

State Bank of New South Wales (t/a Colonial State Bank) v Harrison

COURT OF APPEAL (CIVIL DIVISION)

[2002] EWCA Civ 363, (Transcript: Smith Bernal)

HEARING-DATES: 8 MARCH 2002

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CATCHWORDS:

Mortgage - Order for possession of mortgaged property - Suspension of execution of order - Mortgagor involved in litigation unrelated to mortgagee - Judge ordering stay of execution of order pending outcome of appeal in unrelated litigation - Whether court having jurisdiction to grant such a stay

INTRODUCTION:

ALDOUS LJ: [1] I invite Jonathan Parker LJ to give the first judgment.

COUNSEL:

E Windsor appeared on behalf of the Appellant; The Respondent appeared on his own behalf

PANEL: ALDOUS, TUCKEY, JONATHAN PARKER LJJ

JUDGMENTBY-1: JONATHAN PARKER LJ

JUDGMENT-1:

JONATHAN PARKER LJ: [2] Before the court is an appeal by State Bank of New South Wales Ltd, the Claimant in the action ("the Bank"), against an order dated 3 October 2001 and made by His Honour Judge Seymour QC, sitting as a High Court judge in the Chancery Division.

[3] Before Judge Seymour was an application by Mr Carey Harrison III, the Defendant in the action, for permission to appeal against an order dated 10 January 2001 and made by Master Bowman. By that order, Master Bowman ordered that Mr Harrison give to the Bank possession of his house at 1 Rectory Grove, Clapham Old Town, London SW4 0DX within 28 days, but stayed the order pending an application by Mr Harrison for permission to appeal (Master Bowman having refused such permission). In ordering that possession be given in 28 days, Master Bowman refused an application by Mr Harrison that the order be stayed pursuant to s 36 of the Administration of Justice Act 1970.

[4] Mr Harrison did not seek to appeal the possession order; rather, he sought permission to appeal against Master Bowman's refusal of his application that the possession order be stayed pursuant to s 36 of the 1970 Act. Judge Seymour concluded that there were no grounds for challenging the Master's refusal to grant a stay under s 36 and that the proposed appeal would have no real prospect of success. Accordingly, he refused Mr Harrison permission to appeal against Master Bowman's order. However, the judge then went on to stay the possession order until the conclusion of the hearing of a forthcoming appeal in other litigation to which Mr Harrison is (but the Bank is not) a party. In granting that stay, the judge made it clear that he was not exercising the discretion conferred by s 36, which he described as "inapplicable in the circumstances of the present case", but rather "a general power to order a stay of execution of a judgment". The judge refused the Bank permission to appeal against the grant of this stay, but permission was granted by Robert Walker LJ on 13 November 2001. That is the appeal which is now before us.

[5] Mr Harrison has himself issued an Appellant's Notice, which is also before us, whereby he seeks to appeal against Judge Seymour's refusal to grant him permission to appeal against Master Bowman's order. He also seeks to appeal against two further aspects of Judge Seymour's order: first, the judge's refusal of his application for permission to adduce further evidence in support of his application for permission to appeal; and second, the judge's refusal to grant him permission to amend his Defence in the action.

[6] It is convenient at this point to set out the relevant provisions of s 36 of the 1970 Act. They are as

follows:

"(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 sub-s (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 judgment or order, may -

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

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

[7] I need not read the remaining subsections of s 36.

[8] The factual and procedural background to the matters now before us can be summarised as follows.

[9] In 1989 or thereabouts Mr Harrison, who had recently retired after a career in banking, became a Name at Lloyd's. To enable him to do so, he procured the Bank to guarantee his liabilities to Lloyd's, up to a limit of £ 70,000. The Bank in turn took an "all moneys" second charge over his house at 1 Rectory Grove ("the Property") as security for its liability under the guarantee. As a Name, Mr Harrison incurred very substantial losses. In August 1995 Lloyd's made a call on the Bank under the guarantee in the sum of £ 70,000 and in February 1999 the Bank paid that sum to Lloyd's.

[10] In May 1997 Mr Harrison issued a writ against Lloyd's. It appears that the writ was subsequently renewed on a number of occasions. He was also joined as a party in the current Lloyd's v Jaffray litigation, to which I shall make further reference later in this judgment.

[11] In April 1999 the Bank formally demanded repayment of the £ 70,000, with interest, under the personal covenant by Mr Harrison contained in its charge. Payment was not forthcoming, and in June 1999 the Bank, as chargee, commenced proceedings against Mr Harrison claiming possession of the Property, together with a money judgment for the sums owing to it.

[12] After a number of adjournments, the hearing of the proceedings was concluded before Master Bowman on 9 January 2001. Mr Harrison was represented before the Master by Mr Rupert de Cruz of counsel; the Bank was represented by Mr Peter Watson of Messrs Allen & Overy. The Master delivered judgment the following day, 10 January 2001.

[13] At the outset of his judgment, Master Bowman recorded that the Bank's claim for possession was not resisted, but that Mr Harrison was seeking a stay or suspension of the order pursuant to s 36 of the 1970 Act. After summarising the procedural history, the Master turned to the section, and referred to a number of authorities bearing upon the exercise of the power conferred by the section to stay or suspend an order for possession in favour of a mortgagee for such period as the court thinks reasonable, "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" (see s 36(1)). The Master then turned to the evidence, and in particular to Mr Harrison's fourth witness statement, which had recently been served. Mr Harrison's case, as developed in that witness statement, was that he had cross-claims against the Bank for unliquidated damages resulting from negligent advice given to him by the Bank in connection with his decision to become a Name at Lloyd's, and that if those cross-claims were successful they would extinguish his indebtedness to the Bank. On that basis, Mr

Harrison sought a stay or suspension of the possession order pursuant to s 36 pending a final determination on his cross-claims.

[14] The Master concluded, on the authorities, that in order to justify an exercise of the court's power under s 36 he would have to be satisfied that the cross-claims would be likely to succeed, and that on the available evidence he could not be so satisfied. He went on to conclude that in any event there was no prospect of payment within a reasonable time. As to that, he said (at p 18 of the transcript of his judgment):

"The Bank has now been out of its money for some time and the earliest at which this action could be heard, given some degree of acceleration, would be in the course of next year. There cannot be many circumstances in which, where the court is called upon to exercise its discretion under section 36, that such an interval of time could be regarded as reasonable unless the prospects of success were high. The prospects of success in this case are not high. In those circumstances, on timing alone, I could not be confident that this would be an occasion for the exercise of my discretion."

[15] The Master accordingly declined to exercise his discretion under s 36, and ordered possession in 28 days. He also refused Mr Harrison permission to appeal.

[16] Mr Harrison applied to the High Court for permission to appeal against the Master's refusal to stay or suspend the possession order. The High Court subsequently directed that the application be heard on notice to the Bank, with the substantive appeal to follow immediately thereafter if permission to appeal were granted.

[17] In about June 1991 Mr Harrison was advised by Mr David Charity, a solicitor, acting under the name "Legal Action Charity", that he was entitled to set aside the Bank's charge on grounds of misrepresentation and undue influence. In August 1991, acting on that advice, Mr Harrison wrote to the Bank purporting to rescind or to set aside the charge.

[18] On 28 September 2001 Mr Harrison issued an application in the High Court seeking permission (a) to amend his Defence in the action so as to include the allegations of misrepresentation and undue influence and (b) to adduce further evidence in support of his application for permission to appeal and (if permission were to be granted) in support of the substantive appeal. The application also sought an adjournment of the hearing of his application for permission to appeal (and of the substantive appeal, if permission were to be granted). The application was listed to be heard at the same time as his application for permission to appeal Mr Harrison's applications were heard by Judge Seymour on 3 October 2001. Before the judge Mr Harrison appeared in person (assisted by Mr Charity); the Bank was represented by Miss Emily Windsor of counsel (who also appears for the Bank before us).

[19] At the hearing before the judge, Mr Harrison did not pursue his application for an adjournment; rather, he sought a stay of the possession order pending the outcome of a current application for permission to appeal by the Names in the Lloyd's v Jaffray litigation (including himself), which was due to be heard shortly. At that stage the Names were seeking permission to appeal against the decision of Cresswell J on a preliminary issued (referred to as "the Threshold Fraud point") as to whether Lloyd's had made representations which it knew to be untrue and/or as to which it was reckless whether they were true or false, and whether such representations were communicated to Names, and if so when.

[20] In the event, the judge refused Mr Harrison's application for permission to appeal, but nevertheless stayed the possession order pending the hearing of the Names' application for permission to appeal in the Lloyd's v Jaffray litigation. The judge further directed that should the Names be granted permission to appeal (as in the event they were) the stay should continue over the hearing of the substantive appeal. The substantive appeal is due to be heard over, I think, the next two weeks.

[21] Having set out the factual and procedural background, as I have summarised it, and having noted that by his application dated 28 September 2001 Mr Harrison sought an adjournment of the hearing, the judge continued as follows (at p 7C of the transcript):

"As the matter developed, it seemed that it was not after all sought to have an adjournment of the

hearing of the appeal in the event that I was persuaded that it was appropriate to grant permission to appeal, but rather that I should consider, if the appeal was unsuccessful, whether it was appropriate nonetheless, bearing in mind the imminence of the hearing in the Court of Appeal next week and the fact that any substantive appeal will be heard relatively shortly thereafter, to make an order the effect of which would be to stay execution of the order for possession made by Master Bowman until such time as the appeal in the Jaffray litigation has been finally determined."

[22] The judge then turned to Mr Harrison's Appellant's Notice, observing that it sought permission to appeal only against that part of the Master's order which directed that possession be given within 28 days. He continued (at p 7G of the transcript):

"The point which was raised, in summary, was that the Master should have considered that it was appropriate to exercise his powers under section 36 of the Administration of Justice Act 1970 to grant a stay or suspension of execution of the order for possession pending a hearing of the counterclaim of Mr Harrison in the present action."

[23] The judge then examined Mr Harrison's proposed counterclaim. He pointed out that a claim against the Bank based on allegedly negligent advice given by it in 1989 or thereabouts was clearly statute-barred, but he recorded a submission by Mr Charity that it could nevertheless operate by way of equitable set-off against the Bank's money claim. He also recorded a submission by Mr Charity to the effect that there were grounds for avoiding the Bank's charge, and that Mr Harrison had already taken steps with a view to avoiding it. As to that, the judge commented (at p 10D of the transcript):

"Whether that was a relevant thing to do rather depends upon whether, following the judgment and order of Master Bowman, it was still open to Mr Harrison to avoid a charge which, if Master Bowman's order stood, had already been enforced."

[24] The judge then addressed an application by Mr Harrison for an extension of time for the issue of his Appellant's Notice. In the event, he granted that application.

[25] The judge then turned to Mr Harrison's application for permission to appeal, saying (at p 12B of the transcript):

"In the context of the application for permission to appeal, I must consider also the application for permission to rely on fresh evidence."

[26] The judge noted that the only relief sought by the Appellant's Notice was that the possession offered be stayed pursuant to s 36 until after the trial of Mr Harrison's counterclaim. He then set out the relevant provisions of s 36.

[27] Addressing a submission made by Mr Charity that Master Bowman had erred in refusing to grant Mr Harrison an adjournment of the hearing, the judge commented that it did not appear from Master Bowman's judgment that any application for an adjournment had been made, and that it seemed to him:

". . . difficult to say that the failure of Master Bowman to grant an adjournment which was not sought from him was in breach of natural justice."

[28] The judge concluded that the submission had no merit.

[29] The judge then turned to the question whether, as had been urged upon him, Mr Harrison's counterclaim was likely to succeed.

[30] Addressing this question, the judge began by considering whether, in concluding that the counterclaim was not likely to succeed, the Master had applied the correct test in the context of s 36; or whether, as Mr de Cruz had submitted to the Master, it was only necessary for Mr Harrison to satisfy the court that his counterclaim was arguable. After referring to a number of authorities, the judge concluded that, as Miss Windsor had submitted, the Master had applied the right test in this respect. He expressed his conclusion thus (at p 21A of the transcript):

"In my judgment, that submission is well founded, and it seems to me that the learned Master was plainly right in adopting the test which he did in the present case, which was that in order for there to be any question of him exercising his powers under section 36 of the Administration of Justice Act, it had to be likely that Mr Harrison was going to succeed in his counterclaim."

[31] The judge then turned to the question whether the proposed counterclaim was likely to succeed. As to that, the judge said (at p 22C of the transcript):

"Where the material before the court consists of witness statements which reveal disputes of fact which the court is unable to resolve without the assistance of cross-examination, it cannot be said that a party is likely to succeed. He may, but he may not. As the onus, in my judgment, is upon the mortgagor to satisfy the court, if the mortgagor does not satisfy the court because the court is quite unable to reach any decision, then the trigger condition is not satisfied."

[32] The judge's reference to the "trigger condition" is a reference to the condition in s 36(1) to which I referred earlier.

[33] For that and other reasons the judge concluded that although the Master had been, as he put it:

". . . tempted into incautious territory in seeking to evaluate the probabilities on untested witness statements, had he considered the matter in the round, he would inevitably have come to the same conclusion" (see p 23 of the transcript at G-H).

[34] The judge accordingly concluded that an appeal would not have any real prospect of success.

[35] Turning to the additional evidence on which Mr Harrison sought to rely, and which consisted of further witness statements (all of which the judge had read), the judge said this (at p 24A of the transcript):

"Because of the analysis which seems to me [to be] that which the Master might more happily have adopted, it will be apparent that the further evidence which Mr Harrison wishes to rely upon in support of the application before me is not of great relevance."

[36] The judge then referred to the well-known principles laid down in *Ladd v Marshall* as to the circumstances in which an Appellant may adduce new evidence, and he continued (at p 25C of the transcript):

"In the circumstances of the present case, it is, I think, fairly clear that material which Mr Harrison wished to rely upon . . . could not have been obtained with reasonable diligence for use at the hearing before Master Bowman. It is also right to say that, so far as one can judge by reading the witness statements, which have not been tested by cross-examination, but which are contrary in relevant effect to the witness statements of Mr Royd and Mr Perry [they were witness statements which had been served by the Bank], the evidence is presumably such as is to be believed. However, for the reasons which I have already explained, none of the evidence [and at that point the judge refers specifically to the witness statements sought to be relied on] would have had an important influence on the result of the case. Indeed, it seems to me it would not have had any influence on the result of the case; it would only have served to emphasise that there were vigorous disputes as to the relevant facts which the court was quite unable, at the interlocutory stage, to resolve."

[37] The judge accordingly concluded that Mr Harrison's applications for permission to adduce the additional evidence and to appeal against Master Bowman's order should be dismissed. He expressed that conclusion thus (at p 26A of the transcript):

"I dismiss the application for permission to adduce further evidence in support of the application for permission to appeal and in support of the appeal. I dismiss the application for permission to appeal on the grounds that it would not have a real prospect of success."

[38] The judge then turned to the question whether the possession order should nevertheless be stayed by reference to the *Lloyd's v Jaffray* litigation. He began by acknowledging that his knowledge of the *Lloyd's v Jaffray* litigation was limited. He continued:

"I am aware that 216 Names are apparently parties to that litigation. I am aware that permission to appeal is being sought in relation only to the outcome of the trial of a preliminary issue before Cresswell J. That preliminary issue, I am told, is an extremely important question going to the matter whether the authorities in the Society of Lloyd's at the time relevant to Mr Harrison's claim and the claim of the other Names, acted fraudulently.

Mr Charity submits to me that if, notwithstanding that there are other issues in the case which may have to be resolved hereafter, the outcome of the application for permission to appeal is that permission is granted, and if the outcome of a hearing of an appeal subsequent to the granting of permission is that the judgment of Cresswell J on the preliminary issue is set aside, the overwhelming probability is that at that point the claims of the Names who are parties to the Jaffray litigation will be settled on terms advantageous to them. If that is a possible outcome, and whether that is in fact the outcome is something which may be known by the end of next week, but which seems likely to be known within a reasonable period following upon the hearing of an appeal in the latter part of January and the early part of February next year, it does seem to me that justice requires that nothing irrevocable should be done concerning Mr Harrison's home until it is clear what the future is to be."

[39] Addressing Miss Windsor's submission that it would be inappropriate to stay the order on the ground that there was a possibility that Mr Harrison might eventually succeed in the Lloyd's v Jaffray litigation, the judge concluded that it was "at any rate a possible consequence" of a successful appeal by the Names in the Lloyd's v Jaffray litigation that the guarantee given by the Bank to Lloyd's might be avoided, and that "another possible outcome" was that following a successful appeal by the Names Mr Harrison would immediately be placed in funds which would enable him to pay off the Bank in full. The judge also noted that there was a substantial equity in the Property, and that if the Property were sold it would be unlikely that Mr Harrison would ever be able to return to it. He continued (at p 29A of the transcript):

"For those reasons I reject the submissions of Miss Windsor on this part of the case and in the exercise, not of my powers under section 36 of the Administration of Justice Act 1970, which I am satisfied are inapplicable in the circumstances of the present case, but of my general power to order a stay of execution of a judgment, in dismissing the application before me I nonetheless grant a stay of execution of the order for possession made by Master Bowman on 10th January 2001 until after the decision of the Court of Appeal on the application for permission to appeal in the Jaffray litigation made by Mr Harrison is known, and if that application for permission is successful, such stay to continue thereafter until the decision of the Court of Appeal on the substantive appeal is known. I should perhaps make clear that in making that order I am not seeking to preclude either the Claimant from making application to the court to lift the stay if matters turn out to be rather more prolonged than I currently anticipate, nor to preclude Mr Harrison from making a further application for a stay in the event that the outcome of the application for permission in the Jaffray litigation or the hearing of the substantive appeal if permission is granted is unsatisfactory, but he wishes to urge upon the court that there are nonetheless other grounds why the stay should continue."

[40] The judge subsequently recorded his reasons for refusing the Bank permission to appeal against the stay as follows:

"The Defendant is aged 71. The property in respect of which the order for possession was made has not only been his home for over 20 years, but is his principal source of income, as he rents out a flat in the basement, and his only substantial capital asset. If permission to appeal against the decision of Cresswell J in Society of Lloyd's v Jaffray is granted and the appeal is successful, possible outcomes are that the guarantee given by the Claimant to the Society of Lloyd's in the present case, which was supported by the charge which it is sought to enforce in the present action, will be held to be unenforceable as procured by fraud, or that the Defendant will recover by way of damages against the Society of Lloyd's sufficient to discharge his indebtedness to the Claimant. In either such event the Defendant would be able to keep his home. If permission to appeal is not granted in Society of Lloyd's v Jaffray that is likely to be known with days. Even if permission to appeal is granted and the appeal is ultimately unsuccessful, that is likely to be known within about six months. What in reality the grant of a stay involves is the Claimant being kept out of his money for a little longer, if in the end the Defendant's house has to be sold. On the evidence before me the present value of the house is some £ 420,000, and the equity more than sufficient to enable the Claimant to make a full recovery if the

house has to be sold. In the exercise of my general discretion in relation to the grant of stays of execution I considered that justice required the grant of the stay which I ordered.

I do not consider that an appeal against my decision would have a real prospect of success."

[41] Before turning to the substance of the various matters before us, I should record that at the outset of the hearing Mr Harrison (who appears in person before us) applied for an adjournment of this hearing on the ground, in effect, that he has been unable properly to prepare for today's hearing due to the work that he has had to do in connection with the Lloyd's v Jaffray appeal (which, as I said earlier, is due to start on Monday). He submits that in the circumstances this court should adjourn the current hearing until after that appeal has taken place.

[42] We refused that application. Mr Harrison has had plenty of time in which to prepare for today's application, and no good reason has been put before us as to why today's hearing should be adjourned.

[43] I turn first, then, to Mr Harrison's Appellant's Notice.

[44] As noted earlier, Mr Harrison seeks to appeal primarily against Judge Seymour's refusal to grant permission to appeal against the order made by Master Bowman. Miss Windsor (for the Bank) submits that by virtue of s 54(4) of the Access to Justice Act 1999 this court has no jurisdiction to hear such an appeal. Section 54 of the 1999 Act is headed "Permission to appeal". Subsection (1) provides that rules of court may provide that any right of appeal to the county court, the High Court or the Court of Appeal may be exercised only with permission. Subsection (4) provides as follows:

"No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court)."

[45] The Practice Direction supplementing Pt 52 of the Civil Procedure Rules ("the CPR") provides (in para 4.8):

"There is no appeal from a decision of the appeal court, made at an oral hearing, to allow or refuse permission to appeal to that court. See section 54(4) of the Access to Justice Act 1999 and rule 52.3(3) and (4)."

[46] Paragraphs (3) and (4) of r 52.3 provide as follows:

"(3) Where the lower court refuses an application for permission to appeal, a further application for permission to appeal may be made to the appeal court.

(4) Where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at an oral hearing."

[47] Rule 52.1(2)(b) defines the expression "appeal court" as meaning the court to which an appeal is made (ie the High Court in the instant case).

[48] In my judgment the plain effect of s 54(4) of the 1999 Act is that there is no jurisdiction for this court to entertain an appeal against the refusal of the High Court to grant permission to appeal against Master Bowman's order.

[49] I turn next to Mr Harrison's challenge to the judge's refusal to grant him permission to adduce the additional evidence on which he wished to rely. As is evident from his judgment, the judge read this evidence and considered it in the context of the application for permission to appeal. The judge said as much expressly at p 12B of the transcript quoted earlier. This challenge is accordingly subsumed in the application for permission to appeal and in my judgment this court has no jurisdiction to entertain it.

[50] I turn next to Mr Harrison's challenge to the judge's refusal to grant him permission to amend his Defence to allege that the charge ought to be rescinded or set aside on grounds of misrepresentation

and/or undue influence. Once again, it seems to me that, permission to appeal against the possession order having been refused, there is no substance left in that challenge. The judge considered these claims in the context of the application for permission to appeal. To allow Mr Harrison to pursue this challenge would, in my judgment, be to allow him to circumvent s 54(4) of the 1999 Act by bringing before the court (albeit in a slightly different guise) the very issue which this court has no jurisdiction to address, namely the issue as to whether the judge was right to refuse permission to appeal.

[51] I would accordingly dismiss the three applications made by Mr Harrison in his Appellant's Notice on the short but fundamental ground that by virtue of s 54(4) of the 1999 Act this court has no jurisdiction to entertain them.

[52] I turn, therefore, to the Bank's appeal.

[53] Miss Windsor, relying on a number of well-known authorities starting with *Four-Maids Ltd v Marshall (Properties) Ltd* [1957] Ch 317, [1957] 2 All ER 35, submits that as a general proposition (but subject always to the court's jurisdiction under s 36 of the 1970 Act) a mortgagee (including a chargee) is entitled, subject to any express or implied agreement to the contrary, to take possession of the mortgaged property "before the ink is dry on the mortgage". Prior to the enactment of s 36, she submits, the court had only a limited jurisdiction to deny a mortgagee possession of the mortgaged property. In support of this submission she relies on the following passage from the judgment of Russell J in *Birmingham Citizens' Permanent Building Society v Caunt* [1962] Ch 883, [1962] 1 All ER 163 at p 912 of the former report:

". . . 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 the 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 to the mortgagor a chance of paying off the mortgage 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 circumstances such as temporary inability of a party to attend, and so forth."

[54] Miss Windsor points out that in *Royal Trust v Markham* [1975] 3 All ER 433, [1975] 1 WLR 1416 at 1420E of the latter report, Sir John Pennycuik V-C described the exception identified by Russell J in the passage just quoted as being the "only" exception prior to the enactment of s 36.

[55] Turning to s 36, Miss Windsor points out that both the Master and the judge took the view that Mr Harrison had failed to satisfy the court that the circumstances were such that he was "likely to be able within a reasonable period to pay any sums due under the mortgage" (a condition to which the judge referred as the "trigger condition").

[56] Miss Windsor accepts that where s 36 does not apply there may remain a residual jurisdiction in the court to postpone the giving of possession to a mortgagee, but she submits that such a jurisdiction can be of only a very limited nature, exercisable only so as to postpone the giving of possession for a short period pending a sale of the mortgaged property. In support of this submission she relies on the decision of this court in *Cheltenham & Gloucester Plc v Booker* [1997] 1 FLR 311, (1996) 73 P&CR 412 at 415 of the latter report per Millett LJ. Accordingly, she submits that in any event that limited jurisdiction is not one which can avail Mr Harrison in the instant case. Apart from that, she submits, the only jurisdiction to postpone the giving of possession of mortgaged property to a mortgagee is that conferred by s 36.

[57] Miss Windsor further submits that the court's general case management powers under Pt 3 of the Civil Procedure Rules ("the CPR") do not extend to conferring on the court jurisdiction to grant the stay which the judge granted in the instant case.

[58] In the alternative, should the court have jurisdiction to grant a stay of the possession order by reference to the *Lloyd's v Jaffray* litigation, Miss Windsor submits that there was no good reason for granting the stay and that the judge's decision to grant it was plainly wrong.



[59] Mr Harrison (who as I say appears in person, but who also relies upon a written skeleton argument prepared by a Mr Toogood of the body Legal Action Charity) submits that the judge had jurisdiction to grant the stay in the exercise of his general case management powers. He relies in particular on r 3.1(2)(f) which enables the court to "stay the whole or any part of the proceedings either generally or until a specified date or event", and on r 3.1(2)(m), which enables the court to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective".

[60] On the footing that the court had jurisdiction to grant the stay, and in support of his submission that the stay should not be lifted, Mr Harrison prays in aid the overriding objective of the CPR as formulated in r 1.1, submitting that it would be disproportionate for the stay to be lifted pending the outcome of the appeal in the Lloyd's v Jaffray litigation. He points out that the property is his only asset of any substantial value, and that he has spent much time and effort in renovating it. In contrast, he says, the Bank is a large multi-national company with very substantial resources. Allowing the stay to remain in place will, he says, relieve some of the pressure on him and allow him to prepare his best possible case both in this action and in the Lloyd's v Jaffray litigation. Conversely, he says, if the stay is lifted his case in the Lloyd's v Jaffray litigation will be prejudiced.

[61] Mr Harrison also contends (through Mr Toogood's skeleton argument) that the lifting of the stay would infringe his right to a fair trial under art 6 of the European Convention on Human Rights, in that he would thereby be deprived of a reasonable opportunity of presenting his case to the court under conditions which do not place him at a considerable disadvantage vis-à-vis his opponent. He also relies on the fact that there is a substantial equity in the house, which would enable him to pay the Bank a penal rate of interest in due course.

[62] I turn first to the issue as to whether the judge had jurisdiction to grant a stay pending the outcome of the appeal in the Lloyd's v Jaffray litigation.

[63] In *Cheltenham & Gloucester v Krausz* [1997] 1 All ER 21, [1997] 1 WLR 1558 Phillips LJ (as he then was) said this (at p 1567 of the latter report)

"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."

[64] I respectfully endorse those observations. In particular, I accept Miss Windsor's submission that the court's case management powers conferred by Pt 3 of the CPR do not extend to the granting of the stay which the judge granted in this case. There can be no doubt that in the exercise of its case management powers, the court may stay a mortgagee's possession order for some procedural reason connected with the proceedings in which the possession order is made, eg a stay pending an application for permission to appeal or pending a substantive appeal where permission to appeal has been granted. Indeed, Master Bowman granted such a stay in the instant case. Similarly, where two sets of related proceedings are pending, case management considerations may dictate that one set of proceedings be stayed pending the final determination of the other. But the stay which the judge granted in the instant case had nothing to do with case management; indeed, it may be said that following his refusal of permission to appeal, there was in effect no case left to manage. Rather, the stay which he granted related to the progress of altogether separate proceedings, the Lloyd's v Jaffray litigation, which were not before the judge and to which the Bank was not a party.

[65] In my judgment, in the circumstances of the instant case the judge had no jurisdiction, either under the CPR or under the inherent jurisdiction of the court, to grant the stay in question. The only jurisdiction available to him to stay the possession order was the statutory jurisdiction under s 36: a jurisdiction which he had already concluded was not available to him on the facts of the case.

[66] In any event, even if the requisite jurisdiction existed, the judge's decision to grant the stay was in my judgment plainly wrong. As the judge acknowledged, his knowledge of the Lloyd's v Jaffray litigation was limited. Had he been made aware of the nature of the "Threshold Fraud point" (to which I referred earlier) it would have been apparent to him that even if the Names were successful in the forthcoming appeal, further proceedings would be required in order to establish a case for relief for

any individual Name (apart, as I understand it, from a limited number of Names whose cases were selected as sample cases, and which did not include Mr Harrison). In relation to the other Names an issue would remain outstanding as to whether those Names were induced to become Names by the alleged misrepresentations. Consequently, any judgment in favour of Mr Harrison against Lloyd's in the Lloyd's v Jaffray litigation would only be forthcoming (if at all) some considerable time in the future.

[67] Mr Harrison submitted that there were number of reasons why the Lloyd's v Jaffray litigation will in practice come to an end in the near future. He referred in this connection to the intervention of the European Commission on the issue of the regulation of Lloyd's, and to the "Threshold Fraud point". He submits that Lloyd's will be forced to make an offer to Names, and that this offer will be made in the near future. There are, however, in my judgment no good grounds for supposing that that result will follow, still less that it will follow in the near future. In my judgment, on the evidence presented to the judge, the only possible conclusion is that any judgment in favour of Mr Harrison would be a long way down the line.

[68] The only possible relevance of the Lloyd's v Jaffray litigation, in my judgment, was in the context of an application under s 36. However, the judge concluded that s 36 was "inapplicable", since it did not appear to him that in the event of his exercising his discretion under sub-s (2) Mr Harrison would be likely to be able to pay off the Bank within a reasonable period. In the light of that conclusion (which seems to me to have been plainly correct), the Lloyd's v Jaffray litigation could not in my judgment provide the judge with any justification for the grant of the stay.

[69] For those reasons, I would dismiss Mr Harrison's Appellant's Notice and allow the Bank's appeal.

JUDGMENTBY-2: TUCKEY LJ

JUDGMENT-2:

TUCKEY LJ: [70] I agree that the three applications for permission to appeal made by Mr Harrison should be dismissed and that the bank's appeal should be allowed, for the reasons given by Jonathan Parker LJ.

JUDGMENTBY-3: ALDOUS LJ

JUDGMENT-3:

ALDOUS LJ: [71] I also agree.

DISPOSITION:

Judgment for the Appellant. Application for permission to appeal made by Respondent denied.

SOLICITORS:

Messrs Allen & Overy