COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2021/CLE/gen/00084

IN THE MATTER OF property comprised in an Indenture of Mortgage dated the 24th January A.D. 2011 between Mark Oscar Gibson of the one part and Commonwealth Bank Limited of the other part and of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 11324 at pages 275 to 296.

IN THE MATTER OF property comprised in a Certificate of Upstamping dated the 30th day of August A.D.2012 between Mark Oscar Gibson of the one part and Commonwealth Bank Limited of the other part and of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 11903 at pages 365 to 388.

BETWEEN

COMMONWEALTH BANK LIMITED

Plaintiff

-AND-

MARK OSCAR GIBSON

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Michela Barnett-Ellis of Graham Thompson for the Plaintiff
Mr. Mark Oscar Gibson –pro se litigant

Hearing Date: 21 March 2022

Practice and Procedure - Summary Judgment - Whether there are factual issues to be tried - Whether the Defence to Counterclaim is a bare defence - Order 14 Rules 1 and 5 of the Rules of the Supreme Court 1978

The Plaintiff sued the Defendant for payment of all monies owing to it under a restructured mortgage. The Defendant signed a promissory note and a commitment letter promising to pay to the Plaintiff the sum of $206,496.00 together with interest calculated at a daily rate of 8% per annum. The mortgage was secured by a lot of land in the Eastern District of the Island of New Providence.

Having defaulted in the making of payments, the Plaintiff seeks payment of all monies owed and vacant possession of the property.

The Defendant filed a Defence and a Counterclaim. In the Counterclaim, he alleged, among other things, that the Plaintiff held sufficient monies to satisfy the mortgage and, in effect, the Plaintiff owes him various sums of money as particularized in paragraph 29 of his Counterclaim.

In the interim, the Defendant applied for summary judgment on his Counterclaim alleging, in the main, that the Plaintiff has a bare Defence to the Counterclaim and also, it accepted that held sufficient monies to satisfy the mortgage. The Defendant alleges that the Defence to Counterclaim has no realistic prospect of success.

HELD: dismissing the Defendant's application for summary judgment and awarding costs in the sum of $2,500 to the Plaintiff.

1. The test for summary judgment is whether the plaintiff has a real prospect of successfully defending the claim.

2. The decision on a summary judgment application does not involve the judge conducting a mini trial. The judge should not therefore apply the standard which would be applicable at trial, namely the balance of probabilities on the evidence presented. By the very nature of the proceeding, the testing of evidence is not an option: **Swain v Hillman and another** [2001] 1 All ER 91 at 95b.

3. The power of summary judgment should be approached as a serious step which should be used cautiously and sparingly.

4. If the pleaded case of the parties indicate that there are factual issues to be tried, then the preemptive power of the Court to grant summary judgment ought not to be used: **Swain v Hillman and another** [2001] 1 All ER 91 and **Three Rivers District Council v Governor and Company of the Bank of England** (20010 UKHL 16, para. 95 followed.

RULING

Charles J:

Introduction

[1] On 7 February 2022, the Defendant ("Mr. Gibson") filed a Summons seeking summary judgment pursuant to Order 14 Rule 5 of the Rules of the Supreme Court ("RSC") against the Plaintiff, Commonwealth Bank Limited ("the Bank") on the Bank's Defence to Counterclaim which was filed on 2 February 2022.

[2] On 23 March 2022, I dismissed Mr. Gibson's application for summary judgment on his Counterclaim and gave case management directions for trial of the substantive action. I promised to give some written reasons. I do so now.

Procedural history

[3] By Originating Summons filed on 2 February 2021, the Bank commenced this action against Mr. Gibson wherein it claims:

i. Payment of all monies due and owing to it (the Bank) under a mortgage which was restructured on 22 and 23 December 2016 by promissory note and a commitment letter promising to pay to the Bank the sum of $206,496.00 together with interest calculated at a daily rate of 8% per annum;

ii. Delivery of possession of "All that piece parcel or lot of land being Lot No. 26 on a plan of lots of the Subdivision laid out by The New Providence Land Company Limited" in the Eastern District of the Island of New Providence;

iii. Further and other relief and

iv. Costs.

[4] The Originating Summons was made pursuant to RSC O. 77. It was supported by the Affidavit of Ms. Kayla Darville, the Bank's Manager in its Mortgage Delinquency Department. Ms. Darville has exhibited a number of documents to support the Originating Summons.

[5] On 13 September 2021, Mr. Gibson filed an application seeking, among other things, that the Originating Summons filed on 2 February 2021 be converted to a Writ of Summons because of the substantial factual disputes between the parties.

[6] On 20 October 2021, the Court granted the application and also gave directions for Mr. Gibson to file and serve his Defence and Counterclaim by 17 November 2021 and for the Bank to file and serve its Reply to Defence and Defence to the Counterclaim by 15 December 2021. Case Management Conference was set to take place on 2 February 2022 at 11.00 a.m. with the trial of the action to take place on 1 and 2 December 2022.

[7] On 2 February 2022, the Bank requested additional time to file its Defence to Counterclaim. Ms. Barnett-Ellis, appearing for the Bank, had previously sought such extension from Mr. Gibson who alleged that he had no power to do so. The Court granted leave to the Bank to file and serve its Defence to Counterclaim by 4 February 2022 failing which Judgment shall be entered for Mr. Gibson on the Counterclaim.

[8] The Bank complied with the directions of the Court and filed its Defence to Counterclaim on 2 February 2022; two days ahead of the deadline.

[9] Thereafter, on 7 February 2022, Mr. Gibson launched a two-pronged challenge to the Defence to Counterclaim namely (i) that the Bank had available to it "*funds to service the loan*" and it incorrectly applied his payments and (ii) the Defence to the Counterclaim is a bare defence.

The Counterclaim

[10] For purposes of the summary judgment application, I shall focus on Mr. Gibson's Counterclaim filed on 16 November 2021 and the Bank's Defence to Counterclaim filed on 2 February 2022.

[11] The Counterclaim repeats paragraphs 1- 23 of the Defence. In paragraph 25 of the Counterclaim, Mr. Gibson alleges that the Bank charged him $7,263.40 in unwarranted late fees when it had over $187,626.46 available to them to properly service his loan account and therefore, late fees were unwarranted.

[12] According to him (and this is contained in paragraph 26 of his Counterclaim), the Bank owes him $62,422.96 as of 28 October 2021.

[13] In paragraph 27 of the Counterclaim, Mr. Gibson alleges that the Bank had incorrectly applied $187,626.46 of his repaid amount to loan agreement executed on 23 December 2016. He further alleges that the Bank has admitted that he has paid that sum.

[14] In paragraph 29, Mr. Gibson states that the Bank has breached the contract and he particularised the breach. He avers that the Bank has not properly applied the repaid total amount of $187,626.46 (blended principal and interest) and (unwarranted late fees) resulting in loss to him of $62,422.96 as of 28 October 2021, loss of $7,263.40 in unwarranted late fees, loss to his reputation and creditworthiness and loss in dignity brought about by the Bank.

[15] Mr. Gibson claims, among other things, the following:

1. A refund of $62,422.96 to be applied to the outstanding principal owing to the Bank in the amount of $165,731.71 as of 28 October 2021;

2. A refund of $7,263.40 representing unwarranted late fees to be applied to the principal owed to the Bank;

3. Damages for breach of contract in the sum of $35,350;

4. Damages for false prosecution in the sum of $19,500;

5. Damages for reputational and creditworthiness loss in the sum of $23,500;

6. Damages for humiliation due to false claim and prosecution in the sum of $18,750;

7. Interest and;

8. Costs.

Defence to Counterclaim

[16] In paragraph 2 of the Defence to Counterclaim, the Bank repeats paragraphs 3 to 8 of its Writ of Summons.

[17] In paragraph 3, the Bank refers to paragraph 24 of the Counterclaim and denies that Mr. Gibson was up-to-date with his loan obligations. In fact, the Bank alleges that, at the commencement of this action on 2 February 2021, Mr. Gibson's last

payment was on 9 March 2020. He did not make any payments for 11 months. The loan was in arrears in the sum of $81,034.23 and, as of 2 February 2022, Mr. Gibson owed the Bank the sum of $264,208.18.

[18] Further, in paragraph 3 of its Defence to Counterclaim, the Bank denies the following:

(i) that it owes Mr. Gibson $69,686.36;

(ii) that Mr. Gibson only owes the sum of $165,731.77 as of 28 October 2021. The Bank repeats that Mr. Gibson owes the sum of $264,208.18;

(iii) that Mr. Gibson owes nothing in interest as of 28 October 2021. The Bank repeats that, as of 2 February 2022, Mr. Gibson owes the sum of $264,208.18;

(iv) that Mr. Gibson owes nothing in late fees as of 28 October 2021. The Bank repeats that Mr. Gibson owes the sum of $264,208.18;

(v) that the Bank had available to it the sum of $187,625.46 belonging to Mr. Gibson to keep his loan account up to date;

(vi) that Mr. Gibson only owes add-on charges in the sum of $24,317. 96 to the Bank. The Bank repeats that as of 2 February 2022, Mr. Gibson owes the sum of $264,208.18 and;

(vii) that the calculations contained at paragraphs 6 to 18 of the Defence filed on 16 November 2021 failed to take into account that the account was restructured in April 2014 and December 2016 at Mr. Gibson's request.

[19] In paragraph 4 of the Defence to Counterclaim, the Bank denies that Mr. Gibson was charged unwarranted late fees and, in paragraph 5, the Bank denies that it had available to it the sum of $187,626.46 belonging to Mr. Gibson in order to keep his account current.

[20] As to paragraph 26 of the Counterclaim, the Bank denies that it owes Mr. Gibson $69,686.36. The Bank repeats that Mr. Gibson owes it the sum of $264,208.18.

[21] In paragraph 27 of the Counterclaim, the Bank denies that it has not correctly applied the monies paid by Mr. Gibson and, with respect to paragraph 28, the Bank denies that it failed to amortize Mr. Gibson's loan account.

[22] In paragraph 29, the Bank denies that it breached its contract with Mr. Gibson. The Bank also denies that Mr. Gibson suffered any loss and any of the relief claimed. Essentially, the Bank puts Mr. Gibson to prove each and every allegation in the Counterclaim.

[23] During the last hearing, the Court queried whether the Defence to Counterclaim was a bare Defence. Mr. Gibson latched on to it and raised it as many as 12 times in his submissions. Now, having considered the Defence to Counterclaim properly, I retract those words as the Defence to Counterclaim is a very comprehensive one. It also puts Mr. Gibson to prove his assertions. The maxim "*he who asserts must prove*" is still germane and equally applies to circumstances such as the present where a defendant has filed a counterclaim.

[24] A Reply to the Defence to Counterclaim was filed on 11 February 2022.

The summary judgment test

[25] RSC O. 14 sets out the procedure by which the Court may decide a claim or a particular issue without a trial.

[26] O 14 r 1(1) provides as follows:

> **"Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant."**

[27] O. 15 .r. 5(1) states:

> **"Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then subject to paragraph (3), the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the court for judgment against the plaintiff on that claim or part."**[Emphasis added]

[28] In **Swain v Hillman and another** [2001] 1 All ER 91 at 92, Lord Woolf MR said that "*the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success"*. At page 95b, Lord Woolf MR went on to say that summary judgment applications have to be kept to their proper role. They are not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. Further, summary judgment hearings should not be mini-trials. They are simply to enable the Court to dispose of cases where there is no real prospect of success.

[29] The judge should not therefore apply the standard which would be applicable at trial, namely the balance of probabilities on the evidence presented. By the very nature of the proceeding, the testing of evidence is not an option: **Swain v Hillman and another** [2001] 1 All ER 91 at 95b.

[30] The test for summary judgment is for the Court to be satisfied that the Defendant (in this case, the Bank) has no real prospect of successfully defending the claim. The onus is on the Plaintiff (Mr. Gibson") to show that the Defendant (the Bank) has no arguable case with respect to his Counterclaim.

[31] The common law also aids in highlighting the importance of a full trial to achieve the interests of justice and therefore, the power of summary judgment should be approached as a serious step which should be used cautiously and sparingly. This point was accentuated by Judge LJ in **Swain** when he said at page 96(a) – (c):

> **"To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence,**

> **the discretion to the court to give summary judgment…<u>if there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable</u>. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court."** [Emphasis added]

[32] Further, summary judgment should only be granted by a court in cases where it is clear that a claim (or defence) on its face obviously cannot be sustained or in in some way, an abuse of the process of the court. In **Bolton Pharmaceutical Co. 100 Ltd v Doncaster Pharmaceuticals Group Ltd and Other** [2002] EWCA Civ. 413, Mummery L.J. stated:

> **"17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kind of case. <u>The classic instance is where there are conflicts of fact on relevant issues which have to be resolved before judgment can be given….A mini trial on the facts…without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice</u>.**
>
> **18. <u>In my judgment, the Court should also hesitate about making a final decision without a trial, where, even though there is no obvious conflict of fact at the time of the application. Reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case</u>."** [Emphasis added]

[33] Therefore, the Court should be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff (Mr. Gibson, on his Counterclaim) is entitled to summary judgment if the defendant (the Bank) does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of RSC O. 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others. In reaching its conclusion, the Court has to be satisfied that there is no real question of fact to be tried.

Discussion

[34] This is a money lending action. It is not disputed that Mr. Gibson borrowed the sum of $206,496.00 from the Bank. He agreed to mortgage to the Bank his property as security for the loan. He also agreed to repay the monies borrowed plus interest at a rate of 8.00% per annum. The loan went into default in August 2019 when Mr. Gibson did not make any payments for the months of June, July, and August and the next payment was in November 2019.

[35] According to the Bank, Mr. Gibson has paid the sum of $236,418.25. Of that sum, $34,473.94 was applied to principal and $145,889.12 was applied to the interest which accrued on the loan. As of the 19 October 2021, the loan remains outstanding in the sum of $254,824.99.

[36] Mr. Gibson does not agree with the factual assertions by the Bank and alleges, in his Defence and Counterclaim, that the Bank had available to it "*funds to service the loan*". According to the Bank, it does not hold any other facilities or accounts and therefore, Mr. Gibson must present evidence to demonstrate where and how the Bank allegedly held these monies.

[37] Mr. Gibson also alleges that the Bank incorrectly applied his payments. Undoubtedly, this is a factual issue which Mr. Gibson must present evidence how his payments ought to have been applied.

[38] On the other hand, the Bank alleges that it will prove its case by referring to the loan contract (which includes the commitment letter) which required Mr. Gibson to make monthly payments in the sum of "$2,033.45 (plus 1/12 Life and Homeowners Insurance Premiums)". The Bank says that it will present evidence that Mr. Gibson did not make the payments as agreed and the monies were applied to the principal, interest, late fees and add-on charges appropriately.

[39] As can be gleaned from the parties' contentions, there are serious issues of fact which will have to be ventilated at trial since the Bank has emphatically denied the allegations in the Counterclaim.

[40] The law is clear. In **Three Rivers District Council v Governor and Company of the Bank of England** (2001) UKHL 16, para. 95, the Court explained that summary judgment hearings should not be min-trials. They are simply to enable the Court to dispose of cases where there is no real prospect of success. The Court made the point that summary judgment is easier in simpler cases as opposed to the more difficult ones and stated as follows:

> **"The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be taken that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*…that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all".** [Emphasis added]

[41] As Ms. Barnett-Ellis correctly postulated, pleadings have only recently closed in this matter. Limited evidence has been filed. Neither party has had an opportunity to review all of the documentary evidence or consider witness statements. It is therefore premature to decide the strength of either party's case or indeed, Mr. Gibson's Counterclaim. Mr. Gibson requested that the Court convert the Originating Summons to a Writ because there are serious factual disputes.

[42] As I see it, Mr. Gibson grabs on to my comment that the Defence to the Counterclaim may be a bare one. As I already indicated, the Defence to the Counterclaim meets the threshold requirement of a proper defence. Prima facie, it

appears that the Bank has a reasonable prospect of success on its Defence to the Counterclaim.

[43] In the circumstances and, in the exercise of my discretionary powers, I will dismiss Mr. Gibson's application for summary judgment with costs of $2,500 to the Bank.

[44] I will now give some Case Management Directions so that this matter may proceed to trial on 1 December 2022 with a time estimate of 2 days.

Dated this 7th day of April 2022

Indra H. Charles
Justice