

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

CV. No. 817 of 2008

BETWEEN:

RBTT BANK BARBADOS LTD

PLAINTIFF

AND

OLYMPIAD INC.

FIRST DEFENDANT

JEFFREY CHANDLER

SECOND DEFENDANT

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the
High Court**

**Dates of Hearing: 2016 May 31st
June 3rd, 7th**

Appearances:

**Mr. Ian Bishop in association with Ms. Johanan Lafeuillee Doughlin
Attorneys-at-Law for the Applicants/Defendants**

**Mr. Garth Patterson Q.C. in association with Mr. Bartlett Morgan of Lex
Caribbean, Attorneys-at-Law for the Respondent/Plaintiff**

Ruling on ‘*In Limine*’ Submissions

[1] By document filed April 11th 2016 the Plaintiff herein filed a Request for Issue of Writ of Possession to obtain possession of lands and buildings thereon known as “Lexham”.

[2] On May 25th 2016, the Defendants herein filed an Urgent Application in the following terms:

“the Plaintiff RBTT Bank Barbados Limited by themselves or by their agents be restrained from taking possession of the Applicants/Defendants property known as “Lexham” situate at the Garrison in the parish of St. Michael until such time as this Honourable Court makes a determination of the matter entitled Suit No. 1679/2011 between Olympiad Inc. (as First Claimant) and Jeffrey Winston Chandler (as second Claimant) and RBTT Barbados Limited (as Defendant)”.

[3] The Grounds of the Application are set out hereunder seriatim:

- “1. There is a serious issue to be tried in **Suit No 1679/2011** which involves the same property above described and arises out of the same Deed of Charge dated the 27th October 2005 recorded in the land registry on the 15th of June 2006 as Deed No. 5262 of 2006 made between the Parties. The Applicants/Defendants have a good and arguable case on the merits.
2. The Statement of Case in the **Suit No 1679//2011** was filed 12th October, 2011, before judgment in this matter, and the Defence was filed on the 11th of April, 2014, prior to the Order for possession made by the court on the 28th March, 2014, under which the Respondent/Plaintiff is presently acting.
3. For the Bank to be allowed to take possession of the property will result in an irremediable prejudice to the Applicants/Defendants.
4. It is just and convenient that the Applicants/Defendants should be granted the relief sought.

5. Damages will not be an adequate remedy in the circumstances.
6. The continued occupation of the property by the Applicants/Defendants' should be allowed until judgment in **Suit No 1679/2011** in order to ensure that the Applicants/Defendants are not disadvantaged before such trial and thereby restraining the Respondent/Plaintiff from selling or otherwise disposing of the said Property.
7. In granting the relief sought the court will be furthering the Overriding Objective of dealing with the matter justly in a way that is proportionate to the financial position of each party hereto."

[4] This Application was filed with the Affidavit in Support of the Second Defendant Jeffrey Winston Chandler.

[5] The *'in limine'* submissions surround two (2) main points as follows:

- (i) That this Court is *'functus officio'*; namely, that the issues in **Suit No. 817** were considered in full and determined: **Kirby v The Telegraph Plc and another [1998] ALL ER (D) 413**; and
- (ii) That this matter is *Res Judicata* (Issue Estoppel), that is, that there is no substantive action on which an interlocutory application can be grounded: In **Carl Zeis Stiftung v Rayner and Keeler Ltd (No. 2) [1967] 1 AC 853**.

[6] Counsel while recognizing the Court's jurisdiction to stay execution argues that such a jurisdiction can only be exercised in limited circumstances (this obviously not being such a circumstance).

[7] See for more detail, *In limine* Submissions filed May 27th 2016.

Ruling

- [8] The cases relied on by counsel for the Plaintiff in this matter are primarily cases dealing with amendment of pleadings post judgment, the facts of which are distinguishable from these circumstances.
- [9] It is the view of this Court that it is neither *'functus officio'* nor this matter *'res judicata'*.
- [10] The view of this Court is that it has an unfettered discretion to grant a stay of execution be it pending appeal or, as in the case pending, the hearing of related proceedings (in this case suit no. 1679 of 2011). See **sections 37-46 of the Supreme Court of Judicature Act, Cap. 117A**, as it relates to the exercise of the equitable jurisdiction of the High Court and Court of Appeal and specifically **Section 40** which provides that the rules of equity shall prevail over the rules of the common law where they are in conflict or at variance.
- [11] This Court finds this to be an application for a Stay of Execution, thereby invoking this Court's equitable jurisdiction.
- [12] The applicable law to be applied is that outlined by **Awich CJ (Ag)** in **BCB Holdings Limited, Belize Bank Limited v The Attorney General of Belize Claim No. 743 of 2009** as follows:

“6. When considering an application for a stay of execution, the court must keep in mind that the primary rule is that a judgment creditor is entitled to enjoy immediately the fruits of his success in a litigation, unless court orders otherwise: **BMW v Commissioners of HM**

Revenue and Customs [2008] EWCA CIV 1028, is the current authority (see paragraphs 14 and 15)... It follows that a judgment creditor should be allowed to enforce his judgment, unless and usually on an application for a stay of execution, the court considers it is in the interest of justice to order a stay of execution. Put another way, the court will grant a stay of execution if there will be risk of injustice in the circumstances, if a stay is not granted - see **Gater Assets Ltd v Nak Naftogaz Ukrainy [2008] EWCA Civ 1915**".

[13] See also **Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065**; and **Blackstone's Civil Practice 2011 at Paragraph 71.46**.

[14] This view is shared by **Morrison JA** in **Urban Development Corporation v Jacitar (JA) Limited JM 2011 CA 67** where he followed **Harris JA** in outlining the more modern, flexible approach as outlined by **Phillips LJ** in **Combi (Singapore) Pte v Sriram and Another [1997] 1 EWCA Civ 2164** as follows:

"In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is not ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not no stay of execution should be ordered. But where there is risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is likely to produce injustice. The starting point must be that the normal rule as indicated by Order 59, rule 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal."

[15] At paragraph 13 **Morrison JA** proceeds to adopt this approach using the following words:

“... the grant of stay is a matter entirely within my discretion in the circumstances of this case, bearing in mind the risk of injustice to one or the other or both by the grant or refusal of the stay.”

[16] I share the view of **Awich CJ (Ag)** that such discretion is unfettered when he states at paragraph 10 the following:

“10. The decision to grant a stay of execution of a judgment is discretionary. A discretion by nature cannot be fettered, so a court has unfettered discretion in granting an order to stay execution of a judgment. But it will exercise the discretion only if it has taken into consideration all the circumstances of the case and has come to the conclusion that, the justice of the case demands that a stay be ordered.”

[17] See also the use of the word “may” at **section 38(2)** of the **Supreme Court of Judicature Act, Cap. 117A**.

[18] The *‘in limine’* submission is accordingly rejected.

[19] This Court will now schedule the hearing of the substantive application filed under a Certificate of Urgency.

MARGARET A. REIFER
Judge of the High Court