



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2021: No. 373

IN THE MATTER OF THE PREMISES SITUATE AT GROUND & BASEMENT FLOOR UNITS, 42  
ANGLE STREET, CITY OF HAMILTON, HM 10 BERMUDA

**BETWEEN:**

**HSBC BANK OF BERMUDA LIMITED**

**(Acting by Court appointed Receivers of the Mortgaged Property)**

**Plaintiff**

**and**

**AMBIANCE HOLDINGS LTD.**

**First Defendant**

**CARLTON SIMMONS**

**Second Defendant**

## **RULING**

**Date of Hearing:** 12 October 2022

**Date of Ruling:** 28 October 2022

**Appearances:**

**Jennifer Haworth, Dan Griffin, MJM Limited for Plaintiff**

**Cameron Hill, Spencer West (Bermuda) Limited, for First Defendant**

**Angelita Dill, AAA Law, for Second Defendant**

## **RULING of Mussenden J**

### **Introduction**

1. By a Summons dated 10 May 2022 the Plaintiff (“**HSBC**”) seeks orders as follows:
  - a. That the first affidavit and exhibit CS-1 of the Second Defendant Carlton Simmons (“**Mr. Simmons**”) dated 10 March 2022 (the “**First Simmons Affidavit**” and “**CS-1**”) is defective pursuant to Order 41 Rule 1(8) for want of having being properly signed by the Deponent and signed before the person before whom it was sworn, pursuant to Order 41 Rule 9(5) for want of having been endorsed with the date of swearing and filing, and pursuant to Order 41 Rule 19(4) for failing to state his place of residence or business;
  - b. The First Simmons Affidavit and CS-1 may not be used in evidence pursuant to Order 41 Rule 4 without permission of the Court;
  - c. In the alternative to paragraphs 1 and 2 above, the First Simmons Affidavit and CS-1 is struck out for being scandalous, irrelevant and oppressive pursuant to Order 41 Rule 6; and
  - d. In the alternative to paragraphs 1 and 3 above, Carlton Simmons shall attend for cross-examination at the hearing of the matter to be set down by the Court pursuant to paragraph 1 of the Order dated 14 April 2022 pursuant to Order 38 Rule 2(3).
2. The Application is supported by the First and Second Affidavits of Dan Griffin, registered associate of MJM Limited (“**MJM**”).
3. Counsel for Mr. Simmons opposes the application. Ms. Dill filed an affidavit along with a voluminous exhibit in support of her objection to the application.

### **Background**

4. On 5 September 2019, Rachelle Frisby and John Johnston of Deloitte Ltd. were appointed as Joint and Several Receivers by Order of the Court over the premises situate at ground and basement floor units of the 42 Angle Street, City of Hamilton, HM 12 (the “**Mortgaged**

**Property**”). They carried out an assessment of the Mortgaged Property and sought details of the rental arrangements between Mr. Simmons and Ambiance Lounge and Fresh Clips barbershop.

5. Eventually, two leases (the “**Leases**”) were obtained and reviewed as follows:
  - a. A lease between Mr. Simmons and the First Defendant (“**Ambiance**”) regarding the “Ambiance Lounge” dated 16 June 2017 (the “**Ambiance Lounge Lease**”) and
  - b. A lease between Mr. Simmons and Ambiance regarding “Fresh Clips” dated 16 June 2017 (the “**Fresh Clips Lease**”).
6. The Receivers were advised that there were grounds to challenge the validity of the Leases. Thus Ambiance was provided a period of time to enter into new leases. The Receivers took the position that there were some key issues with the Leases which included (a) Rental sums were not commercial rental rates; (b) The Leases breached the terms of the mortgage dated 7 May 2009 between the HSBC and Mr. Simmons wherein consent was not obtained to underlet; (c) The 30-year Leases were entered into immediately after HSBC’s withdrawal of a proposal to restructure the existing loan and indication that proceedings would be issued; (d) Mr. Simmons attempted to lease the Mortgaged Property to businesses that he owns at terms inconsistent with market rates; (e) The lease term of 30 years is unusually lengthy in a commercial context; and (f) An unusual clause was included in the Ambiance Lounge Lease, whereby in the event the Landlord fails to provide freshwater to the Mortgaged Property the landlord shall pay the sum of \$3,000 per day until fresh water is restored.
7. Counsel for HSBC issued a Notice to Quit dated by 31 July 2021. On 18 August 2021 they requested payment of rent which was in arrears since April 2021 and which remains unpaid.
8. On 16 December 2021 HSBC caused an Originating Summons to be issued for relief as follows:
  - a. A declaration that the Ambiance Lounge Lease is void;
  - b. A declaration that the Fresh Clips Lease is void;

- c. An order for possession of the Mortgaged Property occupied by Ambiance trading as Fresh Clips and Ambiance Lounge, respectively.
- d. Judgment against Ambiance in respect of rental arrears in the sum of \$18,200.00 (Fresh Clips \$7,000.00 and Ambiance Lounge \$11,000.00).

### **Chronology of events**

#### 9. Relevant events took place as follows:

- a. On 16 December 2021 AAA Law Company Limited filed a Notice of Change of Attorney giving notice that it had been appointed to act for Ambiance in place of Chancery Legal Ltd.
- b. On 16 December 2021 there was an order for the Defendants to file affidavit evidence in reply on or before 28 January 2022.
- c. On 28 January 2022 Ms. Dill filed affidavit evidence requesting an extension for the Defendants to file an affidavit as Mr. Simmons was residing in another country where a foreign language is used, telecommunications were being challenged and there were a number of other problems that were being addressed.
- d. On 3 February 2022, Ms. Dill caused a summons for an application for an extension to 10 March 2022 to file the affidavit evidence.
- e. On 17 February 2022 there was an Unless Order that unless the Defendants file and serve affidavit evidence in reply in relation to the Plaintiff's application on before 10 March 2022, the Plaintiff's application, for declaration that the Leases are invalid and an order for possession of the Mortgaged Premises is granted.
- f. On 10 March 2022 Mr. Simmons swore the First Simmons Affidavit "In the City of Hamilton in the Islands of Bermuda" before a Commissioner of Oaths, namely attorney Mr. Paul Wilson. Mr. Wilson did not state on the affidavit the name of the firm with which he was employed. The First Simmons Affidavit was not filed until 27 April 2022. The circumstances of this affidavit are in serious question by HSBC, as it was later learned that the First Simmons Affidavit was sworn over Zoom technology with Mr. Wilson in Bermuda and Mr. Simmons in a foreign country. I address those issues below.

- g. Also on 10 March 2022 Ms. Shaylee Trott, a director of Ambiance, swore an affidavit in this matter before attorney Paul Wilson.
- h. On 13 April 2022 Spencer West (Bermuda) Limited (“**Spencer West**”) filed a Notice of Change of Attorney giving notice that they were instructed and appointed to act as the attorneys on behalf of Ambiance in place of Westwater Hill & Co (“**Westwater**”) now known as Spencer West. However, there is no record of Westwater being on the record in this matter before that Notice of Change of Attorney. The effect was that Spencer West was replacing AAA Law as counsel for Ambiance.
- i. Also on 13 April 2022 Spencer West filed a summons for an application for liquidated damages on behalf of Ambiance against HSBC. The Plaintiff states that no sealed copy has been served on them.
- j. On 14 April 2022, at the hearing, Ms. Dill sought an extension of time to have Mr. Simmons swear an affidavit and have it filed and served. I note here that Mr. Simmons had already sworn the First Simmons affidavit.
- k. On 14 April 2022 an order was made for:
  - i. Mr. Simmons to file and serve affidavit evidence within 21 days failing which no such affidavit evidence will be allowed by him.
  - ii. Ambiance to file and serve its summons seeking damages and affidavit evidence within 21 days. I note here that Spencer West had already filed its summons for damages.
- l. On 27 April 2022 the First Simmons Affidavit was filed and later served.
- m. On 10 May 2022 HSBC filed its summons to strike out the First Simmons Affidavit and on 17 May 2022 Dan Griffin filed an affidavit in support of HSBC’s summons.
- n. On 2 June 2022 there was an order for directions for the strike-out application which allowed for further evidence by the parties, including evidence of Mr. Wilson and an order for Mr. Wilson to be available for attendance and cross-examination at the hearing of the summons.
- o. On 1 July 2022 Ms. Dill filed her Second Affidavit sworn 1 July 2022 along with Exhibit “AD-1” which included the exhibits as set out below. Ms. Dill set out the challenges she faced with getting Mr. Simmons to swear the First Simmons

Affidavit in another country with a foreign language including efforts in respect of an apostille. She also made reference to her reliance on the Commissioner of Oaths and Notary Public (Electronic Notarization) Rules 2021 to swear an affidavit over Zoom. Thus, she made arrangements for Mr. Simmons to appear from the other country on a Zoom call with attorney Mr. Paul Wilson who was in Bermuda and who satisfied himself of the identity of Mr. Simmons, whom he already knew as a former client in Bermuda. They both had copies of the First Simmons Affidavit. Ms. Dill considered that Mr. Simons was ‘electronically’ in Bermuda. Thus, on the Zoom call they went through the process of swearing the First Simmons Affidavit. Ms. Dill exhibited the following documents:

- i. Exhibit “AD-1(a) – general correspondence;
- ii. Exhibit “AD-1(b) – AAA Law correspondence with the Court;
- iii. Exhibit “AD-1(c) – AAA Law correspondence with the Court;
- iv. Exhibit “AD-1(d) – Second Affidavit of Carlton Simmons (**“Unfiled Second Simmons Affidavit”**) sworn June 2022 in which he set out that he was resident in another country because it was not safe for him to be in Bermuda because of some previous unrelated circumstances. Further, he described the difficulties with getting the First Simmons Affidavit sworn in the other country. He explained the circumstances of swearing the First Simmons Evidence on the Zoom call.
- v. Exhibit “AD-1(e) – First affidavit of Paul Wilson sworn on 30 June 2022 (**“Unfiled First Wilson Affidavit”**) in which he described the circumstances of swearing the First Simmons Affidavit on the Zoom call and that he knew Mr. Simmons previously as a former client;
- vi. Exhibit “AD-1(f) – case law;
- vii. Exhibit “AD-1(g) – First Simmons Affidavit;
- viii. Exhibit “AD-1(h) – Correspondence;
- ix. Exhibit “AD-1(i) – Affidavit of Xiomara Maddocks sworn 30 June 2022 before Paul Wilson (**“Unfiled Maddocks Affidavit”**);
- x. Exhibit “AD-1(j) – Unfiled Declaration of Mr. Simmons

- p. On 2 August 2022 Dan Griffin filed his second affidavit in support of HSBC's summons to strike out the First Simmons Affidavit.

**HSBC's Submissions on the strike-out application**

10. Ms. Haworth submitted that there was some urgency to resolving this matter, not just this application, as Ambiance's continued occupation of the Mortgaged Property is causing further losses to HSBC and to other occupants. The Receivers appointed since September 2019 are unable to obtain rental income, are prevented from realizing its security and are incurring costs in maintaining the Mortgaged Property. They claim that the Defendants have deliberately allowed water taps to run in an effort to inflate their threatened counterclaim, depriving other occupants of their water supply.
11. Ms. Haworth submits that the First Simmons Affidavit should be struck out on the following grounds:
- a. Irregularity in the circumstances of how it was sworn;
  - b. That it is both irrelevant and oppressive; and
  - c. Some of the affidavit evidence is contained in Ms. Dill's Exhibit AD-1.

**The Defendants' Submissions on the strike-out application**

12. Ms. Dill submitted that the Court has discretion under Order 41 Rule 4 in allowing the evidence. She argued that in light of all the difficulties and the efforts to get the First Simmons Affidavit sworn the Court should exercise its discretion to admit the evidence on the basis of fairness.
13. Mr. Hill argued that the solemnity of the process of swearing the First Simmons Affidavit was respected. Further, the Court has evolved during the Covid-19 process to use technology and the use of Zoom in this matter should be accepted. Thus the Court should exercise its discretion to allow the evidence of the First Simmons Affidavit. Further, he

argued that the evidence should be allowed in its entirety as the background is relevant to show why the leases are in the formats that they are in.

#### **Rules of the Supreme Court 1985 - Order 41 - Affidavits**

14. Relevant rules of the Rules of the Supreme Court 1985 in this matter are as follows:

*“41/1 Form of affidavit*

*(4) Every affidavit must be expressed in the first person and must state the place of residence or business of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.*

*(8) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.*

*41/4 Use of defective affidavit*

*An affidavit may with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.*

*41/6 Scandalous, etc. matter in affidavit*

*The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.*

*41/8 Affidavit not to be sworn before attorney of party, etc.*

*No affidavit shall be sufficient if sworn before the attorney of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that attorney.*

*41/9 Filing of affidavits*

*Every affidavit used in a cause or matter proceeding in the Court must be filed in the Registry. Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.*

*41/12 Affidavit taken in countries outside Bermuda*

*A document purporting to have affixed or impressed thereon or subscribed thereto the seal or signature of a court, judge, notary public or person having authority to*



*administer oaths outside Bermuda in testimony of an affidavit being taken before it or him shall be admitted in evidence without proof of the seal or signature being the seal or signature of that court, judge, notary public or person.”*

15. The Supreme Court Practice 1999 edition in its guidance at 41/4 states that the effect of the rule on the use of a defective affidavit is as follows:

*“Effect of rule – This rule is only permissive. If the irregularity can be cured without undue hardship, or it is not a matter of substance or affects its actual contents, then it should be put right. Any costs will fall on the solicitor responsible.”*

16. The Supreme Court Practice 1999 edition in its guidance at 41/6 states that the effect of the rule on the power to strike out of any affidavit any material which is scandalous, irrelevant or otherwise oppressive is as follows:

*“Effect of rule – An affidavit must be pertinent and material and may be ordered to be taken off the file if scandalous and irrelevant matter is inserted (Rossage v Rossage [1960] 1 W.L.R. 249) or the scandalous material may be expunged (Warner v Mosses [1881] W.N. 69). The rule empowers the Court to strike out matter which is scandalous or irrelevant or otherwise oppressive so that matter which is scandalous can be struck out and irrelevant matter which is not scandalous can be struck out (Re J [1960] 1 W.L.R. 253). ... The Court has an inherent power to take an affidavit of the file for prolixity, e.g. an affidavit of documents of oppressive length. It may also disallow costs occasioned by prolixity. The Court will strike out facts and matters deposed to in an affidavit which are inadmissible in evidence being irrelevant or otherwise oppressive (Savings and Investment Bank Ltd. v Gasco Investments (Netherlands) B.V. [1984].”*

### **Commissioner of Oaths and Notaries Public Act 1972**

17. Section 10 of the Commissioner of Oaths and Notaries Public Act 1972 states as follows:

*“Jurat or attestation*

*10 Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act or other statutory provision shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”*

### **Commissioners for Oaths and Notaries Public (Electronic Notarization) Rules 2021**

18. Section 3 of the Commissioners for Oaths and Notaries Public (Electronic Notarization)

Rules 2021 states as follows:

*“Application*

*(1) These Rules apply in respect of notarial services provided by way of conference on or before 30 September 2023.*

*(2) A person who attends a conference initiated by a notary public under these Rules must be in Bermuda during the conference.”*

### **Analysis of the Defendant’s Applications**

19. In my view, for several reasons, HSBC’s application to strike out the First Simmons Affidavit should not be granted in respect of the entire affidavit, but various paragraphs should be struck out accordingly.

20. First, an affidavit is the evidence in writing of a party in a matter. Ms. Haworth argues that the irregularities in the First Simmons Affidavit include prolix, irrelevant and incoherent documents running to hundreds of pages. Also, the First Simmons Affidavit has failed to state the place of residence of the deponent, instead stating “formerly of” an address in Bermuda. In my opinion, this is an irregularity for which there is an explanation in the Dill Affidavit and the Unfiled Second Simmons Affidavit, namely that Mr. Simmons is of the view that he cannot reside in Bermuda as there is a present danger to his life arising from a previous unrelated incident. Further, Mr. Simmons has stated that he cannot provide his current address as that would present a risk to his safety. In my view, in this case, on the evidence that Mr. Simmons is of the view that his life is at risk, I am prepared to accept

that the failure to provide his current address is an irregularity for which I should exercise my discretion to allow the evidence of his affidavit. It is not an irregularity that is a matter of substance of which affects its actual contents.

21. Second, in the jurat of the First Simmons Affidavit, it states that it was sworn in the Islands of Bermuda. All the evidence shows that Mr. Simmons was not in Bermuda when he swore his affidavit. I accept that the statement in the jurat is an irregularity and more importantly so is the fact that the affidavit was sworn using Zoom. I have considered the efforts of Ms. Dill to obtain a properly sworn affidavit of Mr. Simmons to no avail. In my view, those efforts were reasonable but Ms. Dill should have provided full and frank disclosure to the Court on 14 April 2022 that she had had the First Simmons Affidavit since 10 March 2022 although there were difficulties with it that she was trying to overcome. To seek more time to obtain an affidavit that she already had was not being up front with the Court. Further, she may have saved time and costs. I have also considered Ms. Dill's argument that Mr. Simmons was 'electronically' in Bermuda and that Mr. Wilson had satisfied himself of the identity of Mr. Simmons.
22. In my view, the Rules contemplate that the person swearing an affidavit should be in the presence of the Commissioner who would verify the deponent's identity, witness the signature (not an electronic signature affixed to the document) and administer the oath. I do not accept Ms. Dill's argument that the Commissioners for Oaths and Notaries Public (Electronic Notarization) Rules 2021 apply for the swearing of an affidavit. Those rules apply where the person attending a conference with a notary public must be in Bermuda. Without going into the detail of the Electronic Transactions Act 1999, in my view that Act does not apply for the procedure of a deponent swearing an affidavit but more so to electronic records.
23. Thus, I am satisfied that there is no legislation to 'electronically' place a person in Bermuda for the swearing of an affidavit. However, this is an irregularity for which I am of the view that I should exercise my discretion to allow the affidavit evidence in this case. During the course of argument, I commented that Ms. Dill may be ahead of her time in respect of modernization when she contended that Mr. Simmons was 'electronically' in Bermuda

begging a comparison with the Star Trek term of Captain Kirk “*Beam me up, Scotty*”. During the Covid-19 pandemic, the Courts, and practically every other organization, were quick to adapt to video-conferencing using tools such as Zoom, Webex and Teams. The Courts used this technology to have mentions, hearings and even trials and appeals. The technology is no longer foreign to the lay person or the Courts. I note that in this case the swearing by Zoom was not because of Covid-19 related restrictions. Whilst I accept that the RSC are a matter for the Chief Justice, in this case, in the circumstances of the swearing of the First Simmons Affidavit, I am of the view that I should exercise my discretion to allow the affidavit evidence out of a sense of fairness between the parties. However, I should clarify that in no way do I intend to set a precedent for people swearing an affidavit to be ‘electronically’ in Bermuda but physically in another country. Holograms, the Holodeck, Princess Leia and Star Trek are yet to make an appearance in the RSC to place someone ‘electronically’ in Bermuda.

24. Third, I have considered the complaint that Mr. Wilson was an associate of Westwater when he swore the First Simmons Affidavit on 10 March 2022. He did not appear for cross-examination at the hearing of this application. Ms. Dill submitted in argument that according to the Bermuda Bar Association website Mr. Wilson remained with Westwater when the firm merged with or became Spencer West. However, I note: (a) that on 29 June 2022 Mr. Wilson wrote an email to Mr. Griffin of MJM from the email account “paul.wilson@spencer-west.com” but signed off the email above “Westwater”; and (b) that there was a media article in the Bermuda daily newspaper the Royal Gazette dated 15 July 2022 by Spencer West that Mr. Wilson was a member of that firm. Mr. Hill, present in the hearing, offered no assistance on this point. Thus, I am not clear if and when Mr. Wilson moved from Westwater to Spencer West. In any event, the Court file shows that Spencer West came on record for Mr. Simmons on 13 April 2022. In my view, I am not satisfied that Mr. Wilson was in breach of Rule 41/8 when the First Simmons Affidavit was sworn by Zoom on 10 March 2022.

25. Fourth, I have considered the complaint that Ms. Dill has sworn an affidavit which exhibits other sworn affidavits in breach of Order 41/9. I cannot comprehend the logic of why the affidavits are contained within the exhibit of Ms. Dill but the effect is that such affidavits

are not properly filed in this matter. In my view, these are irregularities for which I should exercise my discretion to order that they be cured by granting leave for the proper filing of the Unfiled Second Simmons Affidavit and the Unfiled First Wilson Affidavit within 7 days of the date of this Ruling. I note there may be an issue with the Unfiled Maddocks Affidavit as it was sworn before Mr. Wilson who by 30 June 2022 may have been an associate with Spencer West. In any event, I do not consider that affidavit to be of any assistance to the Court.

26. Fifth, I have considered the complaint that the contents of the First Simmons Affidavit are irrelevant and oppressive for the following reasons:

- a. paragraphs 6 -74 concern matters already determined by the Court in its order of 5 September 2019; and that they are also irrelevant to the issue of the validity of the Leases;
- b. paragraphs 75-94 are so prolix and confused that it is impossible to understand their content and or relevance; and
- c. paragraphs 95 onward consist of submissions and a prayer of relief, not evidence.

27. Ms. Haworth argues that attempting to cure the defects will cause HSBC hardship because they will likely be faced with yet another round of deciphering prolix, irrelevant and incoherent documents running to many hundreds of pages of what is in fact a very simple matter of the validity of two Leases which are causing mounting losses for HSBC.

28. I have reviewed the three groups of paragraphs in the context of the ultimate matter before the Court in this application, that is, the validity of the Leases. In my view, paragraphs 6 – 74 are irrelevant to the issue of the validity of the leases. They speak to the history of Mr. Simmons dealings with HSBC but do not touch upon the issue of the Leases. On the contrary, paragraphs 75 – 94 do provide factual evidence about the validity of the leases. In my view paragraphs 95 onward are irrelevant as they do consist of submissions and a prayer of relief, not evidence. On that basis, I will exercise my discretion to strike out paragraphs 6-74 and paragraphs 95 onwards (along with any exhibits referenced in those paragraphs) for being irrelevant to the issue of the validity of the Leases.

29. Sixth, I have considered the fairness of the matter. Mr. Simmons is understandably in a difficult position having to make the decision to live in another country with a foreign language. That fact has caused him difficulty in proceeding with the litigation process as he might have had if he were resident in Bermuda. In my view, the fairness of the matter calls for the relevant evidence of Mr. Simmons to be admitted in this matter, subject to my ruling to exclude the irrelevant paragraphs. To this point of the circumstances of the safety of Mr. Simmons, in my view, Mr. Simmons should be allowed to attend the hearing for cross-examination by video conference.

### **Conclusion**

30. For the reasons above:

- a. I do not grant the Plaintiff's application to strike out the First Simmons Affidavit in its entirety;
- b. I grant leave for the First Simmons Affidavit and CS-1 to be used in evidence pursuant to Order 41 Rule 4 subject to my order below striking out various paragraphs;
- c. I do allow the Plaintiff's application to strike out parts of the First Simmons Affidavit, in particular paragraphs 6 to 74 and paragraphs 95 onwards (along with any exhibits referenced in those paragraphs);
- d. I grant leave to the Second Defendant to file the Unfiled Second Affidavit of Mr. Simmons and the Unfiled First Wilson Affidavit within 7 days of the date of this Ruling for the purpose that they will be proper evidence in this application and matter.
- e. I grant HSBC's application that Mr. Simmons shall attend for cross-examination at the hearing of the matter, such appearance to be by video conference if he is not able to attend in person.

31. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Second Defendant Mr. Simmons on a standard basis, to be taxed by the Registrar if not agreed.

Dated 28 October 2022



**HON. MR. JUSTICE LARRY MUSSENDEN**  
**PUISNE JUDGE OF THE SUPREME COURT**

