



[2022] JMCC COMM 16

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2018 CD 00083**

<b>BETWEEN</b>	<b>FIRST GLOBAL BANK LIMITED</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ORVILLE SPENCE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>NADINE SPENCE</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

Mr. Joerio Scott instructed by Samuda & Johnson for the Claimant

Mr. Lemar Neale instructed by Nea/Lex for the Defendants

**Dates Heard: March 3, and June 7, 2022**

**Civil Practice & Procedure – Application for Summary Judgement – Rule 15.2 of the CPR**

**PALMER HAMILTON, J.**

**BACKGROUND**

[1] This matter was initiated by a Claim Form filed by the Claimant, First Global Bank Limited (hereinafter referred to as FGB Ltd) on the 11<sup>th</sup> day of March, 2013. FGB Ltd claimed against the Defendants (hereinafter referred to as Mr. Spence and Mrs. Spence) the sum of **FOUR HUNDRED AND NINETY-ONE THOUSAND THREE HUNDRED AND THIRTEEN DOLLARS AND FORTY-FOUR CENTS (\$491,313.44)** together with interest accruing daily on the principal balance until payment and being the balance due and owing to the Claimant by the Defendants

on Visa Gold Card provided to the Defendants at the Defendant's request on the 28<sup>th</sup> day of June, 2007. The amount owing is particularized as follows:

<b>Amount Claimed</b>	
<b><u>Principal balance on Visa Gold Card</u></b> <b><u>#4179763208011668</u></b>	403,168.64
Interest from August 16, 2022 to February 21, <u>2013</u> @ 42% per annum (Interest accruing at \$463.92 per diem)	88,144.80
Recoverable expense	98,262.68
GCT @ 16.5%	16,213.34
SUB TOTAL:-	605,789.46
Court Fees	2,000.00
Attorney's Fixed costs on issues	10,000.00
<b>TOTAL AMOUNT CLAIMED \$</b>	<b>617,789.46</b>

- [2] Mr. and Mrs. Spence failed to file an Acknowledgment of Service and Defence within the prescribed time which led to FGB Ltd seeking and obtaining Default Judgment against them. Mr. and Mrs. Spence successfully applied for the said Default Judgment to be set aside. FGB Ltd thereafter filed an Amended Claim Form and Mr. and Mrs. Spence filed a Defence to same.

## **THE APPLICATION**

- [3] FGB Ltd filed an Amended Notice of Application for Court Orders on the 9<sup>th</sup> day of September, 2019 seeking the following Orders:

- (i) *The Claimant be granted summary judgment on the claim pursuant to Rule 15.2(b) of the Civil Procedure Rules 2002 as amended.*
- (ii) *Costs of, incidental to and occasioned by this Application to be paid forthwith by the Defendant to the Claimant's Attorneys-at-Law.*
- (iii) *Such further and other relief as this Honourable Court deems just.*

[4] The sole ground relied on by FGB Ltd was that the Defendant has no real prospect of successfully defending the claim. The Amended Notice of Application for Court Orders listed the following issues to be dealt with by the Court:

- (i) *Whether the amount claimed including interest and recoverable costs is owed to the Claimant under the contract;*
- (ii) *Whether the rate of interest claimed is the Claimant's standard rate for the Gold Credit Card;*
- (iii) *Whether the rate of interest claimed is unreasonable given the contractual agreements and whether the Claimant is entitled to the interest rate charged;*
- (iv) *Whether the Defendant's agreed to the said rate of interest by making payments from receipt of the credit card in 2007 until January 13, 2021 when the last payment was made; and*
- (v) *Whether the claim is statute barred.*

[5] Issue (v) of the Application was already adjudicated on and as such there is no need for me to consider it now.

[6] The Application was supported by the Affidavit and Supplemental Affidavit of Jheanelle Chin Bachan. Mr. and Mrs. Spence relied on their Affidavits filed on the 8<sup>th</sup> day of January, 2018 and their Defences filed on the 18<sup>th</sup> day of May, 2018.

#### **THE CLAIMANT'S SUBMISSIONS**

[7] FGB Ltd's principal contention is that the Defences filed on behalf of Mr. and Mrs. Spence in this matter do not disclose a basis in law that would obviate their obligation to satisfy the debt which they in fact incurred. Learned Counsel for FGB Ltd made note of Rule 15.5(2) of the Civil Procedure Rules 2002, as amended, which stipulates that a Respondent who wishes to rely on evidence in a summary judgment matter must file affidavit evidence and serve same on the Applicant no less than seven (7) days before the hearing. The natural consequence, he further submits, of failing to comply with the aforementioned rule is that the Court will have no evidence before it which could challenge the evidence in support of the summary judgment application. Learned Counsel relied on the

case of **National Export-Import Bank of Jamaica Limited v Yono Industries et al** [2017] JMSC Civ 124 paragraphs 2-7 which gave judgment in support of the abovementioned consequence. It is FGB Ltd's submission that the veracity of the Affidavit evidence filed in the Claim herein and the documentation exhibited are not challenged by any Affidavit evidence by Mr. and Mrs. Spence. In absence of this evidence, the evidence put forward by FGB Ltd as to the existence of the debt and the applicable rate of interest is not contradicted and as such the Court is entitled to accept it.

[8] Learned Counsel Mr. Scott contended that 42% per annum had always been the applicable rate of interest to the loan and both Mr. and Mrs. Spence have always had notice of this. As such Mr. and Mrs. Spence are estopped from denying the rate of interest or from bringing any challenge on the basis of the rate of interest.

[9] Learned Counsel relied on the following cases: **Cavendish Square Holdings B.V. v Ghossoub** [2018] EWHC 2755 para 18; and **Nationwide News Network Ltd v. AIG Jamaica Insurance Company Ltd** [2015] JMSC Civ. 233 para 44.

## **THE DEFENDANTS' RESPONSE**

[10] The Defendants have put forward two (2) issues that are determinative of this matter. Firstly, whether the terms in relation to any interest at the alleged rate or any interest at all were included at the time of the formation of the contract and thus were incorporated. Secondly, whether the agreement was void for certainty and therefore unenforceable. Learned Counsel Mr. Neale submitted that Mr. and Mrs. Spence must have had notice of the terms and conditions before the contract is entered into and those said terms and conditions must be properly incorporated into the contract itself. He further submitted that a term cannot be incorporated unless the relevant party had reasonable notice of it before contracting. The terms, he contends, are therefore unenforceable as they were not included at the time of the formation of the contract or brought to the attention of Mr. and Mrs. Spence. Mr. Neale also submitted that the alleged interest rate is not only an onerous and

unusual term but it was vague, and/or uncertain, and/or incomplete and therefore unenforceable. He further states that there is nothing in the Conditions of Use of the International Visa Credit Card Referral Form between the parties that explicitly states what the interest rate is.

[11] Mr. and Mrs. Spence's position is therefore that the issues are to be properly determined at the trial and not at the interlocutory stage. He contends that challenging the interest rate is a good defence and FGB Ltd's application for summary judgment should therefore be refused with costs to his clients.

[12] Learned Counsel relied on the following cases: **May and Butcher v R** [1934] 2 K.B. 17; **Olley v. Marlborough Court Limited** [1949] K.B. 532; **Interfoto Picture Library Limited v Stiletto Visual Programmes Limited** [1989] Q.B.433; **Thornton v Shoe Lane Parking Ltd** [1971] 2 Q.B. 163; **Tidden Rent-A-Car Co v Clenddenning** (1978) 83 D.L.R. (3d) 400 (Ont. C.A.); **Robertson v BHP Diamonds Inc v Finning International Inc.** 1999 CanLII 6791 (NWT SC); **Trigg v MI Movers International Transport Services Limited** (1991) 4 O.R. (3d) 562 (Ont. C.A.); **Sagikor Bank Jamaica Limited v Marvalyn Taylor-Wright** [2016] JMCA App 34; and **Sagikor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12, para 28.

## ISSUE

[13] The main issue for determination is whether summary judgment should be granted on the claim to FGB Ltd.

## LAW AND ANALYSIS

[14] Pursuant to Rule 15.2 of the Civil Procedure Rules 2002, as amended the Court may give summary judgment on the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue; or the defendant has no real prospect of successfully defending the claim or the issue.

- [15] Rule 15.6 of the CPR outlines the Court's powers in granting summary judgment. Rule 15.6 (1) states that:

*“On hearing an application for summary judgment the court may–*

*(a) Give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*

*(b) Strike out or dismiss the claim in whole or in part;*

*(c) Dismiss the application;*

*(d) Make a conditional order; or*

*(e) Make such other order as may seem fit.”*

- [16] The long established principle pertaining to summary judgments as laid out by Lord Hutton in **Three Rivers District Council v Bank of England (No. 3)** [2003] 2 AC 1 is that the decision whether or not to grant an application for summary judgment is discretionary. Lord Hutton stated that:

*“The important words are ‘no real prospect of succeeding’. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give Summary Judgment. It is a ‘discretionary’ power; that is, 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 prospects of success of the relevant party. If he concludes that there is no ‘real prospect’ he may decide the case accordingly.”*

- [17] In the well-known case of **Swain v. Hillman** [2001] 1 All E.R. 91, Lord Woolf MR said that the expression *‘real prospect of success’* did not need any amplification, as the words spoke for themselves. The word *‘real’* meant that the question for the court was whether there was a realistic prospect of success. Therefore, in order to succeed, the applicant must satisfy the court that the respondent has no real

prospect of proving the claim. FGB Ltd must therefore satisfy this court that Mr. and Mrs. Spence have no real prospect of defending the claim against them.

[18] Summary Judgments are not meant to dispense with the need for trial where there are issues which should be considered at trial and these hearings should not be mini trials. They are simply summary hearings to dispose of cases where there is no real prospect of success. The question of whether there is a real prospect of success is not approached by applying the usual balance of probabilities standard of proof. (See **Royal Brompton Hospital NHS Trust v Hammond** [2001] BLR 297).

[19] In the case of **National Commercial Bank Jamaica Ltd v Owen Campbell and Toushane Green** [2014] JMCA Civ. 19 Brooks, JA stated:

*“In considering applications for summary judgment, the judicial officer is not required to conduct a mini trial but where the case of one party or another is untenable that party should not be allowed to go to trial on that case. There is authority for the principle that parties to litigation must know at the earliest opportunity whether their cases have a real prospect of success. The judicial officer considering the application exercises a discretion whether or not to grant the application.”*

[20] Sinclair Haynes JA outlined the principles relevant to summary judgment at paragraph 78 in the case of **Barbican Heights Limited v Seafood and Ting International Limited** [2019] JMCA Civ 1. She stated that:

*“[78] At page 64 of the Commonwealth Caribbean Civil Procedure, third edition, the learned authors pointed out that: “[On] an application for summary judgment the claimant must satisfy the court of the following:*

*(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.*

*(b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.*

*(c) There must be no real prospect of oral evidence affecting the court's assessment of the facts."*

[21] It is the interpretation of the Conditions of Use of the International Visa Credit Card Referral Form, specifically the rate of interest, which will be crucial in the ultimate resolution of this claim. Item # 27 in the Conditions of Use states as follows:

***Interest will be computed on the average daily balance during the Billing Period. The average daily balance is calculated by taking the beginning balance each day, adding the value of Transaction that day, subtracting any payments and credits posted that day. All the ending daily balances for the Billing Period are then totaled and divided by the number of days in the Billing Period. Interest will be calculated at monthly periodic rates on the average daily balance for the Billing Period. Interest rates may be changed by the Bank at any time and from time to time in its sole discretion. The Bank may change the method of computation of interest at any time and from time to time in its sole discretion.***

[22] Mr. Scott has asked the Court at this interlocutory stage to determine several issues. However, Mr. Neale is of the view that the issues arising in the case before this Court can only be dealt with at a trial. In answering the main issue outlined earlier, I must therefore make a determination as to whether FGB Ltd has satisfied this Court that Mr. and Mrs. Spence do not have a realistic prospect of successfully defending the claim.

[23] Notwithstanding the fact that I must not delve into a mini trial of the issues I see no evidence that suggests that Mr. and Mrs. Spence have a realistic prospect of success. The crux of their argument is that they were not aware of the 42% interest rate. The Affidavits of Mr. and Mrs. Spence both stated that the Claim Form does not include a basis for interest or even how it is computed and therefore FGB Ltd's application for summary judgment is to be refused. However, the Conditions of Use outlines that there is a computation of the relevant rate of interest and that the said interest rate may be changed by FGB Ltd at any time. Mr. and Mrs. Spence have not put forward in their Defence or in their Affidavits what the relevant interest rate they agreed to should be. In other words, since their argument is that they

were not aware of the 42% rate of interest, what rate of interest did they agree to by signing the International Visa Credit Card Referral Form?

[24] The Visa Gold Credit Card statement that was sent to Mrs. Spence in 2012 showed that the monthly interest rate was 3.5% which when calculated works out to be 42% per annum. The evidence before me does not show that the contract between the parties is void for certainty. Respectfully, I disagree with the submissions made by Mr. Neale in respect of the contract being void and unenforceable.

[25] Mr. and Mrs. Spence outlined in their respective Defences that the interest rate of 42% is excessive and unreasonable. However, they have not put forward anything more in relation to same.

[26] I adopt the principle as outlined by Mummery, L.J. in **Bolton Pharmaceutical Co 100 Ltd v. Doncaster Pharmaceuticals Group Ltd and others**. Mummery, L.J. said that the court should hesitate to grant an application for summary judgment if *“reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.”*

[27] The relevant interest rate was put before Mr. and Mrs. Spence without objection as was seen in the credit card statements sent to Mr. and Mrs. Spence and exhibited by FGB Ltd. I therefore find that no reasonable grounds exist for believing that a fuller investigation into the facts would not add or alter the evidence available to a trial judge and so affect the outcome of the case.

A. *Whether summary judgment should be granted on the claim to FGB Ltd?*

[28] Having found that there is no merit in the contract law principles argued by Mr. Neale, the Defendants' only dispute is that the annual interest rate of 42% is excessive and unreasonable. Mr. and Mrs. Spence are therefore not disputing that they signed the International Visa Credit Card Referral Form or the Conditions of Use. In my view, FGB Ltd has demonstrated to this Court that Mr. and Mrs. Spence

have no real prospect of success of defending the Claim. Even though the burden of proof rests on FGB Ltd, Mr. and Mrs. Spence have not put forward sufficient evidence to show that they do in fact have a realistic prospect of successfully defending the claim.

- [29] The view that the discretion to grant summary judgment on the Claim to the Claimant ought to be exercised is one that I find favour with in relation to this matter. In my judgment therefore, I exercise the discretion to grant summary judgment on the claim to the Claimant.

*Interest*

- [30] It is settled law that the purpose behind an award of interest on a judgment sum is to put the Claimant in the position in which he would have been had he not suffered this loss/deprivation as occasioned by the Defendant. Section 3 of the Law Reform (Miscellaneous Provisions) Act gives the Court the power to award interest on debts and damages. It gives the Court the discretion to award interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

- [31] Carey JA in **British Caribbean Insurance Company Limited v Delbert Perrier** Supreme Court Civil Appeal No. 114/94 stated at page 16 that,

*“I do not think it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld...”*

- [32] Morrison JA in **Goblin Hills Hotels Limited v John Thompson and Janet Thompson** SCCA No. 57/2007 unreported Judgment 5<sup>th</sup> June, 2009 held that an award of interest pursuant to the Law Reform (Miscellaneous Provisions) Act is available even in the absence of pleadings. Section 51 of the Judicature (Supreme Court) Act states that *every judgment debt shall in the Supreme Court carry interest at the rate of six per centum per annum....*

[33] The sum due and owing to FGB Ltd as pleaded on Amended Claim Form that was filed on the 22<sup>nd</sup> day of March, 2018 is **FOUR HUNDRED NINETY-ONE THOUSAND THREE HUNDRED THIRTEEN DOLLARS AND FOURTY-FOUR CENTS (\$491,313.44)** together with interest accruing daily on the principal balance until payment. This amount was for the period August 16, 2012 to February 21, 2013.

[34] Applying what is laid out in statute and from the principles from the cases cited above it is therefore my judgment that interest is to be awarded at the rate of 6% per annum until the debt is fully extinguished.

#### *Recoverable Expenses & Costs*

[35] The amount owing as particularized in paragraph 1 of this judgment included a sum for recoverable expenses. No evidence has been adduced as to the nature of the recoverable expenses and the evidence does not show that FGB Ltd is entitled to such an expense. I am therefore unable to make an order for the payment of recoverable expenses as claimed on the Claim Form to FGB Ltd.

[36] The Claim Form also included a claim for 'Court fees' and 'Attorneys Fixed Costs on Issues.' The general rule relating to costs is that if the Court decides to make an order about the costs of any proceedings it must order the unsuccessful party to pay the costs of the successful party (Rule 64.6 (1) of the CPR). In the circumstances of this case, it is fair and just that costs be awarded to the successful party, FGB Ltd. It is therefore my judgment that Mr. and Mrs. Spence are to pay the costs of FGB Ltd in this matter.

#### **ORDERS AND DISPOSITION**

[37] Having regard to the forgoing my Orders are as follows:

1. The Claimant's Amended Notice of Application for Court Orders dated the 18<sup>th</sup> day of June, 2019 and filed on the 9<sup>th</sup> day of September, 2019 is granted.

2. Judgment is entered for the Claimant in the sum of **FOUR HUNDRED NINETY-ONE THOUSAND THREE HUNDRED THIRTEEN DOLLARS AND FOURTY-FOUR CENTS (\$491,313.44)**. Interest to be applied at a rate of 6% per annum until the debt is fully extinguished. This interest is to run from February 22, 2013.
3. Costs awarded to the Claimant to be taxed, if not agreed.
4. Claimant's/Applicant's Attorneys-at-Law to prepare, file and serve Orders made herein.
5. Leave to appeal is refused.