

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 184 of 2023**

Between

**GODFREY ALEXANDER FOX
MARY FOX**

Intended Appellants

AND

RBC ROYAL BANK (BAHAMAS) LIMITED

Intended Respondent

**Before: The Hon Sir Michael Barnett, President
 The Hon Madam Justice Crane-Scott, JA
 The Hon Mr. Justice Evans, MB, JA**

**Appearances: Ms. Tanya Wright, Counsel for Intended Appellants
 Mr. Audley Hanna, Counsel for Intended Respondent**

Dates: 14 May 2024, 30 May 2024

Civil Appeal – Application for an extension of time to appeal a judgment – Costs – Costs follow the event – Usual Order as to Costs – Costs of an extension of time application – Rule 24(5) of the Court of Appeal Rules

The intended appellants made an application for an extension of time to appeal a judgment 20 days after the allotted time for appealing.

Held: Extension of time allowed. Costs of the application is to be paid to the intended respondent, to be taxed if not agreed.

The judge failed to identify that the intended appellants disputed a particular transaction. The judge also failed to make any findings regarding a primary issue; this primary issue requires examination during the hearing of a substantive appeal.

Issues of fraud and undue influence were raised by the intended appellants in the court below. Accordingly, the action should have been converted from one brought by Originating Summons into an action by Writ.

Costs are in the wide discretion of the court. However, costs follow the event unless there is a reason to depart from this general rule.

Christopher Stubbs Shanna's Cove Estate Company Limited and Allan Crawford Sharon Crawford SCCivApp. No. 59 of 2020; applied

JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an application for an extension of time to appeal a judgment. It is not the appeal itself.
2. On 29 August 2023, the trial judge gave judgment in favour of the respondent Bank in the following terms:

“I hereby order that the Defendants pay to the Plaintiff the remaining balance of \$292,484.68 due and owing under the 2009 mortgage together with accrued interest until such payment is satisfied. I extend 3 months to the Defendants to satisfy the judgment debt. The Defendants are to bear the costs of these proceedings, to be taxed if not agreed.”

3. In paragraphs 5 and 6 of the judgment, the trial judge sets out the nature of the dispute. He said:

“5. The Plaintiff then commenced action against the Defendants by filing two Originating Summonses. The first was filed 18 May 2012 for leave to enter judgment for the sums outstanding on the mortgage, further relief and costs (action number 691) and the second was filed 22 August 2012 seeking vacant possession of the matrimonial home located Lot 55 Blair Estates (action no. 1114). These matters were consolidated by a consolidation order of Justice Isaacs on 29 January 2013. It is to be noted that subsequently former Counsel for the Plaintiff withdrew the action for possession 13th May 2013, which was confirmed on 17th March 2014. Therefore only the action for judgment on the outstanding funds remained.

6. The Defendant disputes the 2009 transaction indicating that there was never any agreement to the same in 2009 and alleges that they were not aware of an up-stamping of the 1993 mortgage. The Defendant claims that there are not any arrears outstanding with the Plaintiff as they have been current on payments. In any event, the Defendant claims that the Plaintiff has not

complied with Orders 73 and 77 of the Rules of the Supreme Court and this amounts to an abuse of the court's process. In this vein, the Defendant filed a Summons dated 7 March 2022 supported by an affidavit of Mary Fox filed 23 March 2022 to strike out the Originating Summonses in the entire action as an abuse of process and to challenge the Affidavit of Shayla Campbell. The Court dealt with the matter on the admissibility of the Affidavit of Shayla Campbell, who swore an affidavit as Counsel not involved in the matter. Only the regularity of the proceedings was left to be addressed."

4. In paragraph 7, the judge identified the issues for determination. He said:

"7. The issues that arise for determination in this matter are:

- a. whether the up-stamping of 1993 was valid;**
- b. whether the Plaintiff was compliant with Orders 73 and 77 of the Rules;**
- c. whether the Plaintiff's action should be struck out for undue delay and/or as an abuse of process; and**
- d. whether the application to withdraw the action for possession was properly made."**

5. It is to be noted that the judge did not identify that "*The Defendant disputes the 2009 transaction indicating that there was never any agreement to the same in 2009*" as being a matter in dispute, notwithstanding the denial by the intended appellants as stated in paragraph 6 of his judgment. The judge then proceeded with a "Law and Analysis". He said:

LAW AND ANALYSIS

"17. The Plaintiff's Originating Summons does not indicate the Rule under which they are advancing the application for leave to enter Judgment for the sums outstanding under the Mortgage, for further relief and costs. However, in oral submissions, the Plaintiff indicated that it is proceeding under Order 77 of the Rules. Pursuant to Order 77:

"1. (1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely – (a) payment of moneys secured by mortgage;

4. (sic) (1) The Affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule. The rule applies to a mortgage action begun by originating summons in which the plaintiff is the mortgagee and claims delivery of possession or payment of moneys secured by the mortgage or both.

(2) The affidavit must exhibit a true copy of the mortgage and the original mortgage or, in the case of a registered charge, the

charge certificate must be produced at the hearing of the summons.

(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of:-

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the mortgage.

...

(6) Where the plaintiff claims payments of moneys secured by the mortgage, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

(7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

18. The Plaintiff in this regard relies on paragraph 12 of the Affidavit of Sonia H. Miller filed on 18th May, 2012 which sets out that the total amount of the first advances to the Defendants under Loan Account No. 3302470 was \$291,493.63. Out of this amount, the Defendants only repaid \$2,770.83 on the principal. The interest that accrued and was unpaid as of the filing date was \$3,941.49. Therefore, the principal balance outstanding was \$299,456.00 and the daily interest rate was calculated at \$65.26. These figures are consistent with the Demand Letter sent by the Plaintiff to the Defendants on 20 March 2012, in which the Plaintiff demanded full payment of the principal and all interest and arrears due to the Defendant's default of the mortgage. I find that the Plaintiff has satisfied the requirements of Order 77 of the Rules contrary to the assertions of the Defendants. The figures indicated above show some variation from the figure claimed by the Plaintiff, which in my view is due to daily interest rates and payments made on the loan. The Plaintiff is claiming \$263,221.80 with interest of \$45,624.47 and accrued interest since 27 February 2014 as outlined in the Supplemental Affidavit of Sherland Ritchie filed 6 March 2014. Since the Plaintiff had withdrawn the action for possession before my learned brother Isaacs, J., the issue as to non-compliance with Order 73 falls away.

Failure of Defendants to prepare Defence

19. The Defendants have not filed a Defence or Counterclaim in this matter,

but have instead set out their position in their Affidavits and legal submissions. While I have not ordered those to stand as pleadings, I have considered the issues raised in the interest of justice.

20. Counsel is to be reminded otherwise that Affidavits are reserved for facts supported by evidence that the deponent is able to prove (*see order 41 rule 5 RSC*). An affidavit should not be used to advance arguments where the party has failed to plead, or to present unsupported allegations. This is an abuse of the court's machinery. In considering the arguments of the Defendants, there are no particulars of fraudulent activity or undue influence by the Plaintiff which was made out on the evidence. In *Sheryl Ferguson v Roosavelt Dawkins BS 2020 CA 53*, the Court of Appeal referred to the case of *Subhas Chandra Das Mushib v Ganga Prosad Das Mushib and Ors 1967 AIR 878* in which it was stated that "before a court is called upon to examine whether undue influence was exercised or not, it must scrutinize the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud." The Defendants have not satisfied me of the presence of either undue influence or fraud.

Validity of the 2009 Mortgage

21. The Defendants allege in the Affidavit of Mary Fox that the 2009 mortgage is fraudulent and invalid. They suggest that when the Promissory Note was signed, the First Defendant was still suffering from the effects of his stroke and this essentially amounted to undue influence. I fail to find that the Defendants were unduly influenced by the Plaintiff when the Promissory Note was signed but find that it was a conscious and deliberate decision by the First Defendant to receive the facilities granted in 2009. The First Defendant wrote to the Plaintiff on three occasions in 2009, seeking leniency to clear the overdraft. It is evident from the correspondence that at the time the First Defendant was in a financial bind and needed assistance. Upon the First Defendant's request in a letter dated 27 April 2009, the Plaintiff restructured the mortgage to consolidate the Defendants' loan into one single loan. In a letter dated 16 June 2009 which followed an agreement between the Defendants and the Plaintiff, the Defendants wrote:

"Dear Ms. Gardiner:

Further to our discussion on Friday June 12th, 2009, this letter is to confirm that we agree to pay to the Royal bank of Canada, the sum of Twenty Five Hundred Dollars (2,500.00) at the end of each month.

The funds will derive from the rental property of three commercial units property No. 12 block No. 5 located on Mount Rose Avenue in the Shirley Heights area.

These payments are to repay a loan of consolidation, as you agreed to meet with us again in September 2009 to further discuss the same.

We would like to thank you for your assistance.
Thank you.

Warm regards,

Godfrey A. Fox
Mary Fox”

22. **The Defendants have not made out a claim for undue influence or fraud which carries a high burden of proof on the party alleging the fraud. I cannot find that there was undue influence or fraud on part of the Plaintiff regarding the 2009 mortgage. The Plaintiff acted reasonably at the Defendants request as a result of which mortgage facilities were granted. I find the 2009 mortgage to be valid and the Defendants to be bound by their obligation under the mortgage. The Defendants further made reference to a mortgage between the parties in 2005, and stated that was the only further loan they had received on the second mortgage of 1993, not the 2009 mortgage. There is conflict as the Defendants on the one hand claim that there was never a 2009 mortgage but also say that the 2009 mortgage was a result of undue influence and fraud. In any event, the Court was not furnished with any evidence by the Defendants of the 2005 Mortgage which they suggest transpired. This Court is concerned with the 2009 mortgage which forms the subject of the Plaintiff’s claim and cannot make a ruling on material that is not properly placed before it. I find no merit in this assertion.”**

6. As stated above, the judge entered judgment on 29 August 2023. The intended appellants had six weeks to appeal that judgment but they did not do so within that time; the six weeks expired on 3 October 2023. On 23 October 2023, they made an application to extend the time. They are 20 days out of time. Is it in the interest of justice that the period of time be extended given the short period of delay?

Is this a fanciful appeal with no prospects of success?

7. In our judgment, the judgment has on its face a number of problems. In his judgment, the judge identifies “*whether the up-stamping of the 1993 mortgage was valid*” as the first issue. This was not surprising as in the heading of both actions the actions are described as “In the matter

of the property comprised in a mortgage dated the 2nd day of March A.D. 1993 and made between Godfrey Alexander Fox as borrower and the Royal Bank of Canada as Lender”.

8. In short, the 1993 mortgage was the basis of these actions.
9. A review of the judgment shows that the judge made no findings whatsoever on this primary issue. The judge did not make a finding that the 1993 mortgage was properly up-stamped. It may be that the judge made a decision that it was not necessary to decide that issue, but he never said that in his judgment. Moreover, in paragraph 22 of his judgment, he said *“I find the 2009 mortgage to be valid and the defendant is bound by their obligation under the mortgage”* But that was not the basis upon which the actions were brought, and to enter judgment on that basis without dealing with whether the 1993 mortgage was properly up-stamped, as the judge identified as a primary issue, leaves the judgment as one that requires a careful examination by an appeal court on the hearing of the substantive appeal.
10. Furthermore, the judgment clearly reflects that issues of fraud and undue influence were being raised by the intended appellants in the court below. Indeed, the judge identified that allegation in paragraph 21 of his judgment, where he said:

“The Defendants allege in the Affidavit of Mary Fox that the 2009 mortgage is fraudulent and invalid. They suggest that when the Promissory Note was signed, the First Defendant was still suffering from the effects of his stroke and this essentially amounted to undue influence.”

Those issues cannot be determined in an action brought by Originating Summons. Clearly the matter ought to have been converted into an action by Writ with proper pleadings and discovery. It could not be decided on affidavit evidence without cross-examination. Nothing in the judgment refers to any cross-examination of any of the deponents to any of the affidavits.

11. On this application for an extension of time, as the full record is not before the court, it is not prudent to deal with the substantive appeal. The appeal is out of time by less than a month. It raises important issues as mortgage actions and those issues should be considered by the court. In the circumstances, we accede to the application to extend the time within which to appeal to 15 June 2024.
12. Regarding the costs of this application, this Court (differently constituted) recently addressed a similar issue in **Christopher Stubbs Shanna’s Cove Estate Company Limited and Allan Crawford Sharon Crawford** SCCivApp. No. 59 of 2020. There, I stated the following:

“9. It is settled law that orders for costs are in the wide discretion of the Court.”

10. The normal rule is that costs follow the event unless there is a reason to depart from it. See *Scherer and another v Counting Instruments Ltd and another* [1986] 2 All ER 529.

11. At page 536 of *Scherer*, the English Court of Appeal held, *inter alia*, that a successful party's reasonable expectation of obtaining an order for costs is not a right, but nonetheless depends on the exercise of the court's discretion. The English Court of Appeal explained that a court's discretion is not well exercised unless there are grounds for its exercise. In exercising the discretion regarding costs, a court must act judicially. It must consider grounds which are connected with the case, which may extend to any matter relating to the litigation and the parties' conduct in it, including the circumstances which led to the proceedings.

12. Rule 24(5) of the Court of Appeal Rules provides:

“24. (5) The court may make such order as to the whole or any part of the costs of an appeal as may be just, and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just.”

13. **This Court, differently constituted, in previous costs decisions, has ordered the costs of and occasioned by an extension of time application to be borne by the appellant.** See *Elizabeth Collie v. Lady Henrietta St. George* SCCivApp. No. 133 of 2021; *Keithrell Hanna v. Wendy Willis Johnson* SCCivApp. No. 61 of 2022; and *Rosina Smith v. Fidelity Bank (Bahamas) Ltd* SCCivApp. No. 94 of 2021.” (Emphasis added)

13. In the circumstances, while the delay is not egregious, and does not seem to have been caused by any contumacious conduct on the part of the intended appellants, we will nonetheless order that the intended appellants bear the costs of this application.

THE HONOURABLE SIR MICHAEL BARNETT, P

14. I agree.

THE HONOURABLE MADAME JUSTICE CRANE-SCOTT, JA

15. I also agree.

THE HONOURABLE MR. JUSTICE EVANS, MB, JA