CLE/gen/00555,* in which Cooper-Burnside J (Ag.) considered the test applicable to whether an order is preliminary or interlocutory in the context of an order made for vacant possession, in respect of which an application for leave to appeal had been made. Cooper-Burnside J (Ag) determined that the order granting vacant possession was a final order, applying the test laid down in *White v Brunton* [1984] 2 All ER 606, which provides that once the decision on the preliminary issue is not a decision that is preliminary to a final order, it is considered a final order. In *Kozy Harbour*, the Court examined the cases on either side of the traditional approaches taken to determining whether and order was interlocutory or final and said:

> "[6]. Historically, the distinction between an interlocutory and final order garnered considerable historical debate. Two tests emerged: (i) the order test and (ii) the application test. In *White v Brunton* [1984] 2 All ER 606, the English Court of Appeal authoritatively decided that the application test was to be generally preferred.
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> [...]
>
> 11. Accordingly, it was held in *White v Brunton* that the decision on the preliminary issue was not a decision preliminary to a final order but was to be treated as a final order for which leave to appeal was not required. The division of the hearing of the action into two parts would not deprive the defendant of an unfettered right of appeal.
>
> [12] *White v Brunton* is therefore clear authority that where the final hearing of an action is divided into two parts and a party wishes to appeal against an order made at the end of the hearing of one part, the order should not be treated as an interlocutory order for which leave to appeal is required, if the parties would not have required leave had all the matters raised in the action been heard together."

[27] As most of the local cases take as their starting point the decision in *White v. Brunton*, it is perhaps useful to say something on that. That case drew a line under some of the old authorities

and clarified the test on whether an order was interlocutory or final. The test was summarized in the headnote to that decision as follows:

> "In determining whether an order or judgment is interlocutory or final for the purposes of leave to appeal under s 18(1)a of the Supreme Court Act 1981, regard must be had to the nature of the application or proceedings giving rise to the order or judgment and not to the nature of the order or judgment itself. Accordingly, where an order made or judgment given on an application would finally determine the matters in litigation, the order or judgment is final, thereby giving rise to an unfettered right of appeal. Since a preliminary issue, on a true analysis, is the first part of a final hearing, and not an issue preliminary to a final hearing, it follows that any party may appeal without leave against an order or judgment made on the preliminary issue if he could have appealed without leave against the order or judgment if that issue had been heard as part of the final hearing and the order or judgment on the preliminary issue had been made at the end of the complete hearing. To hold otherwise would, by depriving parties on a preliminary issue of an unfettered right of appeal, indirectly fetter the ability of the court to order such split hearings in cases where it was plainly in the interests of the more efficient administration of justice to do so (see p 607 f g and p 608 b to g, post); Salaman v Warner [1891] 1 QB 734 and *Salter Rex & Co v Ghosh* [1971] 2 All ER 865 followed; *Bozson v Altrincham UDC* [1903] 1 KB 547 disapproved."

[28] The plaintiff contends that *White v Brunton* is particularly apposite the current facts. This is because the plaintiff elected at the hearing to seek vacant possession only in respect of the Shirley Street property (the commercial property) and not the Port New Providence House, although both properties are held as security. The fact that it reserved its right to move a separate action for vacant possession of the residential property, it says, does not support an argument that the vacant possession order in respect of the Shirley St. property was not final.

[29] In their submission dealing with the preliminary issue, the defendants essentially regurgitated the arguments made in support of the grounds of appeal, but they seem to advance two reasons as to why it is said the order was interlocutory and not final. It is said that (i) the order does not dispose of the remaining security lodged by DLC "and under the mortgage"; and (ii) the "*levy against the Port New Providence Property of Donald Cooper as personal Guarantor cannot be effectuated without further Court process to satisfy the right of the First Mortgagee First Caribbean International Bank, and to release the Life Insurance of Donald Cooper held as security under the mortgage*."

Court's analysis on the preliminary point

[30] In my judgment, the Order for vacant possession was a final order. For this conclusion, it is perhaps not even necessary to apply the test approved in *White v Brunton,* and which has been consistently applied in the Bahamian courts (see *Peace Holdings Ltd., Kozy Harbour, supra).*

[31] Indeed, there are several cases from this and other jurisdictions which clearly support the proposition that an order for vacant possession, whether commenced by the more summary process of an originating summons or a writ action, gives rise to an order that is final in nature.

[32] A notable local example is the case of *Finance Corporation of Bahamas Limited v Philip Arlington Mitchell et al 2009/CLE/gen/01398,* and the very instructive judgment of Charles J. (as she then was). That judgment was made in the context of a subsequent application to the

court in respect of the order for vacant possession, but the court's observations are apposite to the discussion on the general nature of such an order:

> "1. The court becomes *functus officio* once a judgment or final order has been entered. Having regard to the fact that an Order was granted in relation to the Bank's entitlement to sums due and owing under the Mortgage and to vacant possession of the subject property, there are no further functions which this Court has the power to exercise as it relates to the terms or effect of the Order. This is particularly relevant in this case where there has been an appeal to the Court of Appeal and such appeal has been dismissed: *Stewart and others v. Metaxides* (In his capacity and as a representative of six others) and another [2007] 2 BHS J. No. 10; *Colin Wright v The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Avril Clarke, Andrea Culmer and Steve Hepburn in their capacities as trustees) (A Judgment Creditor)* (SCCivApp No. 111 of 2018) & Ors.."
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> ...
>
> [19] This very point of a judge becoming *functus* once final judgment had been entered was restated in another judgment of the Court of Appeal just two days ago (17 February 2021) in the case of *Colin Wright v The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Avril Clarke, Andrea Culmer and Steve Hepburn in their capacities as trustees) (A Judgment Creditor)* (SCCivApp No. 111 of 2018) & Ors. The Court of Appeal dealt with an application for Leave to Appeal to the Privy Council and a Stay of Execution. In delivering the Judgment of the Court of Appeal, Isaacs JA stated, at paragraph 31:
>
> > '[20] Having regard to the fact that an Order was granted in relation to the Bank's entitlement to sums due and owing under the Mortgage and to vacant possession of the subject property, there are no further functions which this Court has the power to exercise as it relates to the terms or effect of the Order. This is particularly relevant in this case where there has been an appeal to the Court of Appeal which was dismissed.' "

[33] Similarly, in *Birmingham Midshires Mortgage Services Ltd. v Ebert and another* [2000] Lexis Citation 3275, the UK Court of Appeal confirmed that orders for possession are final orders in which an aggrieved person must directly appeal to the Court of Appeal. The application before the Court there was an urgent appeal against the refusal to stay a possession order, and the Court (per Aldous LJ) stated that (emphasis supplied):

> "16. Finally, he comes to his divisional court application, in which the divisional court will give judgment or directions in relation to applications for judicial review. That also appears to be an application in which Mr. Ebert seeks to challenge the foundation upon which the bankruptcy order was made. <u>That cannot affect the orders for possession that have been made. They are final orders.</u>
>
> 17. In those circumstances his grounds show no basis upon which an appeal could succeed. I have come to the conclusion that permission should be refused. There are no grounds upon which an appeal could succeed.
>
> 18. I say that with regret. It is always unfortunate when possession has to be given up, particularly in these sad circumstances. However, so far as Birmingham Midshires are concerned, they are mortgagees and they are entitled to possession under the mortgage

> deed. That was a contract signed by Mr and Mrs Ebert. If they consult their contract they will see that Birmingham Midshires are entitled to possession for debt payment. In those circumstances Birmingham Midshires should not be kept out of their money any longer than need be. Mr and Mrs Ebert had their day in court in front of His Honour Judge Adams and that has to be an end of the matter. Similarly, in relation to proceedings by the trustee in bankruptcy, the trustee owns Mr Ebert's share of the house and is entitled to sell it subject to the court's supervision. The order having been made, I cannot see any way in which this court would set it aside or give further time. I refuse permission."

[34] Reference may also be made to the UK Case of *Nationwide Building Society v Bateman* [1978] 1 All ER 999, where Goulding J. stated that where a mortgagee brings a claim for possession of mortgaged property, the claim is one for a final and not an interlocutory order, and therefore the affidavit in support must comply with RSC Ord. 41, r. 5. See, to similar effect, *Republic Bank (formerly Barclays Bank of Trinidad and Tobago) v. Hosein et. al.* (TT 1996 HC 15), unreported (applying *National Building Society v Bateman*) and *Royal Bank of Trinidad & Tobago Ltd. v Melville et. al.* (TT 1997 HC 100).

[35] For my part, I accept the contention of counsel for the plaintiff that the fact that the plaintiff elected not to proceed with the claim for vacant possession of the residential premises does not make the order any less a final order with respect to the commercial property. In fact, it should be noted that the reason (at least in part) that the plaintiff decided not to pursue the claim for vacant possession of the residential property was because the court was not satisfied that there was compliance with the requirements of Ord. 77, r. 4(4), to state the particulars of the persons alleged to be in the possession. Further, it was also not clear that the provisions of the Homeowner's Protection Act 2017 in respect of notice before legal action had been observed.

[36] To the extent that the defendants seem to be contending that the application/order was an interlocutory one because the action does not "dispose" of the remaining security lodged by DLC or deal with the release of any collateral security, in my opinion that does not get them anywhere. In any event, these arguments were not developed beyond bare assertions. It was open to the Bank (and the plaintiff as transferee), subject to Ord. 77 and the general principles relating to abuse of process, to choose to enforce only some of its rights and remedies as against the defendants (see, generally, *Lloyds Bank plc v Hawkins* [1993] 3 EGLR 109). Further, the issue of the release of any security is a matter of contractual and commercial dealings between the mortgagee and mortgagor, and occurs either where the debt is paid off and discharged, or where there is a release or forgiveness of the debt by the creditor.

[37] I therefore conclude that the application for leave is not necessary and misplaced. However, in case I am wrong in that conclusion, or in any event *ex abundanti cautela*, I go on to consider the application for leave on the hypothesis that the Order is an interlocutory one.

Application for leave to appeal

[38] I have already set out the principles governing leave to appeal, which do not need to be rehashed. Simply put, the intended appellant must demonstrate a realistic prospect of success on one or more ground of appeal, or that there is some issue which is fit for examining in the public interest.

[39] In the context of mortgage actions, the threshold for establishing successful grounds of appeal is very high. This is because, as has been reiterated in the case law, unless there is some question as to the validity of the mortgage itself, fraud or irregularity in exercising the power of sale, the Courts are loathe to intervene to prevent the mortgagee (or any transferee) from exercising his legal rights under the mortgage: see *Citibank N.A.v Paul Major* [2001] BHS J. No. 442, and *Finance Corporation of the Bahamas Ltd. v Roberts and another* [2016] 2 BHS J. No. 221.

[40] In *Citibank*, Lyons J. explained the effect of Order 77 as follows:

> "15...By this Order, a mortgagor could, on hearing of the summons for possession, and knowing what the mortgagor claims to be owing, counterclaim that the mortgage has been paid out or make a payment into court of the amount allegedly said to be owing.
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> [...]
>
> 16. It is important to remember that under out law, a mortgagee can move to take possession of a subject property immediately upon execution of the mortgage. A claim for possession by a mortgagee can only be defeated by a mortgagor who is able to satisfy the court that the validity of the mortgage transaction itself suffers from a fraud or an irregularity."

[41] As the proposition was famously stated in an old case, in the absence of any contractual or statutory constraints, the mortgagee (lender) is entitled to possession of the mortgaged property "*before the ink is dry on the mortgage*" (*Fourmaids Ltd. v Dudley Marshall (Properties) Ltd.* [1957] 2 All ER 35 at 36).

The Defendants' (Intended Appellants') Case

Grounds of appeal

[42] With respect, the defendants' arguments in support of leave to appeal are rather discursive. As has been mentioned, the defendants also filed in support of their application for leave to appeal the Affidavit of Janet Johnson. That affidavit contained a number of documents on which the defendants were relying for leave to appeal which were not before the Court on the hearing of the Originating Summons. More will be said of this later.

Ground 1: *Serious irregularity in hearing the Originating Summons because of the earlier action between the First Defendant and the Bank which raised issues as to the indebtedness of the defendants*

[43] The defendants' main ground of appeal seems to be based on the existence of a 2015 action between the first defendant and the Bank. This was a writ action by DLC against the Bank of the Bahamas, in which the specially indorsed writ (as amended) was filed 15 October 2015. The Bank filed its defence on 3 December 2015. Both documents were exhibited to the (first) affidavit of Janet Johnson filed in the OS proceedings. Basically, this was a claim by DLC for breach of "agreement" and negligence, which it says resulted from BOB's failure to honour certain promises which it alleges were made to DLC during 2013. The main promise was said to be an agreement to re-organize and "*write-off 50% of the outstanding mortgage balance on the loan*" and to pay weekly installments sums of $3,800.00 on the loan.

[44] In its defence, BOB denied that it or any of its agents agreed to write off 50% of the debt owed by the defendant (DLC) to the plaintiff, or that it agreed that the installment payments under the new demand loan were to be $3,800.00. The Bank pleaded further that any agreement (the existence of which was denied) for the release of the debt or part of the debt in any event had to be supported by consideration and effected by deed, and there was none. Further, it denied that the plaintiff in that action was a current customer of the Bank or that it was the holder of any mortgage or any other security interest in any property owned by the plaintiff. This was because, by deed dated 30 October 2014, the outstanding loan amounts owed by the plaintiff to the defendant, along with the securities executed in favour of the Bank for the plaintiff's debt, were transferred to Bahamas Resolve Ltd.

[45] The defendants contend that the evidence (presumably the evidence of the earlier action) raises a serious dispute of the material facts and issues pertaining to the servicing/payment of the mortgage itself, the interest rate applied, the security and collateral held by the Bank and then transferred to BRL, the amount of the debt owed and the liquated sum claimed. As the argument was put in the defendants' arguments, "*...the Plaintiff's Originating Summons of 2021 unfairly circumvented and unjustly sought to defeat the earlier and existing Writ and Statement of Claim of 2015...without a hearing of the Action which was prejudicial to the First Defendant.*" For whatever reason, the 2015 action was not heard.

[46] While the defendants might feel aggrieved that the discussions between the lender and the defendants did not lead to the results they desired, I do not think the outstanding issue of the 2015 claim amounts to any ground of appeal with a reasonable prospect of succeeding. For one, the law is settled that an alleged release or forgiveness of a debt or part of a debt cannot be established by mere voluntary declarations and must be evidenced by deed and be for consideration: see *Cross v Sprigg*, 6 Hare 552, *Yeomans v Williams* [1865) LR1 Eq. 184. Therefore, whatever discussions ensued between the parties, these did not serve in any way to reduce or extinguish the debt, and it is therefore immaterial to the claim for payment and vacant possession based on the debt.

[47] Secondly, a mortgagee is entitled to transfer his security with or without the concurrence of the mortgagor: see *Re Tahiti Cotton, ex p Sargent* (1874) LR 17 Eq 273 at 2879; *Turner v Smith* [1901] 1 Ch. 213. This right is, however, subject to several qualifications. For one, it obviously cannot be done contrary to the terms of any debenture or agreement between the parties. Secondly, where the transfer takes the form of an express assignment of the debt, if the assignment is to be legal, notice must be given (see s. 2, Choses in Action Act, Ch. 148). Thus, any such assignment is only effective from the date of notice. Thirdly, where the mortgagor is not a party to the transfer, the transferee is bound by the state of accounts between the mortgagor and transferor at the date of the transfer (*Turner v Smith, supra*).

[48] I think it is necessary to say a few words about this point, even though it is not directly relied on as a ground of appeal, as arguments were directed to it during the hearing of the OS. For example, then counsel for the defendants (Mrs. Stephanie Wells, sadly now deceased), argued that there was no power under the terms of the debenture to sell the mortgage to a third party. Therefore, as the point was put in her written submissions, "*...the Plaintiff is not in lawful ownership of the debenture or mortgage, hence there is no competence on the part of the Plaintiff to occupy its position of purchaser of the mortgage*".

[49] I did not find any merit in that argument. As indicated, there is legal right in the mortgagee to transfer his security with or without the concurrence of the mortgagor, and there is nothing in the first mortgage or supplemental debentures which prohibits transfer. Secondly, the debt and the collateral security securing the debt were validly transferred by Deed between the Bank of the Bahamas and Bahamas Resolve dated 30 October 2014. Thirdly, the court specifically enquired whether notice of transfer was given, and the plaintiff provided, in the affidavit of Charles Barnett, a copy of a letter dated 12 November 2014 by which BOB gave formal notice to the Defendants of the transfer, as well as an explanation of what was being transferred and the full amount of the debt said to be owing at the time ($4,963,000.00). Further to this notice, the plaintiff also reminded the defendants of the transfer and made its first demand on the defendants by letters dated 23 September 2015.

[50] Curiously, while Mrs. Wells raised this argument in response to the Order 77 application, it is to be noted that the issue was not raised in the 2015 action against the BOB. Rather, it was argued that the BOB was "estopped" from forwarding DLC's account to RBL without honoring the agreements which it was alleged the parties had arrived at. In fact, the Writ sought an injunction preventing transfer on this basis.

[51] In my view, the transfer of the debt and the collateral security was a valid one at law, and Mrs. Wells did not draw anything to my attention that would otherwise impugn the transfer. As indicated, in any event no issue relating to the transfer has been taken as a ground of appeal. That being the case, the plaintiff was entitled to seek payment of the outstanding loan amounts and seek vacant possession in accordance with the terms of the loan agreements which the defendants had with the BOB, and which were transferred to the plaintiff, and of which the defendants had notice of by no later than the 14 November 2014. In the circumstances, I am not of the view that the 2015 claim raises any grounds with a reasonable prospect of success.

[52] There is another point to be made on the 2015 claim and it is this. There was never any explanation as to why the plaintiff ("DLC") did not seek to progress the writ action with greater urgency. Obviously, a mere claim against the Bank did not have the effect of novating the terms of the loan agreements and the payment of any interest or principal due by virtue of the several loan agreements. In fact, and I will come to address the point later, the defendants admitted that *no* payments were ever made after the plaintiff stepped into the role of the mortgagee following the 2014 transfer.

Ground 2: *Error in hearing the OS and making Order when 2nd Defendant out of jurisdiction*

[53] As indicated, the defendants also contend that the second defendant, Donald Cooper, the Guarantor, was resident outside of the jurisdiction and was not served with the proceedings or represented by Counsel at the hearing. This, they say, was a grave procedural irregularity that was prejudicial and unfair to him as he was unable to defend against the plaintiff's claims.

[54] Firstly, I do not accept this as an accurate representation of the facts with respect to service on the second defendant. In response, the plaintiff filed several affidavits of service relating to both the first and second defendant. For example, with respect to the second defendant, the affidavit of Joshua Fernander, filed 21 April 2021, disclosed that Mr. James Watson attempted to personally serve the second defendant on 25 February 2021 at the Rubis gas station and then on 3 March 2021 at the Port New Providence property. Then, on 5 March 2021, acting on the

understanding that Wells Legal & Corporate Services were counsel for the second defendant, the originating summons and supporting affidavit were served on that firm, which accepted and signed for the documents. However, the following day, Wells Legal & Corporate indicated to counsel for the plaintiff that it was not instructed to act in the proceedings, and returned the documents.

[55] However, the affidavits disclose that on the 1 March 2021, Mr. Fernander served the second defendant with the originating summons and supporting affidavit by prepaid registered mail at his last known postal address, P.O. Box SS 6517. The Notice of Hearing was also sent by registered post to the second defendant on 6 April 2021. Counsel for the plaintiff also emphasized in submissions that service by registered mail was the method of service prescribed in the mortgages and debentures.

[56] I therefore do not accept that the second defendant was not served with the proceedings or the notice of hearing. Counsel for the first defendant indicated to the court that the second defendant was out of the jurisdiction at the time (between Germany or Dubai) and it was not known when he would be back. So in any event, there was no prospect of serving him personally.

[57] Additionally, it has to be borne in mind that the second defendant was the guarantor and not the borrower of the loans. So although the defendants are jointly and severally liable on the debt, the primary debtor was before the court, represented by counsel (Wells Legal & Corporate Services), who entered an appearance on 12 April 2020 and defended the proceedings. The first defendant had been served at its registered office on 9 February 2021 with the documents and was served with Notice of hearing on 6 April 2021. It is also a matter of some significance that the second defendant is not a party to the 2015 action, although in substance it is the primary ground of appeal relied on by both defendants.

[58] In the circumstances, I find that there is no merit in the claim that there was any irregularity because of the lack of participation of the second defendant, whom I accept was served as provided for in the loan agreements, and had notice of the proceedings. There was, therefore, compliance with the requirements of Ord. 77, r.3, relating to the circumstances where a defendant does not enter an appearance.

Ground 3: *Error in hearing OS on the basis of Affidavits filed in the case and not testing evidence where there was a dispute as to the facts and issues*

[59] The defendants also contend that the court relied on affidavit evidence which was disputed as to the material facts and the key issue of the amount of the debt owed and did not allow for the evidence to be tested in cross-examination.

[60] I do not agree that the defendants raised any key dispute as to the amount of debt owed that was required to be tested on cross-examination, or at all. As mentioned, the defendants filed three affidavits through Janet Johnson, the manager of the first plaintiff. In the first affidavit (filed 12 April 2021), the main assertion was that as a result of discussions between the Bank and the first defendant, the Bank agreed to write of 50% of the amount reflected in the account (which was around $4 million) and that there was a compromise for the defendants to pay $2.3 million. The affidavit also exhibited the 2015 action and statement of claim and the defence

by the BOB. There is a curious assertion [at 18] that the Defendant's position is "*...that it never agreed to pay a principle (sic) of over $4.m which it never borrowed by BOB.*" However, when I questioned Mrs. Wells as to whether it was disputed that the money was borrowed, she indicated that there was no dispute that the money was borrowed.

[61] In her supplemental affidavit (filed 19 April 2021), Ms. Johnson deposes that it was never communicated to her that "*the plaintiff had purchased the debt which was transferred from the Bank of the Bahamas (BOB) for the consideration of $1,000,000.00 (sic). I was always left believing that I had to find the sum of $4.4 million the amount that Plaintiff was expecting to be paid.*" The affidavit also exhibited a partial copy of the Deed of Transfer between Bank of the Bahamas and Resolve in respect of the various mortgages. As was established during the hearing, the $1 million figure was clearly in error, and as disclosed on a full copy of Deed, the amount was $100 million.

[62] The second main allegation made in the supplemental affidavit is the allegation that Rubis had offered "$1,350,000.00" to purchase the debt and the indication that if that "offer" had been made to the first defendant, it would have been accepted but that the "lowest figure" ever communicated to the defendants was "$4.4" million. In the affidavit of Charles Barnett, filed 21 April 2021, it is explained that the $1,350,000.00 which the defendants refer to (which in any event is in error) was not an amount to purchase any outstanding debt. In fact, what had transpired was that there was an agreement for sale between the plaintiff (as vendor) and Rubis Bahamas Ltd. (as purchaser) for the purchase of the Shirley St. Property on which the service station was located for the amount of $1,125,000.00. The agreement had a completion date of 21 April 2021. As stated in the affidavit [at 4] "*...The proposed sale to Rubis Bahamas Limited does not obviate the debt owed by the Defendants herein, but would merely contribute to the Plaintiff's recovery of the same.*"

[63] The third affidavit (filed 22 April 2021), merely indicates that the "*offer to pay $1.35m for the gas station is genuine*" and the defendants requested a period of 12 weeks. Further, it is averred by Ms. Johnson that "*Throughout the time of business being done it was my duty to collect all mail and anything else that was sent to Graham Thompson & Co. (GTC) for the 1st and 2nd Defendants*".

[64] In my view, there is nothing in any of these affidavits that disclose any issues going to the mortgages or any fundamental dispute of fact which the court was required to examine further by *viva-voce* evidence and cross examination. As already mentioned, any alleged promise to reduce the mortgage debt (even if made, although this was denied), does not have any effect on the mortgage debt, and the plaintiff was entitled to exercise its right to sell any of the assets to attempt recovery of some or all of the debt. No issues are raised here which in my view have any real prospect of success on appeal.

Ground 4: *Error in hearing the OS as a matter of urgency where no compelling evidence to justify the hearing as a matter of urgency*

[65] The Defendants also contend that there was no compelling evidence to justify hearing the application as a "matter of urgency", and that the plaintiff did not adduce evidence of any closing of the sale of the property.

[66] I do not think that there is any merit in this ground. Firstly, as set out above, the first defendant was initially served on 9 February 2021 with the proceedings, and the second defendant by registered mail on 1 March 2021. So each had notice of the proceedings well in advance of the hearing date, which was set for 15 April 2021, and of which they were also given notice. Secondly, the hearing was conducted over three days (15, 19, 22 of April), and generated over 90 pp of transcripts. The defendants were given a full opportunity to put their case. In any event, the plaintiff did exhibit to the affidavit of Charles Barnett the Agreement for Sale (with some redactions), which clearly indicated that the projected completion date was the 21 April 2021, and therefore the plaintiff could not be faulted for seeking to achieve vacant possession to facilitate the sale.

Ground 5: *Alleged failure to consider all of the evidence and failure to state reasons*

[67] I am also of the view that there is no merit in this ground. As set out above, the court clearly gave consideration to all of the affidavit evidence filed on behalf of the defendants and found nothing in them disputing the validity of the mortgages, or indicating any material irregularity by the plaintiff in purporting to exercise the power of sale, or any fundamental dispute about the amount owing.

[68] In fact, according to the evidence of the plaintiff, when the debt was held by the Bank of the Bahamas, the defendants only paid the first interest-only payment on the loan, and then a lump sum of $20,000, which was apparently sent through Mrs. Well's Chambers, and nothing else since. Mrs. Wells indicated that the defendants did not set out any of the payments they made in affidavit form because, firstly, she was only showed the defendants' bank statements that morning and, secondly, because in any event she did not expect the plaintiff to deny that the defendants had made payments.

[69] However, it is to be noted that in 2014 and 2015 the plaintiff demanded payment of an amount of $4,633,330.00, which was said to be the total of the transferred debt plus interest. It is therefore striking that, even at this point, the defendants were not in a position to adduce evidence of its payments. Also, it is not in dispute that no payments whatsoever were made after the debt was transferred to BRL. As conceded by Mrs. Wells, there were no payments since the matter was transferred to Resolve "*...because that was something that they were always waiting to have the mortgage adjusted as the Bank had promised. And I think that is why nothing happened since the account went to the other place.*"

[70] Another argument taken by the defendant is that the Court failed to give reasons for the decision, and therefore the reasoning and the factual basis on which the Order was made is unclear.

[71] It is true that no formal reasons were given for the Order. At the conclusion of the hearing, the court indicated that having heard the submissions and read the affidavits, it was satisfied that the order for vacant possession in respect of the commercial property (Shirley St. Property) should be made, and accordingly made the Order. As indicated, there was never any suggestion that the mortgage was invalid, nor was there any serious argument impugning the transfer, or anything alleging material irregularity involved in the exercise of the power of sale. In any event, it is not unusual for formal written reasons not to be provided in every case with Order 77 applications, which is the more summary process for seeking vacant possession.

[72] I must remark, however, that in all the circumstances of this case, the defendants' contention that they do not know the basis on which the order was made is rather incredulous, if not disingenuous. In all cases, an order for vacant possession is made on the basis that the mortgage is in arrears and the mortgagor has not pleaded any defence that would lead the court to refuse to grant the order. In the instant case, the evidence placed before the court (which was not controverted) shows that at best the defendants made a few payments of interest at the commencement of the loan, and from 2014 onwards concede that they made *no* payments. Indeed, it might be said that the defendants took a rather cavalier attitude to the obligations which they undertook under the loan agreements. Conversely, it might also be observed that the original lender and the transferee were extremely lenient in not calling in their security sooner. The long and short of it is that, whatever discussions the defendants might have been involved in with the Bank in 2013, it does not excuse the almost complete failure to service the loans over the period of nearly 15 years.

[73] As the position was put by counsel for the plaintiff, Mr. Wilson KC, in his closing submissions urging vacant possession, and with which I agree:

> "...I don't think that my learned friend has advanced any justiciable basis that should operate to delay or prevent the plaintiff from exercising its contractual right. The monies were borrowed, the monies were not paid, and the plaintiff has now been out of its principal sum and interest from 2005 when this mortgage was initially granted...".

Ground 6: *Order is unreasonable and unfair in all the circumstances.*

[74] The heads taken under this ground are rather nebulous, and it is unsure how they are said to impugn the court's Order granting vacant possession. However, under this ground, the defendants submit (among other points) that the timeframe of 21 days to pay the substantial amount of BSD $4,955,086.72 was unreasonable and could result in the assets being sold for BSD $1,350,000.00, which they say is a fraction of what is being claimed by the plaintiff, resulting in prejudice and unfairness to the defendants. The defendants refer to what they described as their "equal offer" of $1,350,000.00 and subsequent offers in or about 2021 to the plaintiff, which they say was an attempt to fully settle the debt, and which they say was not considered by the Court.

[75] The court has already referred to the affidavit of Charles Barnett, in which it was stated that the sum of $1,125,000.00 was an offer to purchase the service station property, and that this transaction was intended to satisfy the debt in part. There was exhibited to the supplemental affidavit of Janet Johnson an email from a "Kingman Ingraham", said to be the recently-engaged accountant of the first defendant, to Mr. Barnett on 15 April 2021, indicating that the client was willing to pay "$1,750.000.00" to "*settle fully the client's outstanding liability with BRL.*" This was acknowledged by Mr. Barnett, who indicated that they would revert. There was also a letter from Ron Pinder, counsel for the defendants, to Bahamas Resolve dated 12 May 2021, which was included in the affidavit in support of the appeal (and which was not before the Court during the hearing), again purporting to offer $1.75 million to settle the debt. Importantly, that letter proposed various terms for the proposed agreement, which included financing spread out over 12 years and other terms.

[76] Firstly, it is to be noted that the offer to pay the $1.35 million for the station was not a defence of tender in terms of the debt, and neither did the defendants pay any sums into court. Secondly, the 12 May 2021 letter was not before the court during the hearing of the OS, and therefore it cannot be contended that the court failed to give consideration to it. But nothing turns on that letter in any event. It is clear that the Bank did not accept any of these offers. Thus, in the absence of any evidence of an offer that was accepted by the Bank and evidenced in writing or deed, these were irrelevant to the consideration of the court on the application by the plaintiff for vacant possession.

[77] Another criticism made is that the Court "*failed to consider*" that the defendants were in a lease agreement with the proposed purchaser Rubis, which was said to be held by the plaintiff as security for the first defendant's mortgage with the plaintiff. The defendants contend that Rubis failed to fulfill its obligations under the said lease agreement, which directly contributed to the defendants' indebtedness to the plaintiff. The defendants also asserted that the Court failed to take into account that the plaintiff failed to collect $2,079,994.50 owed to the first defendant by Rubis, notwithstanding BOB's requirement for the defendants to assign the lease agreement with Rubis to them.

[78] Firstly, there was no mention of any lease agreement in any of the documents put before the Court by the defendants, not that it was material to anything the court had to consider. But in fact, it is important to point out that the defendants are apparently relying on an internal DLC document (sent from Ms. Janet Johnson as President of DLC to the Secretary & Assistant Manager of DLC) in which it is asserted that Rubis owes them this amount and which was put in the affidavit of Janet Johnson in support of the leave to appeal application. As mentioned, the defendants have included in that affidavit a number of documents which were only being put before the court on the application for leave to appeal. While I do not find that any of these documents would have made any difference to the Order 77 application, it is clearly fanciful to assert as a ground of appeal that the court "failed to consider" matters that were not before the court.

[79] Lastly, the defendants contend that the court failed to take into account that the plaintiff's claim of $4,900,000.00 against the defendants was grossly inflated by $1,900,000.00, as indicated by BOB's Receiver-Manager, and that the plaintiff failed to adjust the interest of the first defendant's debt downwards. This allegation seems based on an email included in the affidavit in support of leave, which was apparently written by one Kevin McDonald, said to have been the one-time receiver-manager of the gas station (a point I will come to shortly).

[80] In this regard, I reiterate that it is unreal to assert that the court failed to consider any document that was not put before it. Secondly, the email was sent to a generic email address and to a person by the name of Basil Ingraham and the subject is "Re Texaco". Nowhere in the email does it refer to either the first or second defendant, or any loan by them. More significantly, it defies common sense to suggest that in a claimed debt of $4,956,330.02, that amount could be made up of an over-calculation of interest of $1.9 million. The affidavit evidence of the plaintiff clearly shows that the debt was constituted as follows: (i) total amount of advances of $4,858,000.00; (ii) total amount of interest instalment of $107,330.02; and (iii) total principal amount of $4,956, 330.02.

[81] The defendants also seek to impugn the order on the basis that the amount claimed in the OS was $4,956,330,02, and that the order made was for BSD $4,955,086.72. However, as was set out in the affidavit of Charles Barnett, this difference was explained because the plaintiff applied insurance cheques which the defendants received for hurricane damage to the property to the debt, resulting in the reduction.

[82] There was one issue raised by the defendants which caused me a little bit of disquiet and that is the claim that there was a receiver-manager appointed over the service station during a period in 2013, and the defendants' claim that there was no financial accounting done for the income collected and applied to the debt. It seems the receiver-manager was appointed on 7 February 2013 and discharged on the 12 August 2013, after a period of just over 6 months. Generally, a mortgagee who is, or has been in possession, is liable to account to the mortgagor, but this depends on the circumstances of the appointment. In fact, the receiver-manager operated the station as agent for DLC, and it was specifically agreed that the Company alone would be responsible for his acts and defaults (see *Griffiths v. Secretary of State for Social Services* [1973] 3 All E.R. 1184). In any event, even in the 2015 action, DLC did not (and having regard to the terms of the appointment of the receiver-manager, could not) claim an accounting as against the-then defendant (Bank of the Bahamas) for the receivership period. Any right of accounting would have been against the receiver-manager, and any such claim would now likely be subject to a limitation defence. In all the circumstances, I am of the view that this issue does not raise any ground of appeal with any prospect of success.

Conclusions on prospects of success

[83] In my judgment, the defendants have not put forth any ground of appeal, whether individually or collectively, that discloses any realistic prospect of success, and I would dismiss the application for leave to appeal. Of course, the plaintiff is always at liberty to apply to the Court of Appeal for leave, but this would now also require an application for an extension of time (*Gregory Cottis (as Executor of the Estate Of Raymond Adams) v Robert Adams (a beneficiary of the Estate of Raymond Adams) SCCiv App & CAIS No. 23 of 2021).*

[84] In my view, the defendants are grasping at straws in trying to conjure up grounds for appeal, when the evidence before the court evinces that minimal efforts were made to service what were on any account significant and multiple loans.

Application for a stay of execution

Legislative position and case law

[85] The starting position is that while the court has a very wide discretion to grant a stay (s. 16(3) of the Supreme Court Act), an appeal does not automatically entitle an appellant to a stay of a judgment or order under appeal. Rule 12 of the Court of Appeal Rules provides:

> 12. (1) Except so far as the court below or the court may otherwise direct —
> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;
> (b) no intermediate act or proceeding shall be invalidated by an appeal.

(2) On an appeal from the Supreme Court, interest at six per cent per annum for such time as execution has been delayed by the appeal shall be allowed unless the court otherwise orders.

[86] The principles to be applied when the court is faced with an application for a stay of a Court order pending the determination of any appeal were very neatly pulled together by Mostyn J in *NB v Haringey LBC* [2011] EWHC 3544 (Fam Div), and the authorities cited therein has been applied many times in the courts of The Bahamas (see, for example, the Court of Appeal decision in *The Bahamas Real Association v. George Smith* (SCCivApp No. 169 of 2015). There, His Lordship said as follows (emphasis supplied):

> "7.The leading authorities are *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065, *Leicester Circuits Ltd v Coates Bros plc* [2002] EWCA Civ 474, *Contract Facilities Ltd v The Estates of Rees (decd)* [2003] EWCA Civ 465, the old Court of Appeal case of *Wilson v Church* (No. 2) [1879] 12 Ch Div, 454, an unreported decision of the Court of Appeal, *Winchester Cigarette Machinery Ltd v Payne* (No. 2), 15th December 1993, and a helpful decision which seeks to draw all the authorities together given by the Chief Judge of the High Court of Hong Kong, Ma J, *Wenden Engineering Services Co Ltd v Lee Shing UEY Construction Co Ltd*, HCCT No. 90 of 1999. In that latter case the Chief Judge stated:
>
> > "7. The existence of merely an arguable appeal cannot by itself amount to a sufficient reason to justify a stay. It can be put this way, the existence of an arguable appeal, that is one with reasonable prospects of success, is the minimum requirement before a court would even consider granting a stay. In other words, however exceptional the circumstances may be otherwise justifying a stay of execution, if the court is not convinced that there exists arguable grounds of appeal no stay will be granted. Conversely, however, the existence of a strong appeal or a strong likelihood that the appeal will succeed, will usually by itself enable a stay to be granted because this would constitute a good reason for a stay. (See Winchester Cigarette Machinery Ltd)
> >
> > 8. In most cases the court will not be dealing with the extreme situations I have referred to. Often, it will be faced with simply the existence of an arguable appeal. Here, it becomes necessary for the appellant to provide additional reasons as to why a stay is justified. The demonstration of an appeal being rendered nugatory is one example albeit a common one. Here, where it is demonstrated that an appeal would be rendered nugatory if a stay was not granted the court may require no more than the existence of an arguable appeal. Correspondingly, where it cannot be shown that an appeal would be rendered nugatory if a stay were not granted, the court will require in the absence of any other factors the applicant to demonstrate strong grounds of appeal or a strong likelihood of success.
>
> 8. From these authorities I derive the following five principles in relation to the application before me. First, the court must take into account all the circumstances of the case. Second, a stay is the exception rather than the general rule. Third, the party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. Fourth, in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. Fifth, the court should take into account the prospects of the appeal succeeding.

Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered."

Application of the principles to the present case

[87] Taking the principles indicated by Mostyn J in consideration in turn and applying them to the present case, I am of the view that this is not a case in which a stay should be granted. As to the circumstances of the case, as has been indicated above, a few matters stand out. Firstly, the evidence before the court indicates that only a few payments of interest were made since the commencement of the loan, and no payments since 2014.

[88] As to the second principle, this is self-explanatory, and for the reasons given in this Ruling there are no special circumstances that would justify or necessitate a stay.

[89] As to cogent evidence that the appeal will be stifled or rendered nugatory if a stay is not granted, I will also refer briefly to the observations of Charles J. (as she then was) in *In the Matter of the Contempt of Donna Dorsett-Major [2020] 1 BHS J No. 102* [at 23-26], in examining the wide discretion of the court regarding the grant of a stay and how the discretion should be exercised. There, Charles J. said, manifestly "*the unsuccessful defendant must be able to satisfy the Court that without a stay of execution, he will be ruined and that he has an appeal which has some prospect of success, which requires evidence and not bare assertions.*" I am not of the opinion that the defendants have adduced such evidence, and the affidavit in support of the application for leave clearly does not make any assertions in this regard.

[90] As to the prejudice to the parties, there is clearly a risk to the defendants that if a stay is not granted they will lose the security, and the deal may be closed with the third party. It is always an unfortunate occurrence when a mortgagor has to give up possession of any property which has been pledged as security for a loan. But this has to be balanced against the prejudice and loss to the plaintiff (as transferee of the mortgages), who has been out of its payments of principal and interest for an extended period. The plaintiff has a right to exercise the power of sale to try and recover on their loan and to be in a position to convey the property with vacant possession.

[91] Lastly, as has appeared from the foregoing analysis, I am not of the view that the defendants have adduced any ground of appeal with any reasonable prospects of success. No viable defence (indeed no defence at all) was submitted in respect of the claim for vacant possession, and the defendants' strongest claim seems to be that the Bank was supposed to reduce the loan by 50%. Even if these discussions were held between the parties, there is no evidence before the court that they concretized into any form of binding agreement of which the court should take cognizance.

Prayer for Order to be set aside

[92] In their summons for leave to appeal, the defendants also included a prayer for the Order to be set aside. I can make short work of this claim. I need only repeat the observations of Charles J. (as she then was) in *Finance Corporation of Bahamas Ltd. v Philip Arlington Miller* (set out above), as follows:

> "Having regard to the fact that an Order was granted in relation to the Bank's entitlement to sums due and owing under the Mortgage and to vacant possession of the subject property, there are not further functions which this court has to power to exercise as it relates to the terms or effect of the Order."

As the order has been perfected, I am *functus officio*, and any further functions in respect of that Order can only be pursued on appeal.

CONCLUSION AND DISPOSITION OF MATTER

[93] In all the circumstances of this case and for the foregoing reasons, I refuse the defendants' application for leave to appeal and a stay of the Order pending appeal. I award costs to the plaintiff, to be taxed if not agreed.

Klein J,

28 December 2023