THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2009/0012
(Interlocutory appeal filed pursuant to CPR 62.10)

BETWEEN:

DANIEL ANDREW DUBISSETTE

Appellant

and

GRENADA COOPERATIVE BANK LIMITED

Respondent

Before:
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances (on paper only)
Mr. Cajeton A. K. Hood of Justis Chambers for the Appellant
Ms. Deborah St. Bernard of Lewis & Renwick for the Respondent

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2013: August 8.

Interlocutory appeal – Letter of agreement between appellant and respondent – Monthly loan deductions greater than that set out in letter of agreement – Application for summary judgment – Whether learned judge erred in granting the respondent summary judgment on application for summary judgment made by appellant

The appellant made an application to the court for summary judgment pursuant to Part 15 of the **Civil Procedure Rules 2000**. This application was filed with supporting affidavit evidence. The respondent filed a response to the appellant's application, but no affidavit in response. The learned judge refused the appellant summary judgment, dismissed his claim, and granted the respondent summary judgment. The appellant appealed the judge's decision.

Held: allowing the appeal and reinstating the appellant's claim, referring the matter to the High Court for case management and for hearing before a new judge, and awarding costs to the appellant, that:

The learned judge had no jurisdiction to grant the respondent summary judgment since no application for summary judgment supported by affidavit evidence had been filed or served by the respondent. Moreover, the appellant was given no notice that the court intended to make such an order, so that he would have had an opportunity to make representations.

Rules 15.4, 15.5 and 26.2 of the **Civil Procedure Rules 2000** cited.

JUDGMENT

[1] **MITCHELL JA [AG.]**: This is an interlocutory appeal which, by agreement between the parties, is dealt with as a summary appeal without the benefit of a transcript of what happened in the court below. Also, there is no record of the pleadings or filings in the court below. On 23rd January 2009, the learned trial judge gave a written judgment on an application by the appellant[1] ("Mr. Dubissette") for summary judgment. She dismissed the application and instead granted summary judgment to the respondent[2] ("the Bank"). On 9th October 2009 the Court of Appeal granted leave to Mr. Dubissette to appeal, and his notice of appeal was duly filed on 27th October 2009. Both counsel signed an agreement that the matter proceed as a summary appeal pursuant to rule 62.6(1) of the **Civil Procedure Rules 2000** ("CPR"). Directions were subsequently given for the filing of submissions, and the matter has now been passed to me to deal with on paper as a single judge of the court pursuant to CPR 62.10.

[2] The agreed facts are that Mr. Dubissette signed a letter of agreement with the Bank to borrow a sum of money. The letter was prepared by the Bank. The date of the agreement was 28th December 1999. The loan was for a sum of $264,000.00. Interest was to be at the rate of 11%. The loan was to be serviced by monthly repayments inclusive of interest of $1,688.74 for a period of 25 years. A mortgage document was prepared by the Bank and executed by Mr. Dubissette on 16th February 2000. The mortgage specified the sum loaned to be

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[1] The claimant in the court below.

[2] The defendant in the court below.

$264,000.00 at 11% interest. The monthly repayment sum was not stated in the mortgage. The loan was duly disbursed, and the Bank made automatic monthly debits of $2,578.88 from Mr. Dubissette's account.

[3] In March 2004 Mr. Dubissette requested a decrease in the rate of interest on his mortgage. The Bank granted his request and the interest rate was reduced to 9.5%.

[4] Subsequently, in November 2006, Mr. Dubissette complained to the Bank that he had been overpaying on his loan from its inception, and he requested the matter be corrected, and the overpayment refunded. The Bank informed Mr. Dubissette that the figure of $1,688.74 which it offered in the letter of agreement of 28th December 1999 had been a mistake. A loan of $264,000.00 for 25 years at an interest rate of 11% per annum could not possibly be financed by a monthly repayment sum of $1,688.74. The correct instalment sum was $2,578.88. This was the monthly sum which had been deducted from his account from inception.

[5] Mr. Dubissette filed a claim against the Bank in December 2007. The Bank did not file a defence, and Mr. Dubissette filed a request for the entry of judgment in default of defence. The Bank filed an application for leave to file its defence out of time. This application was opposed by Mr. Dubissette. Leave was granted by the court, and the Bank duly filed its defence. In its defence, the Bank claimed that the term which Mr. Dubissette relied on was an error on the part of the Bank, and that the Bank had deducted the correct sum from his account monthly to service the loan from the commencement of the loan repayment.

[6] On 29th May 2008, Mr. Dubissette filed an application for summary judgment pursuant to CPR Part 15. In his supporting affidavit Mr. Dubissette deposed that:

> "The monthly repayment was being deducted automatically from a chequing account held by me at the Defendant Bank and I was not supplied with monthly statements of the status of the said chequing account."

No affidavit in response was filed by the Bank. In its response to the application, the Bank submitted that Mr. Dubissette's payment of the correct monthly sum over a period of at least 5 years barred him from claiming that the Bank made unauthorised deductions from his chequing account.

[7] Mr. Dubissette's application for summary judgment was heard on 26th September 2008, and on 23rd January 2009 the court delivered its written judgment. The learned trial judge refused summary judgment to Mr. Dubissette, dismissed his claim, and granted summary judgment in favour of the Bank. Mr. Dubissette has now with the leave of the court appealed this judgment.

[8] There are really two issues. The first is whether the Bank is bound by the letter of agreement to accept the monthly repayment figure of $1,688.74 for the period of 25 years. The second is whether the court could grant summary judgment to the Bank on an application for summary judgment made by Mr. Dubissette but not by the Bank, without giving Mr. Dubissette notice of its intention and giving him a chance to respond. I deal with the second issue first.

[9] Mr. Dubissette had applied to the court for summary judgment supported by affidavit evidence as required by CPR Part 15. The Bank had not filed any affidavit in response. Mr. Dubissette submits that the court had before it no evidence on behalf of the Bank for the purpose of hearing any application by the Bank. The court had no option but to find that he had no notice of the deductions from his account since that was the evidence in his affidavit. His claim had been wrongfully dismissed without giving him an opportunity to reply to the Bank's defence. The judge was wrong to have relied on the averments in the pleadings for the purposes of the summary judgment application. In any event, the Bank had made no application for summary judgment in its favour. The judge had decided to strike out his claim on its own initiative without giving him any opportunity to make representations either orally or in writing. The judge ought instead, if he

rejected the application for summary judgment, to have returned the matter to case management.

[10] The learned trial judge gives no explanation how she came to treat Mr. Dubissette's application for summary judgment, supported by his affidavit evidence, as an application by the Bank for summary judgment, supported by no evidence at all. I say this with the provisions of CPR Part 15 and CPR Part 26 in mind. CPR 15.4 and 15.5 provide the procedure to be followed in the case of an application for summary judgment, which is essentially, that an application supported by affidavit evidence be filed and served. CPR 26.2 provides that if the court proposes to make any order on its own initiative it must give any party likely to be affected a reasonable opportunity to make representations. Mr. Dubissette complains that in this case the court took the initiative to strike out his case and to give summary judgment against him without there being any application by the Bank supported by affidavit evidence, and without giving him any notice that the court was proposing to make such an order and giving him an opportunity to make representations. The Bank submits that the learned trial judge was entitled to take such a step. But, in my view Mr. Dubissette's complaint is unassailable. In the light of the provisions of CPR Part 15 and CPR 26.2 above, the court below had no jurisdiction to summarily dismiss Mr. Dubissette's claim without an application by the Bank supported by evidence. In any event, the court gave Mr. Dubissette no notice that it was proposing to make such an order, and giving him an opportunity to respond. The order appears to come out of the blue. From the absence of any explanation from the learned trial judge as to why she was taking such a drastic step in the absence of any application and without giving him the appropriate notice, it would appear that the decision was no more than a slip based on a momentary misapprehension that it was indeed the Bank which had applied in proper form for summary judgment. The order is worded as if it was made on the Bank's application. In the circumstances, in my view, Mr. Dubissette's claim ought to be reinstated. But, if I am to order this to happen,

it would be inappropriate for me to make any findings of fact and/or of law in relation to the first issue that has been pressed by Mr. Dubissette above. It would be preferable if this matter went back to the court for evidence to be led and for the court to come to the appropriate finding as to the facts and the applicable law.

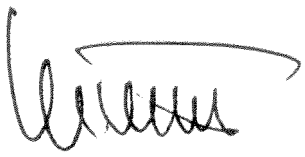
[11] Given what I have said above, the order is:

(1) The appeal is allowed;

(2) The claim is reinstated;

(3) The matter is referred to the High Court for case management and for hearing before a new judge.

(4) Mr. Dubissette is entitled to his costs in the court below in the sum awarded by the judge of $6,875.00 together with costs of the appeal of two-thirds of that amount or $4,583.33.



Don Mitchell
Justice of Appeal [Ag.]