IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2018/CLE/gen/00884

BETWEEN

DR. GLEN S. BENEBY

First Claimant

AND

BENTECH LIMITED

Second Claimant

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Defendant

Before:	**Her Ladyship The Honourable Madam Senior Justice Deborah Fraser**
Appearances:	**Mr. Maurice Glinton KC and Ms. Glinton for the Dr. Glen S. Beneby and Bentech Limited**
	Mr. Luther McDonald KC, Ms. Wynsome Carey and Mr. Darzhon Rolle for First Caribbean International Bank (Bahamas) Limited
Hearing Date:	**25th June 2024**

Summary Judgement—Rule 15. 2 of the Supreme Court Civil Procedure Rule –striking out of counterclaim-Interim Injunction-

RULING

FRASER, SNR. J

[1.] This is an application brought on behalf of the Claimants, Dr. Glen S. Beneby and Bentech Limited, (the First and Second Claimants), for Summary Judgment and Interim Injunction filed on 2 February 2024. This Application is supported by the Affidavit of Dr. Glen S. Beneby and Benjamin Beneby filed on 2 February 2024. The Defendants relied on the Affidavits of Sandra Bandelier.

[2.] The Claimants are seeking the following reliefs**:** (i) Enforcement of the Claimant Mortgage Rights. (ii) Striking out the Defendant's counterclaim pursuant to Rule 62.2 of CPR and Rule 62.6 of CPR**.** (iii) A stay of the enforcement of the mortgage and money lending action. (iv) Grant of an interim injunction pursuant to section 21(1) of the Supreme Court Act.

Background

[3.] The First Claimant, Dr. Glen S. Beneby, acts as a guarantor for the Second Claimant, Bentech Limited, the borrower, (collectively, "the Claimants"). The Claimants are customers of First Caribbean International Bank ("FCIB") (the Defendant).

[4.] Bentech, a company beneficially owned by Dr. Glen Beneby, acquired a condominium complex at Lot 9, Sunrise Beach Estates, New Providence, through a $600,000 mortgage with Barclays Bank PLC in 1994, with an Assignment of Rents allowing the Bank to claim rental income in case of default. Additional financing followed: a $204,000 Deed of Further Charge in 1998, a $498, 505 Second Further Charge in 2003, and a 2011 refinancing where repayment of an existing loan totaling $498,505 was consolidated into a $1,233,000 facility, along with a $25,000 renovation loan and a $37,000 facility for property insurance.

[5.] The Defendant is First Caribbean International Bank (Bahamas) Limited ("FCIB") a company incorporated under the laws of the Commonwealth of The Bahamas and licensed under the provisions of The Bank and Trust Companies Regulation Act, 2000 to carry on the business of banking within the said Commonwealth of The Bahamas.

Procedural History

[6.] The substantive matter was begun by Writ of Summons and Statement of Claim filed by the Second Claimant on 31 July 2018 seeking damages for: (i.) Breach of Mortgage contract; alleged failure to apply payments to its loan account and (ii.) Breach of contractual obligations pursuant to the Financial Transactions Reporting Act 2000.

[7.] On 10 August 2018 the Writ was amended and on 14 September 2018 a Statement of Claim was filed.

[8.] On 2 November 2018 the Defendants filed a Summons to Strike Out the Statement of Claim pursuant to RSC O.18 r.19 and inherent jurisdiction of the court on the grounds it discloses no reasonable cause of action.

[9.] On June 23, 2021, Justice Charles (as she then was) dismissed the Bank's Summons and Writ to Strike Out, filed on November 2, 2018. Bentech was directed to file and serve an Amended Statement of Claim by June 29, 2021.

[10.] On 13 July 2021, the Claimants complied with the directions of the Court and filed it Amended Statement of Claim.

[11.] The Defendant filed a Defence on 12 August 2021.

[12.] Thereafter both parties filed several Witness Statements and Affidavits in support, namely: on 14 December 2022 Defendant filed Witness Statement of Linda Bandelier; and, on 10 February 2023 Defendants file Affidavit of Carlene Farquharson; on 3 July 2023 Claimant filed Affidavit of Linda Bandelier; on 8 March 2023 Claimants filed Affidavit of Louize Charles; on 14 April 2023 Claimant filed Witness Statement of Dr. Glen Beneby; 31 August 2023 Claimants filed Benjamin Beneby Affidavit in support.

[13.] On 10 November 2023, Claimants filed a Summons and Re-Amended Statement of Claim.

[14.] On 14 December 2023, Defendant filed an Amended Defence and Counterclaim.

The Counterclaim

[15.] In the Defendant's counterclaim it repeated in paragraphs 1 to 26 of the Defence. At paragraph 36 – 39, the Defendant alleges that the Claimants breached the credit facility terms by failing to make agreed monthly payments, resulting in arrears and an outstanding balance. Further at paragraph 38 the Defendant exhibited a June 8, 2022, letter from the Second Claimant's attorney acknowledging the Claimant's refusal to pay and refusal to make the agreed payment pending the outcome of the action.

[16.] Further in paragraph 39 the Defendant avers that notices of default and termination were served on the Claimants giving them 14 days to remedy the breaches or face liability for $294,185.26 in arrears and $10,490.28 in loan charges. The Claimants failed to comply, leading to the termination of the loan and liability for the outstanding sums.

[17.] On 19 January 2024 Claimants filed a Reply and Defence to the Counterclaim and thereafter on 2 February 2024 the Claimants filed a Notice of Application for Summary Judgment.

ISSUES

[18.] The issue that this Court must decide is:

Whether the summary judgement should be granted to the Claimants for issues arising out of the Re-amended Statement of Claim, specifically paragraphs 15 and 22; and the Defence and Counter Claim at paragraphs 36-39.

EVIDENCE

The Claimant's Evidence

[19.] On 2 February 2024, the Claimant's filed an Affidavit of Dr. Glen S. Beneby and Benjamin Beneby in support of the Notice of Application of Summary Judgment.

The Defendant's Evidence

[20.] The Defendant relied on the filed Affidavits of Linda Bandelier filed herein on the 9 September 2019 and the 19 March 2021 respectively.

Claimant's Submissions

[21.] In the Submission in Reply, Counsel for the Claimants submit that the summary judgment application is focused on particular issues rather than the entirety of the case. Specifically, it pertains to paragraphs 15 and 22 of the Re-Amended Statement of Claim, filed on 10 November 2023, and paragraphs 36 to 39 of the Amended Defence and Counterclaim, filed on 14 December 2023.

[22.] Counsel for the Claimants, pleaded in it Re-Amended Statement of Claim at paragraph [15] that the Claimants consistently maintained sufficient funds in the mortgage accounts to cover the stipulated monthly payments of $12, 826.87 via standing orders. As of the date of the writ, 143 of 144 required payments had been made, demonstrating compliance and supporting their application for summary judgment.

[23.] Counsel for the Claimants further pleaded at paragraph [22] that, due to the apparent discrepancies identified in the Baker Tilly Report regarding the mortgage transactions, the Bank cannot enforce personal guarantees or rent assignment on the First Claimant's for $900,000.00 and $1,302,505,000.00 without first justifying these discrepancies to the Court.

[24.] Counsel for the Claimants oppose the Defendant's allegation that the Claimants breach the credit facility terms and that the Defendant failed to account for the discrepancies and irregularities in the mortgage transactions as identified in the Baker Tilly Report.

[25.] Counsel for the Claimants aver that the Defendant has breached their obligations under the Bank and Trust Companies Regulation Act 2000, the Homeowners Protection Act and the Claimants seek relief under the Mortgages Act and the Money Lending Act. He argues that the

said relief falls within the Courts summary jurisdiction because the Claimants claims are clear and the Defendant cannot establish a bona fide defence or raise a triable issue

cannot establish a bona fide defence or raise a triable issue.

[26.] Counsel for the Claimants further avers that the bank's counterclaim introduces an impermissible new cause of action post filing of Writ, violating principle laid down in **Eshelby v Federated European Bank Ltd [1932]**. Further, counsel submits that the counterclaim derogates from the Claimants legal rights and is a clog to the Claimants right to redeem and breaches of HOPA 2017, sections 21 and 25 of BTCRA, the Money Lending Act and the Mortgages Act. He asserted that such amendments are retroactive and cannot remedy procedural defects. Further, he contended the counterclaim lacks necessary particulars under CPR Rule 62.6 and should be struck out as an abuse of process.

[27.] Counsel for the Claimants, invites the Court to grant the injunction to preserve the status quo pending trial, highlighting the real risk of imminent harm if the application is not granted.

Defendant's Submissions

[28.] Counsel for the Defendant opposes the Claimants' application for summary judgment and submits that paragraphs 36 to 39 of Defendant's counterclaim details the Claimants breach of the credit facility terms by failing to make agreed monthly payments, resulting in arrears and an outstanding balance. Counsel further argued that the Defendant's defence and counterclaim raised significant issues to be tried.

[29.] Counsel submits that the Bank's counterclaim is seeking judgment for the outstanding debt and vacant possession of the property, not the exercise of its power of sale, aligning with the updated circumstances which arose after the filing of the Writ.

[30.] Counsel for the Defendant submits that while the ***Eshelby principle*** **(Eshelby v Federated European Bank Ltd [1932] 1 KB 423)** prohibits pursuing claims based on events arising after litigation begins, it does not preclude the bank's counterclaim, which addresses breaches occurring during the action. Counsel further submits that the CPR 2022 encourages resolving all issues within a single claim, promoting judicial efficiency and the overriding objective and flexibility of the CPR in permitting amendments to address new claims or issues, provided they align with justice and fairness.

[31.] Finally , counsel for the Defendant, submits that the Claimants have not demonstrated a real and imminent risk of harm sufficient to justify the grant of a quiz timet injunction. Counsel

avers that the Court deny the Claimants' application for summary judgment and interim injunctive relief and allow the case to proceed to a full hearing on the merits.

LAW

[32.] The jurisdiction of the Court to grant summary judgment is governed by **Rule 15.2 of the Bahamas Supreme Court Civil Procedures Rules, 2022 ("CPR")**.

> **Rule 15.2 of the CPR provides:**
>
> "The Court may give summary judgment on the claim or on a particular issue if it considers that the—
>
> (a) Claimant has no real prospect of succeeding on the claim or the issue; or
> (b) Where the proceedings are not brought to an end, the Court must also treat the hearing as a case management conference."

[33.] **Rule 15.6 of the CPR** supplements **Rule 15.2 of the CPR** and provides:

> "(1) The Court may give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end.
> (2) "Where the proceedings are not brought to an end, the Court must also treat the hearing as a case management conference."

[34.] **Rule 15.5 of the CPR states:**

> " (1) The applicant must—
>
> (a) File affidavit evidence in support with the application; and
> (b) Serve copies of the application and the affidavit evidence on each party against whom the summary judgment is sought, less than 14 days before the date fixed for hearing the application.
>
> (2) A respondent who wishes to rely on evidence must-
> (a) File affidavit evidence, and
> (b) Serve copies on the applicant and any other respondent to the application;
>
> At least seven days before the summary judgement hearing."

[35.] The test for summary judgment was espoused in **Swain v Hillman and another [2001] All ER 91** Lord Woolf MR at pages [92] and [95] he expressed the following:

> **"Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favor or, where appropriate, in a defendant's favor. It enables the court to dispose summarily of both claims or defence which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct**

the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.

It is important that a judge in appropriate cases should make use of the powers contained in Pt. 24. In doing so he or she gives effect to the overriding objectives contained in Pt. 1. It saves expenses; it achieves expedition; it avoids the court's being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."

[36.] In **Caribbean Civil Court Practice 2011** the Court is cautioned against conducting a mini trial and the applicable test for summary judgment under Part 15 of the New Civil Procedure Rule is explained at pages 144 to 145, which reads:

"The test under Part 15 (ENG CPR 24) is whether there is a real prospect of success in the sense that the prospect of success is realistic rather than fanciful; when undertaking this exercise, the court should consider the evidence which can reasonably be expected to be available at trial – or the lack of it; it is not appropriate for the court to undertake an examination of the evidence (without a trial) and adopt the standard applicable to trial (namely, the balance of probabilities). See Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550, [2001] BLR 297."

[37.] In **Three Rivers District Council v Bank of England (No 3) [2001] UKHL 16, [2001] 2 All ER 513**, Lord Hope at paragraph [158] opined:

"…the important words are 'no real prospect of succeeding'. It requires the judge to undertake and exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary power' i.e., one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospect', he may decide the case accordingly. I stress the aspect because in the course of the argument counsel referred to the relevant judgment of Clark J as if he had made 'findings' of fact. He did not do so. Under RSC Ord 14 as under CPR Pt 24, the judge is making an assessment not conducting a trial or fact finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters."

[38.] As enunciated in numerous cases 'real prospect of success' means a case or defence that is more than merely arguable. As opined by the Court of Appeal in **Bank of Nevis International Trust Services Inc v Belmont Holdings SKN Limited NEVHCA2023/0018**, where the court cited the test in **RBTT Bank Caribbean Limited v Financial Services Authority** SVGHCVAP2021/0005 (delivered 25th January 2023, unreported):

"The test of 'real prospect of success' on summary judgment application means that the claimant or defendant must have a case or defence that is more than merely arguable. There must be a 'realistic' as opposed to a 'fanciful prospect of success'. A claim would be considered fanciful 'where it is entirely without substance or where it is clear beyond question that the statement of case is contradicted by all documents or other materials on which it is based'."

Discussion and Analysis

Whether the Claimants are entitled to summary judgment

[39.] The Court must assess whether the Defendant has a "realistic" prospect of defending the claim or whether these are issues warranting trial. In considering whether the matter is an appropriate one to engage the summary judgment procedure the Court has taken account of the differing views of the parties on the findings in the Baker Tilly Report, the mortgage balance discrepancies and, the dispute regarding the enforcement of the guarantee and interim relief.

Whether the claimants are not in breach of the loan agreement

[40.] It is not in dispute that there exist a bank/customer relationship between the parties. The dispute centers around the mortgage loan balance. The mere fact that both parties have conflicting views over the mortgage loan balance and bank charges which are at the heart of this action suggests that summary judgment is inappropriate at this stage. The Court would be in a better position at trial to assess the Claimant's evidence relating to the Baker Tilly report and the Defendant's mortgage and credit agreement terms. As contemplated in Rule 15.2 of the CPR the test is whether there is a real prospect of success. Based on the submissions of the Defendant there are compelling reasons why the Court ought to dismiss the Claimants application for summary judgment as the Defendant has a real prospect of successfully defending the Claimants claim.

[41.] Whether the Claimants are able to have recourse to the personal guarantee relative to the advance made by the bank. Counsel for the Claimants contends that the issue of enforceability of the guarantee is amenable to summary judgment. Counsel for the Defendant has argued that the applicability of the guarantee should be considered in its entirety. It is trite law that summary judgement proceedings are unsuitable for claims or issues which requires the Court to embark upon a mini trial to resolve an issue which ought to be tried. Bearing this in mind, the dispute of the guarantee is central to the mortgage and credit agreement which are the issues in the substantive action, these are not straightforward issues that the Court can determine without a need for an investigation into the facts. This would then require the Court to embark upon a mini trial.

Counterclaim

[42.] With regard to the sub issue of whether the counterclaim is defective, the Claimant's counsel argues that the Defendant's counterclaim introduces a new cause of action which is impermissible under the ***E'shelby*** principle and that amendments to pleadings take effect retroactively. Counsel for the Defendant avers that the ***E'shelby*** principle does preclude the bank's counterclaim, which addresses breaches occurring during the action. I find merit in Counsel for the Defendant's submission that the procedural defects in the Defendant's counterclaim can be remedied under Part 26 of the CPR which grants the Court discretion to address such issues in a manner that aligns with the overriding objective of achieving justice. I am therefore in agreement with Counsel for the Defendant, that the issues raised in the counterclaim are triable issues.

[43.] This Court is mindful and cautious not to conduct a "mini-trial" when there are triable issues that warrant ventilation at trial. The submission by both Counsels addressing the procedural issues arising in the Defendant's counterclaim as to whether the ***E'shelby*** principle is applicable and whether the court can exercise its discretion stands as complex legal issues that are more than 'merely arguable' points of law to which the Defendant has a real prospect of success. I am therefore of the view that issues raised in the counterclaim and the procedural defects, are issues of law and facts that are not suitable for summary judgement. . These are issues which would be better dealt with at trial.

Interim Injunction

[44.] The Court considered the arguments and legal principles presented by both parties in relation to the Claimants' request for interim injunctive relief. The Claimants argued that there is a real and imminent risk of irreparable harm should the injunction not be granted, pointing to the Defendant's admission of loan termination and the potential impact of possession or sale before resolving the underlying dispute. They relied on principles of preserving the status quo, as outlined in **Cayne v Global Natural Resources PLC and Francome v Mirror Group Newspapers**, contending that the injunction would not prejudice the Defendant since its security interests remain intact. However, the Defendant countered that the Claimants failed to provide sufficient affidavit evidence to substantiate their claims of imminent harm, asserting that the balance of convenience and justice supports their contractual rights to enforce the loan. They argued that the principles in **Francome** are inapplicable to mortgage disputes, where the mortgagee's right to possession is paramount without substantial evidence to justify delay.

[45.] The Court found the Claimants' case for an injunction unsupported by sufficient evidence. While the Claimants raised valid concerns about potential harm, their failure to meet the evidential threshold, particularly for a *quia timet* injunction, weakened their position. The Court also notes the Defendant's financial capacity to compensate the Claimants if necessary, thereby mitigating any potential prejudice. Balancing the risk of injustice, as outlined in **Cayne and Wolverhampton City Council v London Gypsies and Travellers**, the Court in that case determined that the

Defendant's right to enforce its security interests should not be delayed without strong justification. Consequently, the court declined to grant the injunction, concluding that the matter should proceed to a full hearing for substantive resolution. I hereby refuse the request for an interim injunction.

Conclusion

[46.] In conclusion, I find that there are serious issues to be tried relative to the issues raised in the Re-amended Statement of Claim and the Defence and Counterclaim that need to be examined at trial and on that basis summary judgment should not be granted to the Claimants. I hereby refuse the First and Second Claimant's application for Summary Judgment.

[47.] The Claimants shall pay the costs of the Defendant, to be taxed, if not agreed.

Dated this 2nd December 2024

Deborah E. Fraser
Senior Justice