

**COMMONWEALTH OF THE BAHAMAS**  
**IN THE SUPREME COURT**  
**Common Law & Equity Division**

**2011/CLE/gen/01693**

**BETWEEN**

**BANK OF THE BAHAMAS LIMITED**

**Plaintiff**

**AND**

**MARK OSCAR GIBSON**

**Defendant**

**Before Hon. Justice Ian R. Winder**

**Appearances: Jamal Davis for the plaintiff**

**The defendant appeared pro se**

**15 and 20 January 2020**

**JUDGMENT**

## WINDER J.

On 20 January 2020, in an oral judgment, I granted the plaintiff's application for summary judgment. As requested I now explain briefly, in writing, the reasons given for that decision.

### Background:

1. The defendant, (Gibson) who had been an existing customer of the Bank obtained an additional or new commercial loan from the Bank in the amount of \$80,000 in November 2006. This new loan, according to the commitment letter, brought Gibson's indebtedness to the Bank to \$307,101.09. The two loans had required separate payments from Gibson of \$1,700 and \$1,013 (\$2,713) respectively. The loans were secured by demand mortgages over property belonging to Gibson.
2. In May 2009 the Bank and Gibson agreed to the restructuring of the loan facilities. The earlier period (between November 2006 and May 2009) did not reflect punctual and regular payments of the amounts due by Gibson (See Exhibit MOG-5 of Gibson's 20 December 2019 affidavit). The introductory paragraph of the commitment letter (Exhibit MOG 3 of Gibson's 20 December 2019 affidavit) 26 May 2009 reflected the economic circumstances under which the loan being restructured:

*Bank of the Bahamas International Bank recognizes that the weakness in local economic conditions, precipitated by the global recession has created a certain degree of financial disharmony amongst families and individuals across almost all business sectors. As a result of this the Bank is seeking to provide our customers with financial relief based on individual circumstances.*

3. The restructured terms reflected a loan sum of \$305,855.66 which was to be repaid over a 20 year period and to mature on May 30, 2029. The consolidated payment was to be \$2,558.30.
4. On 9 December 2011, the Bank alleging that Gibson had been in arrears of the loan facility, commenced this action against him. The Statement of Claim endorsed on the Bank's Writ, claimed the following relief:
  - (a) The sum of \$295,713.92

- (b) Interest on the sum to the date of judgment
- (c) Costs

5. The Bank has applied for summary judgment by Summons dated 13 May 2019. In support of the application they relied on the affidavits of Jamison Davis filed on 15 December 2012, the affidavit of Anton Higgs dated 9 June 2019 and the affidavit of Paulette Butterfield dated 14 January 2020. Gibson filed a "counter" Summons on 20 December 2019 seeking to strike out the summary judgment application of the Bank. Gibson relied upon affidavits in support of his case filed on 14 December 2012, 20 December 2019, 8 January 2020 and 16 January 2020. Gibson also relied on an affidavit of accountant Lynden Maycock (Maycock) also filed on 20 December 2019.
6. The Bank says that Gibson did not have sufficient funds on his account to satisfy payments for October 2009, January to March 2010, August 2010, October to December 2010, May 2011 and August 2011.
7. Gibson admits to not having paid anything on the loan facility since 2016. In his 16 January 2020 affidavit he asks that he be permitted to pay the sum he says is due (\$286,113.17), within 240 days.
8. Gibson, who filed a Defence and Counterclaim, alleges that he was not in default of his payments under the loan facility. Gibson relies on an entry in his accounts of the Bank which is identified as "principal disbursement", on 4 September 2009. He says that the last disbursement made by the Bank under the loan facility was made on 4 September 2009 and therefore his payments ought not to have begun until 30 October 2009 rather than 30 May 2009, as asserted by the Bank. This, Gibson says in his Defence, is the result of a provision in the 29 November 2006 commitment letter (relating to the loan purchase property and inventory for his business) which said that:  
"Repayment: **B\$1,700** (Principal and Interest) per month commencing the 30<sup>th</sup> day of the first month following full disbursement of the loan proceeds."  
Gibson, it seems, alleges that this is relevant as the 26 May 2009 commitment letter also provided that "*all other existing terms and conditions outlined in the original loan agreement remain unchanged*".

9. Gibson sought to rely on this provision and an assessment made by Maycock that he was not in arrears of the loan. Maycock, who qualified his assessment of the state of the loan, as not satisfying internationally recognized standards, premised his assessment on the fact that the payments were due to commence on 30 October 2009 and not 30 May 2009. There was no reason provided by Maycock for this view as to the date the loan repayments were to commence.

#### Analysis and Disposition

10. Applications for Summary Judgment under Order 14 rule 1 of the RSC carries the simple test that there is no defence to the claim in the plaintiff's Writ of Summons.
11. On considering the submission and the evidence presented I was satisfied that there was no real defence to the claim. Appreciating that this was a summary application, it was nonetheless evident from the weight of the evidence and the conduct of Gibson that there was no real defence to the claim of the Bank, save perhaps as to the quantum of the amount due. That evidence and conduct may be seen in the following:-
  - (a) It is accepted that the restructured loan was for 20 years to be repaid monthly. With a maturity date of 30 May 2029, it seems clear that the payments were to begin, at the latest, in June 2009. The payments therefore could not have been agreed to commence in October 2009, some 5 months later, as suggested by the Gibson defence. This effectively deprived the Bank of 5 payments and would not amount to a full repayment of the loan by the maturity date.
  - (b) Gibson himself had earlier sworn, in paragraph 6 of his affidavit of 14 December 2012, that his payments were to begin in June 2009. His pleading and later submissions contradicted this.
  - (c) Gibson's conduct also demonstrates that he understood, contrary to his Defence, that payments were due from at least June 2009. Gibson began making payments on his account in the new amount of \$2,558.30 (or near to it) on July 3 2009 not October 2009. [An additional disputed sum of 3,668.22 was paid by Gibson on 30 May 2009, which the Bank says was with respect to a pre-existing facility. If this sum was to be credited to the new loan, as Gibson alleges, this further contradicts his assertion that the first loan repayment was due on 30 October 2009.]

12. Respectfully, a defence by Gibson, that the full sums were not disbursed until 4 September 2009 is untenable. This was the restructuring of existing loan facilities and therefore no moneys were being disbursed from the Bank, as had occurred when Gibson was purchasing the property and inventory under the prior facilities. Any movement of funds were purely notional. The moneys being "loaned" to Gibson, had long been received by him or disbursed on his behalf. The loan balance on 27 May 2009, in Gibson's accounts with the Bank, was already at \$306,666.07, bearing in mind the loan was \$305,855.66. The Bank explained (without any serious dispute) that the 4 September 2009 entry was an internal allocation by the Bank to bring the loan current and not a disbursement to anyone. The provision as to disbursements in the November 2006 commitment letter could not therefore properly relate to the May 2009 loan facility.

13. Further, Gibson's submission, as to the Bank not requiring payment until October 2009, is not only against the weight of the evidence or his conduct but also defies economic or business sense. His submission is that the Bank, restructuring the loan, waived the requirement for Gibson to make 4-5 principal and interest payments. The submission is without any contemporaneous written or oral communication to support it.

14. Even if Gibson's payments were to commence on 30 October 2009 (which was not accepted by the Bank), his payments, by his own account were still short of the \$58,840.90 (23 x \$2,558.30) in monthly payments which would have been due at 30 August 2011 (the date at which the claim in the Writ referenced). According to the evidence of Maycock at page 4 (finding (f)) in his report, Gibson had paid \$56,628.93 up to 30 August 2011. If the payments ought to have commenced in June 2009, Gibson ought to have paid \$67,074.10 (27 x \$2,558.30). His payments therefore fell far short.

15. Having considered the matter I was satisfied that the Bank had made out the case for summary judgment. Gibson, in my view, was clearly in default of the loan facilities and did not have a real defence to the claim, save maybe as to the amount ultimately due

to the Bank. Further, in light of Gibson's admission that he had not paid the loan facility since 2016, I gave summary judgment for the Bank for breach of the mortgage loan facility with damages to be assessed by the Registrar.

16. Having granted summary judgment, I therefore struck out Gibson's application to strike out the Bank's application.

Dated this 10<sup>th</sup> day of August 2020

A handwritten signature in black ink, appearing to be 'I. Winder', written in a cursive style.

Ian Winder

Justice