



[2024] JMCC COMM. 45

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE COMMERCIAL DIVISION
CLAIM NO. SU2022CD00609**

BETWEEN	ASCENDANCY CARIBBEAN 1 LIMITED	CLAIMANT
AND	HANSLEY BERRY	1ST DEFENDANT
AND	DELETA LAWRENCE	2ND DEFENDANT

Ms. Amanda Montague instructed by Myers, Fletcher & Gordon, Attorneys-at-law for the Claimant

Ms Charmaine Patterson instructed by Charmaine Patterson & Associates, Attorneys-at-law for the 1st and 2nd Defendants

IN OPEN COURT

Heard on: 2nd and 22nd October and 2nd December 2024

Civil Procedure- Application for Summary Judgment on part of claim- Part 15 Civil Procedure Rule, 2002- Whether the Defendants have a real prospect of successfully defending the claim- Whether the Claimant is entitled to summary judgment of the claim

STEPHANE JACKSON-HAISLEY J

INTRODUCTION

[1] The matter before me is grounded in a Notice of Application for Court Orders filed May 14, 2024, by the Claimant, Ascendancy Caribbean I Limited (Ascendancy

Caribbean), in which it seeks an Order that Summary Judgment be granted on a part of its claim against the Defendants, Hansley Berry and Deleta Lawrence, in respect of Mortgage Instrument No. 15533692 for the sum of J\$70,080,430.06 as at April 30, 2024 broken down as follows:

Principal balance outstanding	\$17,466,727.42
Accrued interest	\$32,114,061.54
Total on Add-on Charges	\$ 7,057,838.04
Interest on Add-on charges	<u>\$13,441,803.06</u>
Total outstanding Balance	<u>\$70,080,430.06</u>

With interest continuing to accrue at the rate of 19.63% per annum.

CLAIMANT'S CASE

- [2] Ascendancy Caribbean is a company that is in the business of collections. On March 10, 2021, loans secured by Mortgage Instruments Nos. 1533692, 1552880, 1574355, 1619676 and 1653766 which were extended by BNS to the 1st and 2nd Defendants during the period of 2008 and 2020, were assigned to Ascendancy Caribbean.
- [3] In a Claim Form filed on December 30, 2022, Ascendancy Caribbean claims damages for breach of contract seeking the sum of Sixty-Two Million, Two Hundred and Twenty-One Thousand, Eight Hundred and Nineteen Dollars (J\$62,221,819.00) and continuing, together with compound interest which continues to accrue at the rate of 19.63% per annum, before and after judgment. It also sought Seventy-Eight Thousand Dollars (J\$78,000.00) representing Court Fees of Thirty Thousand Dollars (J\$30,000.00) and Attorneys Fixed Cost of Forty-Eight Thousand Dollars (J\$48,000.00). In the Notice of Application for Court

Orders it seeks the sum of Seventy Million, Eighty thousand, Four Hundred and Thirty Dollars and Six cents (J\$70,080,430.06)

- [4] In the affidavit in support of the summary judgment application, Mr. Shane Panton, Operations Supervisor of Ascendancy Caribbean, averred that the mortgages were registered on the Certificate of Title to property located at Lot 15, Great Pond, Ocho Rios, St. Ann registered at Volume 1424 Folio 37 of the Register Book of Titles. He further averred that the Defendants having defaulted on the loans, power of sale proceedings were initiated.
- [5] Mr. Panton averred that by letter dated April 19, 2021, a demand letter was sent to the Defendants to settle the outstanding amounts to which the 1st Defendant responded by email dated April 25, 2021 and expressed a willingness to pay. However, despite the promise to pay, the debt remains outstanding. Mr. Panton asserted that further communication was sent to the Defendants and by letter dated September 30, 2023, the Defendants' Attorney-at-law made a proposal to settle the debt for the sum of Thirty-Five Million Dollars (\$35,000,000.00) in full and final settlement.
- [6] Mr. Panton asserted that despite requesting the payment terms and date of payment from the Defendants' Attorneys-at-law, there has been no response regarding the settlement proposal and the sums remain outstanding to date.
- [7] An updated Statement of Account exhibited in an affidavit of Shyvonne Thompson filed October 1, 2024 shows that the total amount outstanding to Ascendancy Caribbean at that date stood at Seventy-Two Million, Four Hundred and Seventy-Six Thousand, Three Hundred and Eight-One Dollars and Fifty-Four Cents (\$72,476,381.54).

1ST AND 2ND DEFENDANTS' CASE

- [8]** In the affidavit in response, Hansley Berry and Deleta Lawrence admit to receiving one loan from BNS in the sum of Twenty Million Dollars (\$20,000,000.00) which is secured by Mortgage Instrument No. 1533692 and registered on the Duplicate Certificate of Title on the 28th April, 2008. However, they state that with the exception of Mortgage Instrument No. 1533692, they did not sign any of the other Mortgage Instruments exhibited by the Claimant and deny receiving any further amounts from BNS. They countered that the outstanding sum listed by the Claimant is inaccurate as it reflects amounts owing on loans which were never received.
- [9]** They disputed the amount being charged as Add-on Charges and stated that there is no evidence as to how the sum of Four Million, Two Hundred and Six Thousand, Seven Hundred and Fifty-Seven Dollars (\$4,206,757.00) was arrived at. They averred that neither the 1st nor 2nd Defendants were presented with any invoices setting out the claim for legal fees, valuation fees, auction fees, insurance costs or legal expense were incurred in relation to the Mortgage Instrument.
- [10]** They asserted that without more, the claim for interest accrued on principal in excess of Thirty-Three Million Dollars (\$33,000,000.00) is excessive, harsh and unconscionable.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

- [11]** Counsel for the Claimant, Ms. Amanda Montague submitted that the issue that the Court should consider is whether the Claimant is entitled to Summary Judgment on the part of the claim related to Mortgage Instrument No. 15533692 given the Defendants' admission of the debt and their default.

[12] Ms Montague quoted Rule 15.2(b) of the Civil Procedure Rules (CPR) which provides that the Court may give summary judgment on the claim or on a particular issue if it considers that the Defendant has no real prospect of successfully defending the claim or issue. Counsel also quoted the well-known authority of **Swain v Hillman [2001] 1 All ER 91** where Lord Woolf MR stated that there should be a realistic as opposed to a fanciful prospect of success.

[13] Counsel relied on paragraph 11 of **ED & F Man Liquid Products Ltd v Patel & Another [2003] EWCA Civ 472** where Potter LJ stated that:

“...where there is a claim or judgment for monies due and issues of fact are raised by the defendant for the first time which, standing alone would demonstrate a triable issue, if it is apparent that, with full knowledge of the facts raised, the defendant has previously admitted the debt and/or made payments on account of it, a judge will be justified in taking such acknowledgements into account as an indication of the likely substance of the issues raised and the ultimate success of the defence belatedly advances.”

[14] Counsel submitted that the Defendants have no real prospect of successfully defending the claim and that no trial is necessary, therefore summary judgment should be granted. She pointed out that the Defendants have admitted to their indebtedness in relation to Mortgage number 15533692 and despite denying knowledge of the remaining mortgages, they have failed to present any documents regarding their own assessment of the sum owed. Counsel submitted that the bank is entitled to recover all expenses incurred including legal costs and charges once there is a default as there is evidence that the Defendants executed the Mortgage Instruments.

[15] Ms. Montague relied on paragraph 16 and 17 of **Sagicor Bank Jamaica Limited v Taylor-Wright [2018] UKPC 12** where Lord Briggs pointed out that at a summary judgment application the court is considering whether a trial is required to determine the Claimant’s entitlement to the relief claimed. In addition, Lord Briggs stated that a trial will be necessary where the resolution of factual disputes

at a trial, through examination in chief, cross-examination and oral arguments, will affect the Claimant's entitlement to the relief sought.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

[16] Ms. Charmaine Patterson appeared as Counsel for the Defendants. Ms. Patterson commenced her submissions by stating that no cogent evidence has been provided regarding the status of the loans. Counsel averred that the documents disclosed are computer generated and were not presented by the person seeking to put them in evidence. It was submitted that whilst the Court should not conduct a mini trial, it should look into the merits of the case to determine whether the evidence presented by the Claimant is properly before the Court.

[17] Counsel submitted that there is a serious issue to be tried, and it is unjust and contrary to the overriding objective of the Civil Procedure Rules for summary judgment to be granted and that the rights of the Defendants need to be preserved until the issue is ventilated. Counsel quoted **Global Trust & Donald Glanville v Jamaican Redevelopment Trust Inc. & Dennis Joslin Jamaica Inc. SCCA 42 of 2004, delivered July 27, 2007** in advancing the submission that a trial would be necessary to sort out the (i) accuracy of the accounting in disputed information provided by the Claimant and (ii) the information acquired prior to the matter commencing.

DISCUSSION

[18] The main issue that the Court has to consider is whether the Claimant is entitled to summary judgment of the claim. Part 15.2(b) CPR provides that the court may give summary judgment on a claim or on a particular issue if it considers that the defendant has no real prospect of defending the claim or issue.

[19] On behalf of the Claimant, it was indicated that the Mortgage Instruments were executed by the Defendants. The documents presented reflect their signatures on all the documents. The Defendants admit to the loan in the sum of Twenty Million Dollars (\$20,000,000.00) in respect of Mortgage Instrument no. 1533692 however, they deny knowledge of the other Mortgage Instruments. The Defendants' argument is that the Claimant has wrongfully subsumed all the mortgages registered on the title to the Defendants' property, four of which, the Defendants deny having any knowledge of. The Defendants have also asserted that the Mortgage Instruments disclosed were not executed by them and submitted that a trial is necessary to determine who executed the remaining mortgages. Counsel for the Defendants have also asserted that the Defendants are unaware of how the remaining mortgages came about to be registered on their Title and have indicated that a handwriting expert would be required to determine the legitimacy of the signatures.

[20] The Claimant in the Notice of Application for Summary Judgment has asserted that it is seeking Summary Judgment on the part of the claim that relates to Mortgage Instrument No 15533692 for the sum of Seventy Million and Eighty Thousand, Four Hundred and Thirty Dollars and Six Cents (\$70,080,430.06). When the Claim Form is compared with the Notice of Application, in relation to the sums being claimed, they appear to be the same. In other words, it appears that the sum total of the monetary value being claimed in the Claim is the same as what is claimed in the Notice of Application which purports to relate only to mortgage instrument no. 15533692. This begs the question what then the value of the other outstanding mortgages is mentioned in the Claim. Is it that they have no value? If that is so, then what the Claimant seeks in the Notice of Application would in essence settle the entire claim.

[21] In any event though, it seems that all the Claimant would be entitled to if summary judgment would be granted would be summary judgment in part. The Defendants have put forward a clear Defence as it relates to the remaining Mortgage

Instruments and so there would be no basis to grant summary judgment in respect of them. It is also clear from the Defence that the Defendants are also saying that the sums claimed in relation to the admitted loan are not accurate as they reflect amounts owing on loans which they know nothing about.

[22] In addition to the assertions in the Defence, in the evidence before the Court as extracted from the joint affidavit of Hansley Berry and Deleta Lawrence, they dispute the add-on charges and they explain the reason for this, which is that they have not been presented with any invoice for payment of any expenses incurred by the mortgagee. They require itemized proof that they have incurred these charges and the supporting invoices.

[23] The Court must consider whether from the information provided by the pleadings and the affidavit it could be said that the Defendants have no Defence to the Claim. The claim is essentially one for breach of contract. In respect of the admitted mortgage, they have accepted that they are in default and so there is an acceptance that they have breached the contract which is in essence an acceptance of liability. They have however not admitted to the quantum as stated in the Claim or the updated amount as stated in the Notice of Application for Court Orders.

[24] The Defendants have disputed the interest on the principal, the add-on charges and the interest on the add-on charges and how it is calculated. They also assert in their affidavit evidence that the interest charged is excessive and the transaction is harsh and unconscionable. Although they say in their evidence that the entire transaction is harsh and unconscionable, this assertion does not form a part of the Defence. They request that there be a thorough ventilation of the issue and a reopening of the transaction and that an account be taken purporting to the dealings of the Claimant in order to provide justice for them. This seems to be introducing a whole new realm into the transaction. It is not appropriate to raise such a Defence in affidavit form. If the Defendants had intended for this to be a

part of their response to the Claim for which the Court should take note, they ought to have made this assertion in their Defence.

[25] The essence of the Defence is that they admit the loan amount of Twenty Million Dollars (\$20,000,000.00), the subject of Mortgage Instrument number 1533692 and they admit having defaulted on it. Taken together with their affidavit evidence, they are not disputing the principal amount but are disputing the interest and the add on charges.

[26] The well traversed case of **Sagicor Bank Jamaica Ltd v Taylor Wright** although not directly on point provides useful guidance. At paragraph 19 of the judgment, the Court provided a reminder of what should guide a court considering a summary judgment application, that is to say:

“The court will, of course, primarily be guided by the parties’ statement of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows:

(1)...

...

(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.”

[27] The Defendant in the submissions before me pointed out that there is no evidence of the interest rate utilized each year, nor is there any invoice supporting the add-on charges. It appears that there is some uncertainty as to the terms for interest and the calculation. The Claimant’s claim for the interest rate of 19.63% per annum is not stated on the mortgage instrument the Defendants admit having defaulted on. In fact, all the disputed mortgage instruments have a different interest rate, and none speaks to a rate of 19.63%.

[28] It is true that the Defendants have not presented any documents supporting their own assessment of the sums owed. However, they could hardly have been expected to present this in the circumstances where the Claimant has not provided a clear indication in the documentary evidence of the interest rate used in arriving at their calculations.

[29] This renders the **Sagicor Bank Ltd v Taylor Wright** case distinguishable for the reason that, Sykes J (as he then was), at first instance, despite noting the absence of a non-admission of the Bank's account as to the extent of Mrs Taylor- Wright's repayments, and the interest which had been accrued, appeared to have harboured no uncertainty as to the actual terms for payment and interest and arrived at a conclusion regarding the Bank's entitlement to both principal and interests. The Privy Council remarked on this lack of uncertainty and the resultant effect at paragraph 28 of the judgment as follows:

"It may fairly be said that, if all that had been before the court on the hearing of the summary judgment application had been the Claim Form, the Particulars of Claim, the Defence and the Reply, then the court may have entertained a real prospect of defence based, for example, upon uncertainty as to the terms for payment of interest. But both the Bank and Ms Taylor-Wright presented to the court the commitment letter, in which those terms were set out in detail. The judge was therefore entitled to conclude, as he did, that there was no triable issue about those matters."

[30] The suggestion is that where there is some uncertainty as to the terms for payment of interest, the Court may have entertained a real prospect of defence. However, it was indicated that both parties presented to the Court the commitment letter in which those terms were set out in detail. This is lacking in the instant case.

[31] Rule 15.2 allows the Court to give summary judgment on an issue where the defendant has no real prospect of successfully defending the issue. The Claim

herein is for breach of contract. The Defendants have not denied that they are in breach. They have admitted being in default of the mortgage payments. It is unassailable that the Defendants have defaulted on the loan and thereby breached the contract and so are liable to pay the principal, interest and other relevant charges. In this case, there appears to be no real Defence to the claim except to say that the calculation of what is outstanding is inaccurate. There would be no useful purpose served by having a full-blown trial on all the issues raised. This approach is consistent with Lord Potter's dicta in the case of **ED & F Liquid Products Ltd v Patel & Another** relied on by counsel for the Claimant that where *'with full knowledge of the facts raised, the defendant has previously admitted the debt and/or made payments on account of it, a judge will be justified in taking such acknowledgement into account as an indication of the likely substance of the issues raised and ultimate success of the defence belatedly advanced'*.

[32] The Defendant herein admitted the principal amount however a calculation of how the sums outside of the principal were arrived at, how the interest rate was determined, the calculation of interest accrued and the add-on charges, needs to be ventilated. No authority was presented by either side which specifically addresses how to treat with a situation such as this where certain portions are admitted and not others. On behalf of the Respondent the case of **Global Trust Ltd and Donald Glanville v Jamaica Development Foundation et al** was cited however I did not find it particularly helpful, not only because it dealt squarely with the question of injunctive relief but also because the fine point of the calculation of the loan and whether it had been repaid was dissimilar to the current circumstances. In my research I found two cases from the Caribbean that are persuasive and provide some guide as to how to treat with a situation such as this.

[33] In a Court of Appeal decision from the Commonwealth of the Bahamas, **Mark Oscar Gibson Sr. and the Bank of the Bahamas Limited** BS2021CA23 the question of whether summary judgment should be granted, where the real issue to be determined was the true amount owing to the bank, was considered. The

parties entered into a contract for a loan to the Defendant in 2009 for which the Defendant default in 2011. In court proceedings the Defendant conceded that he had not paid the loan facility since 2016 and that he owed the Bank the sum of \$286,113.17 and asked for permission to pay on or before 240 days. The court found that based on the Defendant's admission the only real issue was the true amount owing to the bank. The Judge made an order for Summary Judgment in light of the admission and ordered that damages should be assessed to ascertain the amount actually due and owing. The Court of Appeal found the order for Summary Judgment to be justified upheld the decision of the Court.

[34] Similarly, in the decision **Sagicor Finance Inc. Formerly The Mutual Finance Inc. v Glenis Remi and Sagicor Finance Inc. Formerly The Mutual Finance Inc. v Yason Alberton** [2016] ECSC J1214-2 wherein the Claimant contended that two separate Defendants defaulted on their payment obligations under Bills of Sale and Promissory Notes resulting in their vehicles being sold to clear outstanding debts. The Defendants admitted the loan transactions but argued that the loans terminated when the Claimant exercised its right of seizure and sale under the Bill of Sales Act. The Court found this argument to be fallacious but found merit in the assertion that the Claimant did not particularize the amounts claimed but merely stated the global amounts purportedly representing outstanding amounts together with interest due and owing under the loan agreements.

[35] The Court took the view that an itemization of the amounts would have been better appreciated by both the Defendants and the Court to justify the amounts claimed and concluded that this can be achieved in an assessment of damages rather than engaging the Court's limited resources in a full trial on this narrow point. The assessment of damages would give the Defendants an opportunity to challenge any of the disputed sums and interest claimed. The court ordered that summary judgment be entered in favour of the Claimant for an amount to be decided by the Court on an assessment of damages.

[36] This is an attractive position to take. Had that been the only issue the Court would have seriously considered whether to order summary judgment on the entire claim and order them to proceed to an assessment of damages. However, there is more to this Claim. There remains the issue of mortgages numbered 1552880, 1574355, 1619676 and 1653766 which would have to be determined at trial as there is no concession on those mortgages. So in respect of those mortgages, the issue of both liability and quantum of damages, if applicable would have to be resolved with a trial. It would certainly be a better use of the Court's time to have the issue regarding the calculation of the sums outstanding be dealt with at the same time of trial rather than to order that the issue of the calculation be treated with at a separate hearing.

[37] I order that summary judgment be granted in respect of the claim for breach of contract relative to Mortgage Instrument number 15533692 and the principal balance outstanding of Seventeen Million, Four Hundred and Sixty-Six Thousand, Seven Hundred and Twenty-Seven Dollars and Forty-Two Cents (\$17,466,727.42). The issue of the calculation of interest and all other charges in relation to Mortgage Instrument no. 15533692 is to be tried. The issue of Mortgage Instruments bearing numbers 1552880, 1574355, 1619676 and 1653766 is to proceed to trial.

[38] My orders are as follows:

1. Summary Judgment is granted to the Claimant in respect of the outstanding principal for Mortgage Instrument bearing number 15533692 for the sum of Seventeen Million, Four Hundred and Sixty-Six Thousand, Seven Hundred and Twenty-Seven Dollars and Forty-Two Cents (\$17,466,727.42).
2. The issue of the calculation of accrued interest, total add-on charges and any interest on add-on charges for Mortgage Instrument bearing Mortgage Number 15533692 is to proceed to trial.

3. The issue in relation to Mortgage Instruments bearing numbers 1552880, 1574355, 1619676 and 1653766 is to proceed to trial.
4. Costs to be cost in the claim.

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Stephane Jackson Haisley
Puisne Judge