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COMMONWEALTH OF THE BAHAMAS  
IN THE COURT OF APPEAL  
SCCivApp & CAIS No. 24 of 2018

Junkanoo Estates Ltd

First Appellant

Yuri Starostenko

Second Appellant

Irina Tsareva-Starostenko

Third Appellant

And

UBS (Bahamas) Ltd (In Voluntary Liquidation)

(Extension of Time  
Stay)

Before: The Hon Mr Justice Barnett, JA (Actg)

Mr Philip Lundy, Counsel for First Appellant  
Second Appellant appeared Pro Se  
Third Appellant appeared Pro Se  
Mr Marco Turnquest, with Ms. Chizelle Cargill,  
Counsel for Respondent

2 February 2018

1 The oral judgment of the court was delivered by  
2 Barnett, JA (Actg):

3 I have before me two applications. The first is for  
4 an extension of time to file the Notice of Appeal and the  
5 second an application for a stay of execution of an order made  
6 by Mr. Justice Evans on 21st December, 2017.

7 With respect to the application for an extension of  
8 time, on 23rd March, 2015, on an application for summary  
9 judgment in which all parties were present, the court gave  
10 a judgment that the present appellants pay the sum of  
11 \$920,164.87 together with interest and costs. The court also  
12 ordered that if the judgment debt was not paid by 13th April,  
13 2015, the appellants were required to vacate the premises and  
14 hand over all documents to their possession relating to the  
15 property.

16 The appellants sought to appeal that judgment of  
17 23rd March, 2015, but could not do so because they never  
18 obtained the leave of the court and all attempts to appeal  
19 that judgment failed up to the Privy Council. As a result of  
20 that, on 24th April, 2017, the appellants sought from  
21 Mr. Justice Evans leave to appeal that judgment of 23rd March,  
22 2015.

23 On 21st December, 2017 Justice Evans granted leave  
24 to appeal to this court on "the one point which I consider  
25 warrants consideration". In granting leave, Mr. Justice Evans

1 said:

2 "However, I cannot agree that an appeal on that  
3 point would be hopeless. The interesting factor  
4 is that there is still before the Court  
5 a counterclaim in which the Defendants intend to  
6 raise issues that may affect the issue determined  
7 on the Summary Judgment Application. These  
8 details were not available to the Court as  
9 Mr. Mackay failed to have the relevant affidavit  
10 filed in time for the hearing in March 2015 and  
11 did not seek an adjournment to do so. These are  
12 matters which the Court of Appeal may consider if  
13 they are persuaded on an appeal that there is a  
14 discretion in the circumstances of this case to  
15 set aside the Order."

16 Having granted leave, it was still necessary for the  
17 appellants to obtain an extension of time to file its Notice  
18 of Appeal, and by a document dated 5th January, 2018, they  
19 sought that extension of time.

20 Counsel for the proposed respondent has objected to  
21 the court granting that extension. Whilst I have sympathy for  
22 the point they make about the delay, it seems to me that  
23 Justice Evans having granted leave to appeal on that point,  
24 indicating that point warranted consideration by this court,  
25 in all of the circumstances I should extend the period of time  
for them to file the Notice of Appeal, and I grant that time  
to today's date to 2nd February, 2018. The proposed  
appellants did in fact file a Notice of Appeal on 1st  
February, 2018, and I order that that Notice of Appeal stand  
as a valid Notice of Appeal filed within the time extended by  
this court for the purposes of appeal. I acknowledge the fact

1 that counsel for the respondent is taking that objection, that  
2 the Notice of Appeal goes beyond that in which leave was  
3 granted. That is an objection he can make substantively  
4 during the course of the appeal itself.

5 With respect to the application for a stay, UBS, the  
6 proposed respondent, is a mortgagee and, as a mortgagee, has a  
7 legal right to possession. That right exists regardless of  
8 whether or not there is a default by the appellants in the  
9 mortgage. It is a right vested in the mortgagee immediately  
10 upon the making of the mortgage.

11 The appellants argue that the mortgage is void and  
12 as a result of which that right to possession does not exist.  
13 A review of the decision or the advice of the Privy Council to  
14 Her Majesty delivered on 3rd April, 2017, Lord Sumption  
15 described the appellants' position in paragraph 3 of that  
16 advice. He says:

17 "The defendants say that they have a defence.  
18 This is that the alleged defaults were due to  
19 UBS's own breaches of their obligations in  
20 relation to the management of the invested funds,  
21 in particular in failing to provide an electronic  
22 trading platform for the investment of the funds  
23 under management and failing to carry out certain  
24 trades. It is also said that there is  
25 a cross-claim for damages flowing from the same  
breaches."

23 There is no suggestion in the Board's advice that  
24 part of the defence was that the mortgage was void. In the  
25 circumstances, I move on the basis that there was a mortgage

1 in existence which gives UBS the right to possession. I see  
2 no reason to deprive them of that right. The court made an  
3 order in April of 2015 requiring the appellants to deliver  
4 possession up and the court made a further order in December  
5 of 2017 requiring the appellants to deliver up possession.  
6 UBS, as a mortgagee, is entitled to possession and nothing  
7 said by the appellants persuades me that there is a basis for  
8 depriving them of that legal right. Requiring the appellants  
9 to vacate the property and deliver up possession will not make  
10 the appeal nugatory. They are still able to pursue their  
11 appeal. The dispute is a dispute about money and if they are  
12 right, they could be compensated in monetary terms. There is  
13 no reason for them to remain in possession against the right  
14 of the mortgagee.

15 For those reasons, I refuse the application for  
16 a stay, the order of Justice Evans stands, and the appellants  
17 must vacate the property by 4th February, 2018.

18 The costs of application for a stay will be paid by  
19 the appellants. Such costs to be taxed, if not agreed.

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21 Dated this 2nd day of February, 2018

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BARNETT, JA (Actg)

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