

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0028

BETWEEN:

RBTT BANK CARIBBEAN LIMITED

CLAIMANT

AND

GUSTAF OLLIVIERRE
LORELLI OLLIVIERRE

DEFENDANTS

Appearances:

Mrs. LaKeisha John-Farrell for the Claimant

Mr. Sten Sergeant for the Defendants

Ms. Erma Haynes representative for RBTT Bank Caribbean Limited present

2020: 30th July

ORAL DECISION: JUDGMENT ON SUBMISSIONS

Byer, J.:

- [1] On the 30th July 2020, I gave an oral decision in this matter. Upon the delivery of that decision counsel for the defendants requested that the same be reduced to writing. This is the judgment given on that request.
- [2] The claimant bank filed a Fixed Date Claim Form pursuant to Part 66 of CPR 2000 as against the defendants for failure to service their mortgage debt and sought relief for inter alia judgment on the said sum stated to be due and owing and for an order of sale. The defendants in response filed an affidavit in defence, identifying what they considered as irregularities and improprieties with how the claimant bank had handled their mortgage loan and in particular how that mishandling resulted in the defendants being classified as delinquent in their debt servicing.
- [3] After a protracted period in which the court facilitated an opportunity for the parties to discuss a compromised settlement, the claimant bank made it clear to the court and to the defendant, that they were no longer interested in pursuing the claim as the defendants had made good on their debt servicing and the loan was now up to date.

- [4] Upon the indication having been given to the court, the court was prepared to grant leave to the claimant bank to discontinue their action against the defendants but the parties became entrenched in a position that not only should the defendant be paid costs but that the claimant bank should be deprived of the same and if not, that even upon the claimant bank refusing to pursue their claim, that the defendants on the state of the pleadings should be allowed to continue on the issues raised in their affidavit in response.
- [5] The court therefore recognizes the issues that are to be considered as follows:
- 1) Whether the claim can proceed on the present state of the pleadings, with the position of the claimant bank that they expressed no interest in proceeding with the matter and
 - 2) Following on to this, upon the claimant bank determining that they no longer wished to pursue the claim as filed against the defendants, what order should the court make with regard to costs.

Issue #1

- [6] On this issue it is clear in this court's mind that the claimant did nothing procedurally incorrect in seeking to start the Part 66.4 CPR proceedings by way of Fixed Date Claim Form supported by affidavit filed on behalf of the claimant bank.
- [7] In response the defendant was entitled to file an affidavit in response which would have stood as their defence to the claim.¹
- [8] Upon perusing that affidavit it was clear that the defence raised certain issues on the claim of the claimant, that if the matter had continued to trial, would have had to have been ventilated to determine whether the claimant was entitled to the reliefs as prayed.
- [9] However the position of the claimant is clear, they have no interest in pursuing the claim now that the defendants' account is current in their books.
- [10] This court therefore declines to take the position urged on it by the defendants, that an order should now be made for pleadings to be filed and for the matter to proceed to ventilation before the court on any matters raised by the affidavit of the defendants in response. In this court's mind, an order of that nature in all the circumstances of the case would not be a proper utilization of the court's time when the claimant who started these proceedings no longer seeks to rely on the same. Let me make it clear however, that this is not an indication that the court is of the view that the queries and issues raised by the defendant on the affidavit are not valid concerns that may, in another suit, ultimately determine how the bank may seek relief and what those reliefs may in fact be. However, what I do find is that this present case, is not that case.

¹See Part 8 and Part 10 CPR 2000

[11] That being said, I give the claimants leave to discontinue their claim against the defendants. The Notice of Discontinuance to be filed within three days of today's date.

[12] That brings us squarely to Issue #2.

Issue #2

[13] The entitlement to costs on proceedings will always be a thorny one when one party who has brought proceedings for whatever reason decides midstream to no longer pursue their claim.

[14] The submission of the defendants in a nutshell is that the mere fact that the claimant bank decided not to pursue the reliefs for payment of the full sum and vacant possession with an order for sale, evidenced that the claimant bank really had no legitimate interest in seeking the orders but merely utilized the court proceedings as a coercive tactic to get the defendant to pay any sums due and owing. It is this misuse of the court's proceedings that should not be countenanced and thus costs should be paid by the claimant bank.

[15] The claimant bank's position is having been entitled to bring the claim and that the claim having triggered the contractual obligations under the mortgage for the payment of all costs incurred by the bank enforcing their powers pursuant to the mortgage, the claimant bank should be entitled to their costs - they achieved what they wanted but that was only achieved because of the filing of the action.

[16] When this court looks at this issue the major concern for the court is that any order made should not be viewed as a penalty against a claimant who brings litigation and due to certain circumstances seeks to compromise or discontinue the same especially when it is the practice of this court in particular to encourage our practitioners to advocate mediation.

[17] Thus it cannot and should not be the position of the court to discourage parties from settling matters².

[18] Additionally, it is also the position (and provided for in the CPR) that on discontinuance a defendant to the proceedings should recover their costs and it is for the claimant to show why this should not be so.

² This was a similarly held position in the case of **Boxall v Waltham Forest LBC 2001 4 CCLR 258** – and while this court accepts that that case dealt with judicial review proceedings this court finds that the principle should still apply in strictly civil proceedings.

- [19] Indeed once the claimant makes the decision for whatever reason that they do not wish to pursue the claim, there must attach in this court's mind what the court in **Brookes v HSBC Bank**³ called "the risk of litigation".
- [20] The court in that case even went so far to say that even if it was the actions of the defendant which may have resulted in the bringing of the proceedings, this was not necessarily a factor that would be held against the defendant to defeat the usual rule that the claimant is liable for costs on the discontinuance.
- [21] It is also not for this court to delve into what may have occurred if the matter had proceeded to trial in terms of relative success of the parties.
- [22] This matter came up before the court on nine occasions – by the fourth time that it appeared before the court on its docket, the intimation was clearly made by the claimant bank that they were prepared to take a particular position save and except there was an outstanding issue as to what costs should be paid and to whom.
- [23] For five appearances thereafter this court managed this case, in an attempt to have all the facts before it and the applicable law.
- [24] At no time was there an indication that the claimant bank had any intention of resiling from their position of not proceeding to trial, and at no time did the defendant indicate that they would accede to the discontinuance without insisting on costs.
- [25] I accept that the claimant was entitled on their records to file their claim; they should not be penalized for that. I accept that the defendant was entitled to defend the claim and they incurred costs for so doing.
- [26] Without making any finding as to what may have transpired on the claim, I am satisfied that this is a matter in which neither party should be rewarded or penalized as the case may be for the actions taken and as such in my discretion I order that each party is to bear their own costs on this matter.

³2011 EWCA Civ 354

Order of the court is therefore:

1. The Fixed Date Claim Form filed on the 28th January 2019 is discontinued the said Notice of Discontinuance to be filed on or before the 5th August 2020.
2. On this discontinuance exercising my discretion I order each party is to bear their own costs.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar