COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No.43 of 2020

BETWEEN

MARK OSCAR GIBSON SR.

Appellant

AND

THE BANK OF THE BAHAMAS LIMITED

Respondent

BEFORE: **The Honorable Mr. Justice Isaacs, JA**

The Honorable Mr. Justice Jones, JA

The Honorable Mr. Justice Evans, JA

APPEARANCES: **The Appellant Pro Se**

Mr. Jamal Davis, Counsel for the Respondent

DATES: **23 July 2020; 30 November 2020; 18 February 2021**

****

Civil Appeal – Summary Judgment- Order 14 rule 1(1) of the Rules of the Supreme Court- Mortgage Debt-Whether action compromised- Costs

The parties herein entered into a contract dated 26 May 2009, whereby the appellant's previous credit facilities with the respondent bank for the sums of $230,000.00 and $80,000.00 (under an existing loan contract dated 29 November 2006) were consolidated and restructured for a combined sum of $305,855.66, payable over 20 years. The respondent commenced legal action

against the appellant by a specially endorsed Writ of Summons filed on the 9 December 2011 alleging that the appellant had breached the contract.

The respondent applied for Summary Judgment by Summons dated 13 May 2019. Winder J delivered an oral ruling on 20 January 2020 granting the Summary Judgment in the following terms:

> **"IT IS THIS DAY ADJUDGED as follows:**
>
> **(1) That Judgment be entered herein for the Plaintiff herein as against the Defendant herein for damages to be assessed;**
>
> **(2) That the Defendant's said Summons be dismissed; and**
>
> **(3) That the costs occasioned on the Plaintiff's said Summons**
>
> **(4) and on the Defendant's said Summons be for the Plaintiff, to be taxed if not agreed."**

The appellant, who appeared pro se, filed a Notice of Appeal on 26 May 2020.This original notice was supplemented by a further notice filed on 1 September 2020, after the production of the written reasons by the judge. The appellant contended that during the hearing of the application before Winder J, the respondent conceded that all that was due and owing to them was the sum of $286,113.17.

He submitted that in those circumstances the learned judge should have made an order to that effect. Further, the appellant's other point of contention was that, when the demand was made and the action filed, he was not in arrears. He based this submission on his view that the respondent was using the wrong commencement date for the loan payments.

***Held*:** Appeal dismissed. The costs of this appeal are awarded to the respondent to be taxed if not agreed.

(1) It is clear that the trial judge did not construe Mr. Davis' comments as an agreement to compromise the action for the sum of $286,113.17. In my view, he was correct not to do so as what was said could not without more constitute a compromise of the action.

(2) The 2009 agreement clearly stated that the loan would run for 347 months and expire on the **New Maturity Date: (May 30, 2029).** In these circumstances, it was clear that the commencement date would have to be June 2009.

(3) It is clear that there was a dispute as to whether the appellant was in arrears when the demand was issued. However, as noted by the trial judge, in light of the appellant's admission that he had not paid the loan facility since 2016, the only real issue to be determined by the Court was the true amount owing to the bank. In these circumstances,

having regard to the clear terms of O .14 r 1(1) of the RSC the order for Summary was justified. By ordering that damages be assessed the judge has ensured that the issue as to the amount actually due and owing can be determined on that assessment.

Higgs Construction Company v Patrick Devon Roberts and Shenique Esther Rena Roberts 2017/CLE/gen/00801 (unreported)

AerCap Ireland Ltd and others v Hainan Airlines Holding Co. Ltd [2020] EWHC 2025 (Comm)

JUDGEMENT

Judgement Delivered by the Honourable Mr. Justice Milton Evans, JA:

1. The appellant's appeal is against the Order of the Honourable Mr. Justice Ian Winder dated 20 January 2020 whereby he granted Summary Judgment against the appellant.

BACKGROUND

2. The parties herein entered into a contract dated 26 May 2009 whereby the appellant's previous credit facilities with the respondent for the sums of $230,000.00 and $80,000.00 under an existing loan contract dated 29 November 2006 were consolidated and restructured for a combined sum of $305,855.66, payable over 20 years.

3. The commitment letter evidencing the new arrangements was in the following terms:

> **"Date: May 26, 2009**
>
> **Bank of The Bahamas**
>
> **Dear: Mr. Gibson**
>
> **Re: Mr. Mark Oscar Gibson**
>
> **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 many 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.**
>
> **In this regard the undersigned (or name of bank representative) contacted (name of customers) on (date) and**

discussed a temporary restructuring of the terms of the subject account with the Bank. Therefore, we are pleased to confirm with you the amended terms mutually agreed during this conversation:

Loan Amount: $305,855.66
Rate of Interest: 8%
Term: 347
Monthly Repayment: $(2, 5 58.30)
New Maturity Date: (May 30, 2029)

All other existing terms and conditions outlined in the original loan agreement remain unchanged.

If you concur with the above, kindly indicate your acceptance/acknowledgement by signing and returning the enclosed copy to us within 14 days hereof."

4. On 1 November 2011 the respondent issued a demand letter which was in the following terms:

"REGISTERED

November 1, 2011

Hi Technology
T/A Mr. Mark. O. Gibson
 # 21 Sisal Rd
P.O. Box N-8529 Nassau, Bahamas

WITHOUT PREJUDICE

Dear Customer

Ref: Loan Account No. 157M325072740065

The Bank of The Bahamas Limited having it's Registered Office at Sassoon House located at the the corners of Shirley Street and Victoria Avenue in the City of Nassau, Bahamas hereby formally demand that you pay forthwith to the Bank at it's Shirley Street Branch the Sum of Three Hundred and One Thousand, Seven Hundred and Fifty One Dollars and Ten Cents (B$301,751.10) in respect to your obligation under a promissory note between you and the Bank.

Kindly note that interest and late charges will continue to accrue until the date of payment in full. The Bank advises further, that any and all costs incurred in connection with the liquidation of this debt are for your account and will include , but not to be limited to Attorney costs, Court costs and costs of employing a debt collector or similar and are not included in the outstanding indebtedness mentioned above.

For and on behalf of the Bank of the Bahamas Limited.

Wendell Collie **Mr. Llewellyn Owen**
Collection Officer **Manager, Collections"**

5. The respondent commenced legal action against the appellant by a specially endorsed Writ of Summons filed on 9 December, 2011. The Statement of Claim was in the following terms:

"STATEMENT OF CLAIM

1. **The Plaintiff is and was at all material times a company engaged in banking business at diverse branches within The Bahamas.**

2. **The Defendant is and was at all material times the Plaintiff's customer.**

3. **The Plaintiff granted the Defendant a secured loan in the amount of $305,855.66 together with interest thereon at the rate of 8% per annum on the 26th May, 2009.**

4. **The Defendant has defaulted in his payment obligations under the said loan and has failed and/or refused to pay the balance thereunder notwithstanding the Plaintiff's demand for payment.**

5. **The Defendant is indebted to the Plaintiff in the total sum of $300,774.45 made up as follows: $295,643.92 as to the principal sum; $5,060.53 as to interest sum; and, $70.00 as to late fees, as of the 22nd November, 2011.**

PARTICULARS PURSUANT TO ORDER 73 RULE 2 OF THE RULES OF THE SUPREME COURT

a) **The loan was granted on the 26th May, 2009;**

b) The sum of $305,855.66 was lent to the Defendant;
c) The rate of interest charged was 8% per annum and $60.00 per diem;
d) The contract for repayment was made on the 26th May, 2009;
e) The Commitment letter was signed by the Defendant on the 26th May, 2009.
f) The Defendant has re-paid the total sum of $75,103.95 towards the said loan;
g) The amount of principal due but unpaid is $295,643.92;
h) The date of default was the 28th August, 2011;
i) The amount of interest due but unpaid is $5,060.53 as of the 22nd November, 2011;

6. The Plaintiff demanded of the Defendant; payment of all outstanding sums due to the Plaintiff by the Defendant on the 1st November, 2011. Notwithstanding the Plaintiff's demand as aforesaid, the Defendant has failed and/or refused to liquidate his indebtedness as aforesaid, to the Plaintiff.

7. As a result of the matters complained of herein, the Defendant is indebted to the Plaintiff in the total sum of $300,774.45 being $295,643.92 as to the principal sum, the sum of $5,060.53 as to the interest aforesaid, and the sum of $70.00 as to late fees, as of the 22nd November, 2011.

AND THE PLAINTIFF CLAIMS:

1) The sum of $295,713.92;
2) Interest on the said principal sum as of the 22nd November, 2011 in the amount of $5,060.53 and continuing thereon at the rate of 8% per annum or $60.00 per diem up until Judgment; and, at such rate determined by the Honourable Court after Judgment pursuant to the Civil Procedure (Award of Interest) Act, 1992;
3) Costs to be taxed if not agreed; and
4) Such further or other relief as the Court deems just.

Dated the 28th day of November, A.D., 2011"

6. The respondent applied for summary judgment by Summons dated 13 May 2019. In support of the application, the respondent 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. The appellant filed a "counter" Summons on 20 December 2019 seeking to strike out the summary judgment application of the Respondent. The appellant relied upon affidavits in support of his case filed on 14 December 2012, 20 December 2019, 8 January 2020 and 16 January 2020. The appellant also relied on an affidavit of accountant Lynden Maycock (Maycock) also filed on 20 December 2019**.**

7. Winder J delivered an oral ruling on the 20 January 2020 granting the Summary Judgment in the following terms:

> **"IT IS THIS DAY ADJUDGED as follows:**
>
> **(1) That Judgment be entered herein for the Plaintiff herein as against the Defendant herein for damages to be assessed;**
>
> **(2) That the Defendant's said Summons be dismissed; and**
>
> **(3) That the costs occasioned on the Plaintiff's said Summons and on the Defendant's said Summons be for the Plaintiff, to be taxed if not agreed."**

8. The learned judge later provided his reasons in a brief written decision. His written judgment sets out the issues he considered and the conclusions to which he arrived, and I set them out as follows:

> **"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 disbursal", 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 30th 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. **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 | 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 10th day of August 2020"

9. The appellant who appeared prose filed a Notice of Appeal on the 26 May 2020 which was not only prolix but was also not very clear and as such his grounds were not clearly articulated. This original notice was supplemented by a further notice filed on 1 September 2020 after the production of the written reasons by the judge.

10. The Notice of Appeal was also filed out of time, and thus the appellant sought an extension of time. That application was graciously not challenged by Counsel for the respondent, so we granted the extension and proceeded to hear the substantive appeal on the 30 of November 2020. After hearing Counsel, we reserved our decision and promised to provide a written decision which we do now.

DISCUSSION

11. As identified by the trial judge, the question for his determination was whether on the information provided to him by pleadings and affidavits, it could be said that the appellant had no defence to the claim being made by the respondent.

12. Order 14 r 1(1) of the Rules of The Supreme Court 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, <u>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."</u> [Emphasis Mine]**

13. The test which is applicable is well known and was most recently applied by Charles J in the case of **Higgs Construction Company v Patrick Devon Roberts and Shenique Esther Rena Roberts** 2017/CLE/gen/00801 (unreported) where she observed as follows:

> **"[26] Under O. 14 r 5, the test to be applied by the Court is whether there is any "triable issue or question" or whether "for some other reason there ought to be a trial". If a plaintiff's application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff.**
>
> **[27] It is a well-established principle of law that the Court ought to be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 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."**

14. In **AerCap Ireland Ltd and others v Hainan Airlines Holding Co. Ltd** [2020] EWHC 2025 (Comm) **Cockerill J** observed that:

> **"13. The law governing applications for summary judgment is not contentious. In summary:**
>
> **a) The test for summary judgment is that (i) the party against whom the application is made has no real prospect of success on the claim or issue in question, and (ii) there is no other compelling reason why the claim or issue should be disposed of at trial: CPR 24.2.**
>
> **b) A real prospect of success means a 'realistic' as opposed to a 'fanciful' prospect of success": *Swain v Hillman* [1999] EWCA Civ 3053.**

> **c) At the same time, a 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable".**

15. In the present case, Winder J found that the appellant 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. The short answer to this matter is that the judgment of Winder J notes that "**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."** To this extent he accepts being indebted to the respondent and obligated to pay *"at least"*"**($286,113.17.)**

16. The respondent's position as to the appellant's indebtedness is set out in the affidavit of Anton Higgs filed on the 6 September, 2019. In paragraph 3 of that affidavit he stated as follows:

> **"3. That I verily believe that the amount of the Defendant's present indebtedness to the Plaintiff under the Loan account is $487,783.54 (being $317,422.38 as to the principal sum, $167,281.16 as to the interest sum and $3,080.00 as to late fees) as of the 18th day of July, A.D., 2019, that his last payment thereunder was on the 6th day of June, A.D., 2016 and that his arrears thereunder is presently $286,776.34. There are now produced and shown to me marked Exhibits "A.H.-1" and "A.H.-2", a true copy of the Loan account and the Defendant's current account with Plaintiff bearing account number 5510025006 respectively, both as of the said 18" day of July, A.D., 2019."**

17. In his submissions before us, the appellant contended that during the hearing of the application before Winder J, the respondent conceded that all that was due and owing to them was the sum of $286,113.17.

18. He submitted that in those circumstances, the learned judge should have made an order to that effect. The appellant in his second affidavit filed on 16 January 2020 in support of his application to dismiss and strikeout the respondent's application stated as follows:

> **"17. That the Defendant maintains that he is only owing to the Plaintiff $ 286,113.17 as of 30th July, 2012. This is the correct amount calculated by Certified Public Accountant found in Exhibit labeled L.M-1, Appendix-2, Page - 1 of the affidavit of Mr. Lynden Maycock filed 20th December, 2019.**

18. That the defendant humbly asks the court to grant permission to repay the Plaintiff the amount of $286,113.17 in one (1) Disbursement on or before two hundred and forty (240) days of final judgment."

19. The appellant relied on an exchange between the trial judge and counsel for the respondent which is seen in an extract from the transcript as follows:

"THE COURT: Mr. Davis. Case number 1693 of 2011. Mr. Mark Gibson appearing in person.

THE COURT: You were here last on the 15th.

MR. DAVIS: Yes, my Lord.

THE COURT: I received some documents from Mr. Gibson on the 16th.

MR. DAVIS: Yes, I got that as well.

THE COURT: Do you have any issues with it?

MR. DAVIS: No, my Lord, except to say that I see from paragraph eighteen that there is an admission of at least the sum of $286,000 as from 2012 and our request to pay that amount."

20. It is clear that the trial judge did not construe Mr. Davis' comments as an agreement to compromise the action for the sum of $286,113.17.

21. In my view, he was correct not to do so as what was said could not, without more, constitute a compromise of the action.

22. I should note that the appellant's other point of contention was that when the demand was made and the action filed, he was not in arrears.

23. He based this submission on his view that the respondent was using the wrong commencement date for the loan payments. It is unfortunate that the Commitment letter did not have a commencement date. The appellant submitted that in these circumstances as the agreement provided that '**All other existing terms and conditions outlined in the original loan agreement remain unchanged'** the 2006 agreement would govern the commencement date.

24. In my view the learned judge rightly rejected that submission. The 2009 agreement clearly stated that the loan would run for 347 months and expire on the **New Maturity**

Date: (May 30, 2029). In these circumstances it was clear that the commencement date would have to be June 2009.

25. It is clear that there was a dispute as to whether the appellant was in arrears when the demand was issued. However, as noted by the trial judge in light of the appellant's admission that he had not paid the loan facility since 2016, the only real issue to be determined by the Court was the true amount owing to the bank.

26. In these circumstances, having regard to the clear terms of O .14 r 1(1) of the RSC, the order for Summary Judgment was justified. By ordering that damages be assessed the judge has ensured that the issue as to the amount actually due and owing can be determined on that assessment.

27. I should note that it is a cause for concern that a dispute between the parties which had its genesis over a difference of what may have been around five thousand dollars resulted in an action for a claim for the sum of $295,713.92. However, what is of greater concern is that the action which was filed on the 9 December 2011 is still before the Courts unresolved and has now grown to a claim for **$487,783.54**.

28. We were not able to obtain from either party a reasonable explanation for the delay. It suffices to say, however, that this is unacceptable and is not to be considered indicative of how matters are processed through our Courts.

29. In the circumstances as I have found them I would dismiss the appeal and award the costs of this appeal to the Respondent to be taxed if not agreed.

_____

The Honorable Mr. Justice Evans, JA

30. I agree.

_____

The Honorable Mr. Justice Isaacs, JA

31. I also agree.

_____

The Honorable Mr. Justice Jones, JA