

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 1108 of 2016

**IN THE MATTER OF the property
Comprised in a Deed of Charge by
way of Legal Mortgage dated the 5th
day of November 2004, made between
RAWLINS CHRISTOPHER SKEETE
AND CLICO MORTGAGE AND
FINANCE CORPORATION now
Capita Financial Services Inc.**

**AND IN THE MATTER of Part 66 of
the Supreme Court (Civil Procedure)
Rules, 2008.**

BETWEEN

CAPITA FINANCIAL SERVICES INC.

CLAIMANT

AND

RAWLINS CHRISTOPHER SKEETE

DEFENDANT

**Before The Hon. Justice Barry L. Carrington, Judge of the High Court
(Acting.)**

2018: November 19

**Ms. Stephna Greenidge, of De Novo Legal, Attorneys-at-Law, for the
Claimant**

Ms. Patricia White, Attorney-at-Law for the Defendant.

DECISION

INTRODUCTION

[1] The Defendant made an Application to the court pursuant to **section 30 of the Supreme Court of Judicature Act Cap 117A (Cap. 117A)** for an order that the time limited for the Claimant to give up vacant possession of the property situated at Lot 46 Six Men's in the parish of Saint Peter in this Island, in accordance with the order of Master of the High Court, made on January 18, 2017, be postponed for a further six months.

[2] The grounds for the Defendant's application are, that -

“.....the Defendant's financial situation had improved, and the postponement would allow the Defendant to liquidate the outstanding arrears and interest due to the claimant.”

[3] The Defendant filed an Affidavit in support of his Application and the Claimant filed an Affidavit in response deposed by Gerri Ann-Marie Shepherd, Collections Officer of the Claimant.

THE FACTS

[4] The Claimant, by Fixed Date Claim Form dated August 11, 2016 and filed on the 15th day of August, 2016 and with the supporting affidavit of David Colin Smith, Senior Accounts Manager of the Claimant, claimed that on or about the August 25, 2004, the Defendant executed a commitment letter with

the Claimant for a loan of \$198,000.00 to finance an existing loan and to complete a dwelling house on a property situate at No. 46 Six Men's, St. Peter. The loan was repayable over 24 years by monthly instalments of \$1,359.35.

[5] The Defendant became seised of the fee simple absolute in possession in the property at No. 46 Six Men's St. Peter by conveyance dated December 31, 1996.

[6] By Deed of Charge by way of Legal Mortgage dated November 5, 2004, between the Claimant as Mortgagee and the Defendant as Mortgagor of the property situate at No. 46 Six Men's, St. Peter ("Deed of Charge"), the Defendant was obligated to repay the principal sum of \$198,000.00 plus interest at the rate of 6.5 percent per annum.

[7] The Deed of Charge contained the following relevant provisions, namely:

- I. The principal sum of \$198,000.00 advanced by the claimant as Mortgagee was acknowledged by the Defendant as Mortgagor.
- II. The Mortgagor to pay the Mortgagee interest at the appropriate rate on the principal sum such interest to accrue on a daily basis.
- III. The Mortgagor to pay the Mortgagee the principal sum and interest thereon by 288 monthly instalments on the last day of each month until the principal sum and interest have been paid in full. Further, it

was agreed that the instalments shall be applied first in payment of interest on the amount of the principal sum remaining.

IV. The principal sum and all the interest thereon and all other moneys owing hereunder shall become immediately due and payable by the Mortgagor to the Mortgagee in any of the following events:

- a) if default is made for a period of 14 days on the payment of any instalment or interest or other sum of money payable (whether or not notice requiring payment thereof shall have been served upon the Mortgagor).
- b) if the Mortgagor fails to perform or observe any expressed or implied covenant, agreement or obligation on the part of the Mortgagor contained or implied in the presents.
- c) if the Mortgagor commits any act of bankruptcy or makes any assignment for the benefit of or enter into any arrangement or composition with Mortgagor's creditors.
- d) if the Mortgagor sells or otherwise disposes of (otherwise than testamentary disposition) the property or any part thereof without the prior written consent of the Mortgagee or if the property or any part thereof should be compulsorily purchased or requisitioned.
- e) if any other creditor shall proceed against the property.

V. The Mortgagee may at its absolute discretion, permit the Mortgagor to repay the principal and interest by instalments other than those agreed to and may make such arrangements as to mode and time of payment as the Mortgagee determines but such arrangement shall not affect the power of sale and other statutory powers conferred on the Mortgagee or render the Mortgagee liable in damages or otherwise

for the exercise of any such power in any case where if the arrangement had not been made no liability would have arisen.

- [8] The Defendant is in possession of the property and his payments of the mortgage sum and interest over the years were irregular.
- [9] The Claimant instructed counsel to issue a notice to the Defendant dated February 3, 2011 demanding payment of the principal sum and interest within one (1) month of the date of the notice. The mortgage balance was \$186,036.66, interest \$4,686.49, arrears \$14,089.75 and the monthly payment was \$1,332.50.
- [10] A second Notice dated the May 10, 2012, was issued to the Defendant demanding payment of the principal sum plus interest, within one (1) month.
- [11] Prior to the issue of the Notices, the Claimant sent letters to the Defendant dated July 29, 2010, November 10, 2010, May 5, 2011, July 20, 2011, October 17, 2011 and January 16, 2012, advising the Defendant of the outstanding arrears and interest and requesting the Defendant to make payments or make suitable arrangements to pay. The Claimant threatened legal action if the Defendant failed to make the requisite payments.
- [12] In response to the several letters and Notices, the Defendant made numerous promises to recommence payment of the mortgage, and with the exception of payments of \$2000.00 on June 13, 2012, \$1000.00 on June 28, 2012, and

\$1000.00 on January 27, 2014, the Defendant failed to make any other payments or deliver up possession of the mortgaged property.

[13] The Defendant's amount was in significant arrears as follows:

Balance in Principal sum	\$186,036.66
Interest outstanding	\$41,856.70 as at 29/7/2016
Per Diem Interest (6.25%)	\$31.86 w.e.f. 30/6/2016
Arrears	\$74,002.70 as at 30/6/2016
Home Insurance arrears	\$900.00 as at 29/7/2016

MORTGAGEE'S APPLICATION

[14] Pursuant to the Fixed Date Claim Form filed on August 15, 2016, the Claimant claimed:

1. Payment of \$186,036.66 principal sum, outstanding interest of \$41,856.70 as at July 29, 2016 and continuing at the rate of \$31.86 (6.25%) per diem until payment and arrears of \$74,002.70 and policy insurance in the sum of \$900.00, and/or
2. Possession of the property, and/or
3. Foreclosure, and/or
4. Sale of the property.
5. Such further and other relief as the court deems fit
6. Costs.

[15] It is noted that the Defendant did not file an affidavit in response.

THE MASTER'S ORDER

[16] The Master of the High Court heard the matter on January 18, 2017 and made the following order:

- “1. That the Defendant shall, six (6) months after personal service of this order on him deliver to the Claimant, vacant possession of the property known as ALL THAT land (part of Colleton, Six Men's Development) situate at Colleton Six Men's in the parish of Saint Peter in Barbados containing by admeasurement 359.5 square metres or thereabouts and being lot numbered 46 on a Plan made and certified on the 15th day of March 1991 by Derek C. Franklin, Land Surveyor (hereinafter call “the Key Plan”) ABUTTING AND ABOUNDING on the lots numbered 44, 45 and 48 respectively on the Key Plan and on a verge which is part of a road reserve 8.0 metres wide inclusive of carriageway 5.0 metres wide shown on the Key Plan or however else the same may abut and abound together with the dwelling house thereon, being the property comprised in the mortgage dated the 5th day of November, 2004 made between the Defendant as Mortgagor of the One Part and the Claimant as the Mortgagee of the Other Part and recorded in the Land Registry of Barbados on the 19th day of April 2005, as Deed No. 324 of 2005.
2. The Defendant shall pay to the Claimant costs of this action assessed in the sum of \$3,500.00, subject to VAT of 17.5 % together with the sum of \$75.00 for personal service of the Application pursuant to Part 65.4 (1) of the Supreme Court (Civil Procedure) Rules, 2008.”

THE PRESENT APPLICATION

The Defendant's Submissions

- [17] Counsel for the Defendant submitted that pursuant to **section 35 of Cap. 117A**, the Defendant/Mortgagor was applying for an order that the time limited for the execution of the Order of the Master, be extended by a further six (6) months.
- [18] Counsel indicated that the affidavit in support of the Application filed by the Defendant on March 23, 2018, contained the history of the matter. Counsel said that at paragraph 30, the Defendant indicated that he had financial difficulties and had no income apart from what he makes on the boat. Counsel indicated that the boat needed repairs and the Defendant did not pay the Mortgagee but instead carried out the requisite repairs.
- [19] The Defendant through his counsel made a request to the Claimant for an additional six months in which to settle the outstanding arrears and interest or a "...substantial part thereof..." The Claimant replied via email dated January 3, 2015, refusing the request.
- [20] Counsel submitted that after making the request to the Claimant for the six months extension and filing the application in March 2018, the Defendant

realised that his eyesight was diminishing and underwent an operation in June 2018.

[21] Counsel indicated that the Defendant proposes to pay between \$5,000.00 and \$8,000.00 in the months of November and December 2018, and thereafter “upwards of \$8,000.00 monthly”. Counsel also submitted that the Defendant’s wife who is a retired forensic photographer living overseas can now contribute towards the payment of the mortgage.

[22] Generally, counsel did not dispute the outstanding balances that were stipulated in an email from a representative of the Claimant and exhibited to the Defendant’s affidavit as “RCS2”. The balances are as follows:

Principal \$194,334.41
Interest \$ 56,996.95
Arrears \$ 97,987.25 - 226 days

[23] Counsel did not refer the court to any authorities and based her case on the provisions of **section 30 of Cap. 117A**.

Claimant’s Submissions

[24] Counsel for the Claimant indicated that the Claimant has made every effort to assist the Defendant, but without success. Counsel objected to the granting of an extension of time, submitting that on the date the Order was made the Master permitted a stay of execution for six months after personal

service of the Order on the Defendant and possession could have been taken six months thereafter. Counsel indicated that the Order was served on the Defendant on July 5, 2014, and took effect on January 6, 2015, approximately one year after it was made.

[25] Counsel submitted that the present application was filed on March 23, 2015, brought under **section 30 of Cap 117A** and the Defendant was not entitled to a postponement of the time set out in the Master's Order. Counsel argued that **section 30** provides for the exercise of the court's power in an action for possession of a mortgaged property by a mortgagee and that the court's power is to be exercised during the proceedings and not subsequent to an order granted in those proceedings.

[26] Counsel propounded the view that **section 30 (1)** allows for the exercise by the court of any of the powers conferred by subsection (2) which sets out certain conditions to be satisfied, namely:-

“...if it appears to the court that it exercises that power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage; or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.”

[27] The court was referred to **Fisher & Lightwood's Law on Mortgages 11th edition at para. 1950** for guidance on the provision referred to above, which in summary states, inter alia, as follows:

(i) where the mortgagor has entered or is about to enter into a contract for the sale of the property at a price which will enable that to be achieved or (ii) where the mortgage can be paid off from another source.

Counsel contended that the Defendant has not provided any evidence that he has entered into a contract for the sale of the property or has acquired some source of funds to pay off the mortgage.

[28] Counsel indicated that since December 2016, no payments were made in that one-year period despite the Defendant's purported improving financial circumstances. In addition, counsel argued that the Defendant's payment history reveals extremely sporadic payments such that at September 24, 2018, of the approved mortgage of \$198,000.00, the balance of \$194,334.41 remained with arrears of \$108,647.25 plus interest capped at \$56,996.95.

[29] Counsel submitted that when the Defendant's proposal is examined, there is not much likelihood of the Claimant recovering its moneys. Counsel argued that the proposal to pay \$5,000.00 to \$8,000.00 in November and December hardly makes a dent in the balance, and further the proposal to pay \$8,000.00 monthly thereafter is uncertain since no evidence of possible income from fishing has been provided.

[30] Counsel also submitted that there is nothing before the court to encourage it to exercise its power in circumstances where the mortgagor is unlikely to

pay and contended that the requested order should be denied. Counsel however suggested that if the court is minded to exercise its power, reference should be made to **section 30(2)(b) of Cap.117A**.

[31] Counsel further argued that the Master's Order granted a stay of execution for six months. Counsel reiterated that the exercise of the court's power is to be made during the hearing of proceedings and not subsequent to the making of an Order, and consequently, the Defendant's application may amount to an abuse of the powers of the court.

[32] Finally, Counsel submitted that contrary to **section 30(3) and (4)**, what is before the court is not an application to vary or revoke any condition imposed by the Master's Order of January 18, 2017, and the Defendant is not entitled to be granted a postponement of the Master's Order.

THE ISSUES

[33] This matter gives rise to two (2) issues for the consideration of the court, namely, (i) whether the court has the jurisdiction to extend the time ordered by the Master for the Defendant to give vacant possession of the mortgaged property, pursuant to **section 30 of Cap. 117A** and (ii) if it has, whether and on what terms the court should vary that Order.

THE LAW

[34] The Defendant relies on **section 30 Cap.117A** to found his claim for a “postponement” of the time limited for the giving up of possession of the property to the Claimant.

[35] **Section 30 of Cap. 117A** states:

“(1) Where the mortgagee under a mortgage of land that consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the High Court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that if it exercises that power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

- (2) The Court may,
 - (a) adjourn the proceedings, or
 - (b) on giving judgement, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgement or order,
 - (i) stay or suspend execution of the judgement or order, or
 - (ii) postpone the date for delivery of possession,for such periods as the court thinks reasonable.
- (3) Any adjournment, stay, suspension or postponement under subsection (2) may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.
- (4) The court may from time to time vary or revoke any condition imposed under this section.
- (5) ...

(6)”

[36] Since **section 30 of the Cap. 117A** is of considerable importance in deciding this case, it would be useful to examine its origins particularly so in light of the fact that that section is *in pari materia* with **section 36 of the Administration of Justice Act, 1970 of the United Kingdom (“1970 U.K. Act”)**. **Section 36** states:

“(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2) The Court –

(a) may adjourn the proceedings, or

(b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgement or order or, may –

(i) stay or suspend execution of the judgement or order, or

(ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum

secured by the mortgage or the remedying of any default as the court thinks fit.

(4) The court may from time to time vary or revoke any condition imposed by virtue of this section.

(5)

(6)”

[37] **Section 30 of Cap. 117A** is an almost identical replica of **section 36 of the 1970 U.K. Act**. The distinctions are very subtle and considerable assistance can be had in construing **section 30 of Cap.117A** from the UK authorities that interpreted **section 36**.

[38] It is pertinent however, to briefly examine the law prior to the enactment of **the 1970 UK Act** to understand the mischief that that Act sought to remedy and to give context and meaning to **section 30 of Cap. 117A**. At common law, the Court enjoyed no residual jurisdiction to postpone the giving of possession to a mortgagee for a short period in order to sell the mortgaged property. Millet LJ, in **Cheltenham and Gloucester Building Society PLC v Booker [1997] 1 FLR, 311** stated that the Administration of Justice Act, 1970 was enacted because it was considered by Parliament that the jurisdiction of the courts to deny mortgagees possession was too limited. He stated that it was extremely limited at common law but nevertheless it did exist. To buttress his point, he referred to the judgment of Russell J in

Birmingham Citizens Permanent Building Society v Caunt and Another

[1962] Ch. 883, 912 (“Caunt’s case”), as follows: -

“Accordingly, in my judgment, where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the Court has no jurisdiction to decline to order or to adjourn the hearing whether on terms of keeping up payments or paying arrears if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in the circumstances such as temporary inability of a party to attend, and so forth.”

Millet L.J. further stated: -

“So, as the law stood before 1970 the mortgagee had an immediate right to possession, subject only to the single exception mentioned by Russell J, and it was not in the power of the court to refuse it.”

[39] Sir John Pennycuick V.C, (as he then was) in the case of **Royal Trust Co. of Canada v Markham** [1975] 1 WLR 1416, 1420 (“Markham’s case”), quoted with approval, the passage from Russell J and stated:

“A characteristic instance in which that sole exception is applicable is where the mortgagor has entered or is about to

enter into a contract for the sale of the property at a price which will enable the mortgagee to be paid off in full.”

[40] Finally, Pennycuik V.C. in the case of **Halifax Building Society v Clark and Another [1973] 2 ALL ER 33 at page 37** (“Clark’s case) referred to Russell J’s comment and said the following about the common law position:

“... that passage is a correct statement of the law and, so far as I am aware, the statement has always been acted on.”

[41] The UK officials later decided that the common law position was too limited and had the effect of restricting the court from granting the mortgagee immediate possession of the mortgage property. That limitation was addressed by the passage of **section 36 of the U.K. 1970 Act** which extended the power of the court to (i) adjourn proceedings or on giving judgment, or making an order, for delivery of possession of the mortgaged property or at any time before the execution of such judgment or order, or (iii) postpone the date for delivery of possession, on the condition that the mortgagor, within a reasonable period, can make payment in full to liquidate the mortgage or remedy any breach of any other obligation under the mortgage.

[42] The effect of **section 36** was immediately evident in **Clark’s case** where a husband who was the freehold owner of a dwelling-house mortgaged the

property to the Plaintiffs on terms, inter alia, that the redemption money became immediately payable if the husband failed to pay two consecutive monthly subscriptions. The husband deserted his wife who remained in occupation of the house while the husband was in arrears of payment of the instalments. The mortgagees sought possession of the property and the Master made an order for possession, but in the purported exercise of his powers under **section 36(2) of the 1970 Act**, suspended the order on terms that the wife pay the current instalments and a further monthly sum until the arrears had been cleared. On appeal, it was held that the court only had power to suspend the order under **section 36(2)** if the condition in **section 36(1)** had been complied with, namely, that the mortgagor would be able within a reasonable period, to pay any sums due under the mortgage and since the words ‘any sums due’ meant the redemption money and there was no likelihood of the husband or the wife paying the redemption money under the mortgage within a reasonable period, the court had no power to suspend the order for possession under **section 36(2)**.

[43] In his judgment, **at pages 37-38**, Pennycuick V.C. referring to Millet L.J.’s comment in the **Caunt case**, said:

“Now, looking at the first two subsections of s 36, it seems to me clear beyond argument that the powers conferred by s 36(2) are only exercisable by the court if the condition in s 36(1) is

complied with, i.e. that it appears to the court that the Mortgagor is likely to be able within a reasonable time period to pay any sum due under the mortgage. The powers are expressly made exercisable on that condition and it seems to me quite impossible to construe the subsection as conferring powers under s 36(2) on the court irrespective of whether or not this condition in s 36(1) is satisfied...

The Act is perfectly clear and explicit and it seems to me plainly impossible to construe s 36(2) as unconditional; to do so would fly in the face of the express words contained in the Act.”

[44] For the sake of completeness, Pennycuick V.C., at **page 38**, gave his opinion on the meaning of the words “any sums due” in section 36(1) as follows:

“It occurred to me that, where section 36(1) refers to ‘any sums due under the mortgage’ the subsection might conceivably have been intended to mean any instalments due, in contradistinction to the entire redemption moneys, but again I think that is an impossible construction of the section, nor did counsel for the (wife) advance that contention.”

[45] In further elaboration of the court’s power under section 36, Sir John Pennycuick V.C. said in **Markham’s case** at page 1422:

“The power of suspension exercisable by the court under section 36 is conditional on it appearing to the court that in the event of the exercise of the power of the court, the Mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage; “likelihood” is a question of fact to be determined by the judge on evidence before him.”

[46] The common law provision was clear and unambiguous but was regarded as limited. Any request to the Court to postpone or vary the terms of the

Order for the mortgagor to give possession, unless otherwise agreed by the mortgagee, would only be entertained where the full mortgage price would be paid off.

The point was reinforced in the case of **Cheltenham and Gloucester PLC V Kranz and Another [1997] ALL ER 21**, where Phillips L.J. said:

“In my judgment, the very specific delimitation of the power given by section 36 makes it clear that the legislature did not intend that the court should have any wider jurisdiction to curtail the mortgagee’s right to possession. That right enables the mortgagee to exercise his power of sale in the manner he chooses and in the confidence that he can offer a purchaser vacant possession. Section 36 circumscribes that right where the proceeds of sale are likely to discharge the mortgage debt. It does not do so where the mortgage debt will not be fully discharged, and it is in those circumstances that the mortgagee’s rights are of particular importance.”

DISCUSSION

- [47] **The Supreme Court of Judicature Act, Cap.117A** was enacted on November 4, 1991 and **section 30** is an original section of the Act. **Cap 117A’s** predecessor was the *Supreme Court of Judicature Act, Cap.117* which was enacted by Parts between August 15, 1958 and November 30, 1958 but it did not have a provision similar to **section 30 of Cap. 117A**.
- [48] There is a dearth of local cases on the interpretation of **section 30** and resort must of necessity be had to the authorities used to construe the

provisions of **section 36 of the 1970 U.K. Act** even though they are of persuasive authority only.

[49] The UK has moved slightly beyond the stringent provisions of section 36 by enacting **section 8 of the Administration of Justice Act, 1973 (section 8 of the 1973 U.K. Act)**. I shall return briefly to that provision since the law of Barbados has not yet advanced to that stage.

[50] The application before the court is for an order for the postponement of the time limited for the Defendant to give up vacant possession of the mortgaged property. The basis of the application is that the Defendant's financial circumstances have improved to the point that he is now able to make enhanced monthly instalment payments, and that his wife who resides overseas is willing to assist in making the payments. It should be stated here that the Defendant did not provide evidence of improved financial circumstances and the mere mention of it, without more, will not suffice. The court expected to see, for example, evidence comprising receipts for the sale of fish from the Defendant's deep-sea fishing business, or evidence from other fishermen with similar facilities as the Defendant's demonstrating that the sales receipts from their catch were sufficient to sustain their families, pay bills and make substantial mortgage payments. Finally, there was no affidavit or other

correspondence from the Defendant's wife that detailed her ability and/or willingness to make mortgage payments on her husband's behalf.

[51] Even with the type of evidence the court expected to see as substantiating the Defendant's claim about improved financial circumstances, had that evidence been provided, the Defendant would still be hard-pressed to satisfy the requirement of being able to pay the redemption money within a reasonable time. Further, it was not put before the court that the Defendant sought the postponement to sell the mortgaged property in order to pay the mortgage money in full.

[52] My research into and investigation of these matters reveal that similar applications are usually granted as a matter of course. It is generally felt that there is reluctance to force a mortgagor to give vacant possession of the mortgaged property because he/she will be losing his/her home, and that the granting of a postponement will thereby give the mortgagor the opportunity to recommence stalled mortgage payments. In addition, there is general misunderstanding about the meaning of 'any sums due under the mortgage' (**section 30(1)**), with the application of the over-generous interpretation that it means that the court could order the postponement on the mortgagor's payment or undertaking to pay a sum of money, usually an instalment or two. Regrettably, that is not the case.

[53] The provisions of **section 30** do not permit the court to grant an order to postpone a mortgagee obtaining vacant possession of a mortgaged property in instances where the mortgagor simply wants to continue making instalment payments. The authorities have all pointed to a fetter on the exercise of the court's power to grant an order for postponement of the mortgagee's right to vacant possession of the mortgaged property where the mortgagor can only continue to pay instalments that are unlikely to extinguish the mortgage debt within a reasonable time. The Defendant has failed to demonstrate that he has the ability to pay the mortgage arrears and interest in a reasonable time, or to establish that he has made provision for the sale of the property such that the proceeds of the sale would extinguish the mortgage debt.

[54] The court's hands are tied in this regard and so too were the hands of the UK justices until the UK legislature enacted **section 8 of the 1973 U.K. Act** which, when read in conjunction with section 36 of the 1970 U.K. Act, conferred on the court the power to suspend an order for vacant possession of mortgaged property in order to enable the mortgagor to make instalment payments until the mortgage money was satisfied. **Section 8 of the 1973 U.K. Act** which, so far as is relevant, states:

“(1) Where by a mortgage of land which consists of or includes a dwelling-house, or by any agreement between the mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in whole or in part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise, then for purposes of section 36 of the Administration of Justice Act 1970 (under which a court has power to delay giving a mortgagee possession of the mortgaged property so as to allow the mortgagor a reasonable time to pay any sums due under the mortgage) a court may treat as due under the mortgage on account of the principal sum secured and of interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment (my emphasis).

(2) A court shall not exercise by virtue of subsection (1) above the powers conferred by section 36 of the Administration of Justice Act 1970 unless it appears to the court not only that the mortgagor is likely to be able within a reasonable period to pay any amounts regarded (in accordance with subsection (1) above) as due on account of the principal sum secured, together with the interest on those amounts, but also that he is likely to be able by the end of that period to pay any further amounts that he would have expected to be required to pay by then on account of that sum and of interest on it if there had been no such provision as is referred to in subsection (1) above for earlier payment.”

[55] If there was such a provision in Cap. 117A, the Defendant would have stood a better chance, *ceteris paribus*, of obtaining the order that he seeks. The courts are mandated to interpret and apply the law, leaving the function of law making to the legislature. In those circumstances, the

court is obligated to construe and give effect to the provisions of **section 30**.

[56] Before finally disposing of this matter, I wish to make an observation. It is not, in my opinion, difficult to discern the intention of Parliament in enacting **section 30** which is to ensure that only in certain specified circumstances would the court be empowered to grant a postponement of the execution of an order for vacant possession.

[57] The Claimant is entitled to demand the immediate payment of the mortgage money pursuant to the mortgage agreement, particulars of which are outlined at para [7]) of this Decision. The Claimant made such a demand: see para [9]. However, paras [10] and [11] detail the Claimant's efforts at persuading the Defendant to pay his instalments or make suitable arrangements for payment. Para [12] shows the Defendant's unfulfilled promises to pay that led ultimately to the Master's Order for vacant possession.

[58] Consequently, it is therefore easy to comprehend the imposition of the stringent requirements for the exercise of the court's power to adjourn or postpone the date for delivery of the property where every effort is made by the mortgagee to encourage the mortgagor to pay the instalments. To further postpone the mortgagee's right of vacant possession should only

be done in circumstances which grant additional time to a mortgagor to satisfy the debt but within a specific timeframe, or as **section 30** states, “within a reasonable period” and not indefinitely.

DISPOSAL

[59] It is therefore ordered that the Defendant’s application for an Order that the time limited for the execution of the Order of the Master, be postponed for a further six months, is denied.

[60] Each party will bear its own costs.


BARRY L. CARRINGTON
Judge of the High Court (Acting)