



**IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS**

Action No. CL 101/18

BETWEEN:

**ANTHONY KIKIVARAKIS
OFFICIAL LIQUIDATOR
TCI BANK LIMITED (IN LIQUIDATION)**

Plaintiff



-and-

**(1) LAVERN FORBES
(2) HOWARD GARDINER
(3) THE REGISTRAR OF LANDS**

Defendants

By Counterclaim

BETWEEN:

LAVERN FORBES

Plaintiff

-and-

**(1) ANTHONY KIKIVARAKIS
OFFICIAL LIQUIDATOR
TCI BANK LIMITED (IN LIQUIDATION)**

CL 101/18 Anthony Kikivarakis as Official Liquidator TCI Bank Ltd (In Liquidation) v Lavern Forbes & ors; Lavern Forbes v Anthony Kikivarakis as Official Liquidator TCI Bank Limited (In Liquidation) & ors

(2) RAINBOW GARDENS LTD
(3) CLAYTON STANFIELD GREENE

Defendants

JUDGMENT

Before: **The Hon. Mr. Justice B. St. Michael Hylton QC (Ag)**

Appearances: **Mr. Peter McKnight for the Plaintiff and the 1st Defendant by Counterclaim**
Hon. Mr. Alvin Garland for the 1st Defendant and the Plaintiff by Counterclaim

Hearing Date: **18 August 2022**

Venue: **Court No. 5, Graceway Plaza, Providenciales**

Date Delivered: **31 August 2022**

CL 101/18 Anthony Kikivarakis as Official Liquidator TCI Bank Ltd (In Liquidation) v Lavern Forbes & ors; Lavern Forbes v Anthony Kikivarakis as Official Liquidator TCI Bank Limited (In Liquidation) & ors

Introduction

1. On 3 May, 2022 Simons J delivered a brief judgment (CL 101 of 2018; [2022] TCASC 8) (“the Simons Judgment”) in favour of the Plaintiff who is the Official Liquidator of TCI Bank Ltd. The First Defendant (“Mrs. Forbes”) filed an appeal against the Simons Judgment and has applied for a stay of some of the orders in that judgment pending the hearing of her appeal.
2. The Simons Judgment sets out the relevant facts as follows: Mrs. Forbes is a former customer of the bank. In 2007 the bank loaned Mrs. Forbes \$198,000.00 for the purchase of a dwelling house on the land comprised in Parcel 60503/32. The land was owned by the Second Defendant, Howard Gardiner but was being developed, along with other adjoining Parcels into a housing scheme by the First Defendant, Rainbow Gardens Limited, a company wholly owned and controlled by Mr. Gardiner.
3. Due to a dispute between the Bank and its then lawyers, Saunders & Co., the transfer of the land and the charge given by Mrs. Forbes to secure the loan were never registered although these documents were prepared, fully executed and available in registrable form. The land therefore remains registered to Mr. Gardiner, to whom the purchase funds for the dwelling house were paid by the Bank.
4. From around the time the bank was put into liquidation, Mrs. Forbes discontinued mortgage payments because she said she had no proof of her title to the property, though she remains in occupation.

The Claim and Counterclaim

5. Based largely on these facts, the Plaintiff filed this action, seeking payment of the debt, a declaration that the property is beneficially owned by the bank under a resulting trust, an order for possession, and costs.

6. Mrs. Forbes counterclaimed for damages and costs, alleging that the bank was negligent.

7. No relief was claimed against the Second Defendant Mr. Gardiner, and the Simons Judgment indicates that the court excused him from attendance at the trial. It also indicates that the Fourth Defendant Rainbow Gardens Limited had been struck from the register and the court ordered that Mr. Clayton Greene be struck out as a Defendant to the counterclaim. The contest was therefore between the Plaintiff and Mrs. Forbes.

8. The learned judge held that both parties were at fault – the bank for failing to ensure the registration of its changes and of the transfer to Mrs. Forbes, and Mrs. Forbes for discontinuing mortgage payments and essentially living rent free since the bank was placed into liquidation. He then made the following orders:
 1. The Plaintiff's application for a declaration that the property is beneficially owned by the Plaintiff under a resulting trust, the trustee of which is Howard Gardiner is granted.

2. The Plaintiff shall be at liberty at any time of it's choosing to call for the transfer of the property from Howard Gardiner to the bank or to its agent or nominee, with the Plaintiff bearing all costs associated therewith.
3. The Plaintiff is granted possession of the property forthwith.
4. The First Defendant shall pay to the Plaintiff the principal only of the monthly mortgage payments since the discontinuance of such payments by the First Defendant to the date hereof and thereafter upon such terms as may be agreed between the Plaintiff and the First Defendant. Such recovery shall be reduced by the sum of \$50,000.00.
5. The Plaintiff's claim for interest is refused.
6. The First Defendant's claim for interest is refused.
7. There shall be no order as to costs.

The Appeal

9. On 1 June 2022 Mrs. Forbes filed an appeal against the Simons Judgment in which she only challenges the orders relating to possession, damages and costs. The notice of appeal indicates that she will be seeking the following order from the Court of Appeal:

That the Learned Judge's ruling be quashed, in so far that the Appellant was at fault for
CL 101/18 Anthony Kikivarakis as Official Liquidator TCI Bank Ltd (In Liquidation) v Lavern Forbes & ors; Lavern Forbes v
Anthony Kikivarakis as Official Liquidator TCI Bank Limited (In Liquidation) & ors

discontinuing mortgage payments, an order that the Damages awarded to the Appellant are insufficient and incorrect, that the Respondent is not entitled to be granted possession of the property, and that the Appellant is entitled to her costs for being successful in her counterclaim against the Respondent.

10. The grounds indicate that Mrs. Forbes will be taking issue with various rulings by Simons J, including his assessment of the evidence.

11. I have not seen a transcript of the evidence.

The Submissions

12. In her submissions at the hearing of her summons for a stay, Mrs. Forbes disputed Simons J's findings on the evidence, especially his finding that she was at fault. She also submitted that in the absence of a stay it would be difficult to enforce any judgment against the Bank, and in fact, her appeal would be rendered nugatory.

13. In response, the Bank raised various procedural issues. It submitted that:

- a) Mrs. Forbes' notice of appeal was filed late.
- b) Mrs. Forbes did not seek or obtain leave to file an appeal.
- c) The summons for a stay was not filed at the same time as the notice of appeal.
- d) The certificate of urgency gives the wrong date for the judgment.
- e) There are errors in the headings of the certificate of urgency and the notice of appeal.

- f) The summons for stay was filed 8 weeks after the Simons Judgment so there was no urgency to justify the certificate of urgency.

14. The Bank also argued that the appeal has little to no chance of succeeding.

Discussion

15. I can dispose of the Bank’s “procedural issues” quickly. It appears that the appeal may have been filed late, but I would not refuse a stay on that basis, because even at this stage, the court can grant an extension of time¹.

16. The Simons Judgment was given at the end of a trial. No leave was required to file an appeal. (See **Court of Appeal Ordinance CAP 2.01** sections 4, 5, 15). In **Turtle Cove Hotel and Residences Ltd. v. Tides Development Project, Inc.** (CL-AP 1 of 2022) [2022] TCACA 2 (07 March 2022), Morrison P at paragraph 9 said that “...an appeal from a final judgment...is an appeal as of right”. In my view, none of the other “issues” would be relevant to my decision on this summons.

17. The summons seeks a stay of the orders in paragraphs 1, 2, 3 and 4. The order in paragraph 1 is a declaration, and there is clear authority that the court cannot stay a declaration. **Bowen v Robinson** [SCCA] 114/2010, delivered November 24, 2010 (unreported) is a decision of the Court of Appeal of Jamaica. The court explained why there cannot be a

¹ See **In Re: Inversiones Globales Ltd. v. Hape** (CL 1 of 2000, CL 17 of 1999) [2000] TCACA 2 (22 May 2000) at paragraphs [32] to [35].

stay of a declaratory judgment. Morrison JA (as he then was²) stated³:

“More to the point, in my view, is the further question that now arises, which is whether the court has any power to stay execution of a purely declaratory order.”

18. The learned judge went on to cite the following passage from PW Young QC’s text, **Declaratory Orders**⁴:

“The effect of the court’s order is not to create rights but merely to indicate what they have always been... Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings...”

19. Morrison JA then stated that the appeal involved a declaration by the judge that an election was a nullity and that such an order did not require any of the parties to take, or to refrain from taking, any action of any kind⁵. He therefore concluded⁶:

² Justice Morrison went on to be President of the court.

³ Paragraph 12.

⁴ Paragraph 13.

⁵ Paragraph 15.

⁶ Paragraph 16.

“It follows from this therefore that, in my judgment, no question of a stay of execution can arise in this case and the application must be refused accordingly.”

20. I respectfully adopt and agree with Morrison JA’s reasoning and conclusion, and decline to grant a stay of Simons J’s declaration on that basis. In any event, I would have refused to grant such a stay because there is no appeal from that order.

21. In my view, the order in paragraph 2 is also in the nature of a declaration and the application to stay it should also be refused on that basis. However, even if I am wrong on that, the stay should be refused on the ground that there is no appeal from that order.

22. The orders in paragraphs 3 and 4 require Mrs. Forbes to do something, and they are being challenged in her appeal. I must therefore consider whether it is appropriate in the circumstances to grant a stay.

23. In **Green v Wynlee Trading et al** [2010] JMCA App 3, the Jamaican Court of Appeal stated that determining whether to grant a stay of execution is a two-step process. Morrison JA explained that the first step is to establish that the appeal has some prospect of success and the second is to consider whether the case is a fit one for the granting of a stay. The learned judge said⁷:

“The threshold question on any such application is, of course, whether the material

⁷ At Paragraph 12.

provided by the parties discloses at this stage an appeal with “some prospect of success” ... Once that criterion has been met, the next step is for the court to consider whether, as a matter of discretion, the case is a fit one for the granting of a stay.”

24. On an application for a stay of execution, determining whether there is some prospect of success does not require the court to embark upon anything like a hearing of a substantive appeal. The court should only be concerned with whether there is some merit in the appeal.

25. In that case, Morrison JA concluded that the appellant had satisfied the first test on the basis that the appeal was not hopeless (although not particularly strong). He said:

“I therefore think that this ground, even if it does not strike me as having, as [counsel] submitted, a “strong prospect”, may nevertheless have some prospect of success.”

26. The approach of that court has therefore consistently been to apply a test similar to that applied in summary judgment applications, that is, satisfying itself that an appeal is not fanciful or (to use Morrison JA’s words) not “completely unarguable”. I would apply the same test and approach, and especially given the fact that I have not seen a transcript of the evidence taken at the trial, I am not able to say that the appeal (save for the appeal against the order for possession which I address below) is fanciful or unarguable.

27. A case is fit for granting a stay if a refusal of the stay would give rise to a risk of injustice.

The court should engage in a balance of convenience exercise similar to the one it carries out when granting injunctions. In explaining this stage of the test, Morrison JA relied on

CL 101/18 Anthony Kikivarakis as Official Liquidator TCI Bank Ltd (In Liquidation) v Lavern Forbes & ors; Lavern Forbes v Anthony Kikivarakis as Official Liquidator TCI Bank Limited (In Liquidation) & ors

the following dicta from Clarke LJ in **Hammond Suddard Solicitors v Agrichem International Holdings** [2001] All ER (D) 258 (Dec):

“...Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay.”

28. The English Court of Appeal also stated in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited** [1997] EWCA 2164:

“...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 not 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 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.”

29. No doubt recognising that these are the applicable questions, Mrs. Forbes stated both in her affidavit and in her counsel’s submissions, that her appeal would be rendered nugatory if there is no stay. However, she does not indicate how it would be rendered nugatory, or even why the grant or refusal of a stay would affect her ability to enforce any judgment that might result from a successful appeal.

30. In my view, the decisive factor in this case is the terms of the notice of appeal. Even if

Mrs. Forbes succeeds in her appeal, the orders in paragraphs 1 and 2 (declaring that the bank is the beneficial owner of the property and can call for a transfer to its nominee) will still stand. The Plaintiff will therefore be able to complete a sale of the property. In those circumstances I see no basis on which the Court of Appeal would set aside the order for possession.

31. Furthermore, being required to give up possession would not affect enforcement of a successful appeal on damages and/or costs.

32. As far as paragraph 4 is concerned, Mrs. Forbes' affidavit does not suggest that if she had to pay the reduced principal sum before her appeal is heard she would be ruined, or would not be able to recover it if her appeal succeeds.

33. For these reasons, I dismiss the summons for a stay of execution and order the applicant to pay the costs.

B. St. Michael Hylton QC
Acting Judge of the Supreme Court
31 August 2022

