

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

Common Law and Equity Division

2011/CLE/gen/01693

B E T W E E N

BANK OF THE BAHAMAS LIMITED

Claimant

AND

MARK OSCAR GIBSON SR

Defendant

Before: Acting Registrar Mr. Renaldo Toote

Appearances: Jamal Davis for the Claimants
Mark Oscar Gibson Sr., *Pro Se*

Hearing dates: 3 November & 8 December, 2021; 22nd March, 20 & 21 October, 22
November & 2 December 2022

*Assessment of damages— mortgagee's action - outstanding mortgage debt – penalty on interest— penalty on principal –
capitalization of interest on arrears.*

ASSESSMENT OF DAMAGES

Toote, Registrar (Acting)

[1.] This is an assessment of damages pursuant to the order of *Winder, J.* (as he then was) dated 10th August 2020, whereby summary judgment was entered against the Defendant, Mr. Mark Oscar Gibson Sr., upon his admission of breaching his mortgage obligations to the Claimant, Bank of the Bahamas Limited ("the Bank").

Background

[2.] The background to this matter is largely contested. Mr. Gibson was an existing customer of the Claimant Bank when, in or about November 2006, he applied for and obtained a commercial loan in the amount of \$80,000.00. This loan was subsequently consolidated with his then-existing mortgage obligation, resulting in a total indebtedness of \$305,855.66.

[3.] The restructured mortgage agreement provided for repayment over a 20-year term, with interest accruing at a rate of 8% per annum. Monthly payments were fixed at \$2,558.30.

[4.] By letter dated 9th December 2011, the Claimant Bank alleged that Mr. Gibson had fallen into arrears and demanded repayment of the outstanding sums.

[5.] In the Statement of Claim filed 9th December 2011, the Bank asserted that as at that date, the Defendant was indebted to it in the amount of \$300,744.45, comprising:

Principal: \$295,643.92

Interest: \$5,060.53

Late fees: \$70.00

[6.] The Claimant further claims that the Defendant's continuing default caused the indebtedness to increase significantly, such that as at 11 April 2025, the payoff balance was \$664,220.14 representing:

Principal: \$283,570.25

Interest on Overdue Principal: \$72,145.10

Past Due Interest: \$201,715.29

Penalty on Interest: \$100,875.19

Late Fee: \$5,551.00

Accrued Interest: \$363.31

The Dispute

[7.] A central issue in this assessment is whether the Bank is legally entitled to impose a penalty or capitalize arrears on both principal and interest following the Defendant's breach of the mortgage agreement.

[8.] The Defendant, Mr. Gibson, contends that there is no clause within the mortgage agreement that permits the Bank to impose a penalty on unpaid principal or interest, and argues that the amounts now claimed by the Bank exceed what is legally or contractually recoverable.

[9.] In response, counsel for the Claimant, Mr. Davis, submits that Clause 4 of the mortgage agreement authorizes the Bank to capitalize overdue interest and treat such capitalized sums as part of the principal, thereby attracting further interest. He maintains this process does not amount to a penalty but is a contractual mechanism of debt accrual.

[10.] Clause 4 of the mortgage agreement provides:

“IT IS FURTHER AGREED AND DECLARED that if any interest required by these presents to be paid shall not be paid by the day on which the same shall have become payable then without prejudice to any or all of the rights and remedies accruing to the Bank consequent on such default and without rendering such interest other than overdue and immediately payable the interest so in arrear shall thenceforth itself bear interest at the rate aforesaid computed from the date on which the same shall have become payable to the date on which it is in fact paid and may at the sole discretion of the Bank be at any time capitalized and added for all purposes to the principal monies hereby secured and bear interest accordingly until actually paid AND all overdue interest whether capitalized or not and the interest thereon shall be secured and all the covenants and provisions contained in these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal monies hereby secured and the interest thereon shall equally apply to such overdue interest whether capitalized or not and to the interest thereon which shall itself become interest-bearing and subject to capitalization at the discretion of the Bank if still outstanding at the expiration of six (6) months from the date of the original default.”

Evidence

[11.] At the assessment hearing, the Claimant relied primarily on the witness statement of Ms. Paulette Butterfield, Special Activities Manager at the Bank, filed 28 September 2021. Ms. Butterfield gave oral evidence and was cross-examined.

[12.] The Defendant gave evidence on his own behalf and filed several affidavits. Additionally, Mr. Milford Lockhart, a certified chartered public accountant, testified on behalf of the Defendant. However, I did not find Mr. Lockhart’s evidence beneficial to the Defendant’s case. Under cross-examination, he admitted that he had erroneously calculated the amortization period as 347 months, when it ought to have been 240 months in accordance with the terms of the mortgage agreement. Mr. Lockhart further conceded that his analysis was one-sided, having been conducted without full disclosure of the Defendant’s breach of contract, and thus could not accurately reflect the proper state of indebtedness. He also highlighted that the mortgage agreement contained capitalization

clauses and not penalty clauses, and that this distinction was material in determining the Bank's rights under the agreement.

[13.] I find support in the approach adopted by Fraser Snr J. in *Commonwealth Bank Ltd v Mark Oscar Gibson* [2021/CLE/gen/00084], where she too found Mr. Lockhart's evidence lacking in independence and rigor due to an incomplete understanding of the loan's history. As in that case, Mr. Lockhart here relied heavily on amortization assumptions and failed to include the Defendant's own admitted breaches, making his conclusions unreliable for the purpose of determining indebtedness.

Issues for Determination

[14.] The Court must determine:

- a. The total recoverable amount due under the mortgage agreement, inclusive of contractual interest;
- b. Whether Clause 4 validly permits penalty of overdue interest, and if so, whether it has been correctly invoked; and
- c. Whether such penalty sums are recoverable in the absence of express pleading.

Capitalization vs. Penalty

[15.] In support of his position, the Defendant relies on the judgment of *Barnett, CJ* (as he then was) in *Bank of the Bahamas v Alpin O. Russell* [2008/CLE/gen/00449], where it was held that penalty fees are irrecoverable. Notably, Clause 4 of the mortgage in that case was identical to the one before this Court.

[16.] As in the present matter, the Claimant in *Russell* sought to justify additional charges as capitalization pursuant to Clause 4, rather than penalties. *Barnett, CJ* acknowledged that Clause 4 permits the capitalization and compounding of arrears, but did not equate that right to an automatic entitlement to claim unspecified penalties.

[17.] Mr. Davis distinguishes *Russell* by submitting that the term "penalty" here reflects the natural result of capitalization, not an arbitrary or punitive charge. He contends the increase in debt was simply the outcome of the contractually agreed mechanism. It must be reiterated, however, that capitalization inherently involves adding unpaid interest to the principal balance of a loan, thereby accruing further interest on the enlarged sum. Given this definition, it remains unclear why the Bank seeks a separate cost designated explicitly as a "penalty on principal," if such amounts are indeed capitalized and already accruing interest as per Clause 4.

[18.] It is particularly significant that the Bank has not offered any coherent or satisfactory explanation as to why it adopted the terminology "penalty on principal" rather than

consistently using "capitalization," as stipulated in the mortgage agreement particularly if the two are indeed one in the same. This lack of clarity undermines the Bank's position and creates confusion as to whether the sums in dispute constitute genuine capitalized arrears or impermissible penalty charges especially while the Bank failed to justify how the fees were formulated.

[19.] It must be noted, that this mortgage agreement does not define the term "penalty", nor does it indicate that "penalty" and "capitalization" are to be used interchangeably. Without contractual clarity or a defined formula, this Court cannot accept the Claimant's *post-facto* characterization of "penalty on principal and interest" as "capitalization" so as to justify an increase of balances. Corollary, the Defendant has not established any overcharge rates other than the arbitrary use of the phrase "penalty".

[20.] In the context of a mortgage or loan agreement, a "penalty" typically functions as a punitive charge, designed to punish rather than compensate for actual losses. The common law consistently disfavors punitive penalties unless clearly and expressly agreed upon in the contract. Conversely, capitalization is the addition of unpaid interest to the principal balance of a loan, resulting in interest accruing on the enlarged amount. The distinction between these terms is crucial, and any ambiguity favors a restrictive interpretation against the imposing party.

[21.] A penalty on interest and principal in a mortgage contract would typically be treated as a form of liquidated damages, which must be:

- i. expressly defined;
- ii. quantified or quantifiable; and
- iii. agreed upon by the parties as compensation for any breach.

[22.] It must be emphasized that the Statement of Claim does not explicitly plead reliance on Clause 4, nor does it specify calculations or applications of capitalized interest or penalties beyond the nominal late fee of \$70.00. Additionally, the Butterfield witness testimony did not provide a definitive formula or transparent application process for the imposition of such penalties. Moreover, the Bank did not articulate a credible justification for classifying charges as penalties distinct from the capitalization process explicitly allowed by the mortgage agreement. Without contractual clarity, precise definitions, or adequate evidence, this Court finds the Claimant's attempt to justify its terminology as unpersuasive and unsupported by the agreement or by common law principles.

[23.] It bears repeating that in *Commonwealth Bank Ltd. v Gibson* [2021/CLE/gen/00084], *Fraser, Snr J.* accepted the Claimant's entitlement to enforce the capitalized balance where pleaded and supported by contractual documents.

The Pleadings

[24.] It is pertinent at this juncture to reiterate the fundamental legal principle that parties are bound strictly by their pleadings. (*See Bahamasair Holdings Ltd. v Messier-Dowty Inc. [2018] UKPC 25*). This principle is crucial in ensuring fairness, procedural integrity, and predictability in civil litigation. It underscores that parties cannot introduce new matters at trial that have not been explicitly raised and particularized in their pleadings.

[25.] In the case of *Glendon E. Rolle (T/A Lord Ellor & Co) v Scotiabank (Bahamas) Limited* 2017/CLE/gen/01294 the court affirmed the principle that the pleadings serve as a roadmap, marking out clearly the parameters of the issues in dispute. It was emphasized that pleadings must be precise, disclosing distinct causes of action and defences, thus preventing parties from being unfairly surprised at trial.

[26.] Specifically, *Sir Michael Barnett JA* (as he then was) in *Bahamas Ferries Limited v Charlene Rahming* (SCCivApp & CAIS No. 122 of 2018) held unequivocally that the pleadings are the essential starting point in any litigation. His Lordship highlighted that the trial judge's decision must rest solely on the issues presented in the pleadings. It was clearly stated:

“It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. [...] One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.” (*Nada Fadil Al Medenni v Mars UK Limited [2005] EWCA Civ 1041*).

[27.] This binding approach has been reiterated consistently in subsequent judgments, including *Montague Investments Limited v Westminster College Ltd & Another* [2015/CLE/gen/00845], emphasizing the necessity of clarity and specificity in pleadings. The courts have underscored repeatedly that parties' preparations for trial, including decisions on evidence and witness testimony, are inherently based on the pleadings.

[28.] In the instant case, the Statement of Claim does not expressly rely on Clause 4 of the mortgage agreement, nor does it articulate any formula or justification for the penalty charges beyond nominal late fees. The Claimant has neither clearly pleaded nor adequately justified the imposition of separate penalty charges as distinguished from capitalization, as explicitly defined within the mortgage agreement. Without a specific pleading clearly setting forth these allegations, it remains improper and unjust to allow recovery based on an un-pleaded claim.

[29.] Accordingly, consistent with the principles enunciated in the cited authorities, this Court finds that the Claimant's claim for penalties or any sums characterized ambiguously without adequate contractual support or explicit pleading is impermissible and cannot be sustained.

Conclusion

[30.] Given these considerations, the Claimant remains entitled solely to the recovery of clearly pleaded and contractually justified amounts, explicitly excluding any unsubstantiated penalties or unspecified capitalized sums.

[31.] Damages are assessed as follows:

Principal: \$283,570.25

Interest on Overdue Principal: \$72,145.10

Past Due Interest: \$201,715.29

Late Fee: \$5,551.00

[32.] The Claimant shall be entitled to post-judgment interest at the statutory rate of 6.25% under the Civil Procedure (Award of Interest) Act.

Costs

[33.] Having carefully considered the outcome of these proceedings, it is evident that the Defendant achieved a degree of success by successfully challenging and reducing the penalty interest claimed by the Claimant. This substantial reduction in the claim reflects meaningful and tangible success on the Defendant's part, thereby demonstrating the reasonableness and legitimacy of their defense and counter-arguments. It is an established principle under judicial discretion regarding costs, reflected notably in Part 24 of the Supreme Court Civil Procedure Rules, that the court should weigh the extent of success achieved by each party when deciding whether to award costs.

[34.] Accordingly, it is just, fair, and equitable in the circumstances given the Defendant's partial success on crucial matters of dispute, I decline to make any order as to costs in this matter.

Dated the 30th day of April, 2025

[Original signed & sealed]

**Renaldo Toote
Registrar (Acting)**