

**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE  
CIVIL DIVISION**

**COMMONWEALTH OF DOMINICA**

Claim No: DOMHCV2021/0148

**BETWEEN**

**CIBC First Caribbean International Bank**

Claimant

**-and-**

**Tomato Café Ltd.**

1<sup>st</sup> Defendant

**Pinnacle Development Ltd.**

2<sup>nd</sup> Defendant

**Whitney Sommers**

3<sup>rd</sup> Defendant

**Before the Hon Mde. Justice Jacqueline Josiah-Graham**

**Appearances:** Mr Stephen Isidore, Counsel for the Claimant/Respondent; and  
Mr Mark Douglas, Counsel for the 3<sup>rd</sup> Defendant/Applicant

-----  
2023: 28<sup>th</sup> February  
30<sup>th</sup> March  
-----

**ORAL REASONS**

**Striking out Claim against Third Named Defendant**

- [1] **JOSIAH-GRAHAM, J:** This is an application brought by the third defendant, Whitney Sommers filed on 22<sup>nd</sup> July, 2022, to strike out a mortgage claim brought by the Claimant on 6<sup>th</sup> July, 2021. The Claimant filed a claim to which the third Defendant filed a defence and counterclaim. The third Defendant now seeks to have the claim against her struck out.
- [2] The Claimant claims that the third Defendant is obligated to repay the loan outstanding to the Bank as Guarantor of a Loan Agreement, she having executed the guarantee on behalf of Tomato Café Ltd and personally guaranteed repayment of the loan pursuant to a Guarantee and Postponement Agreement dated 12<sup>th</sup> December 2012 (hereinafter, the "Guaranty Agreement").

**Issue for Determination**

- [3] The issue for determination is whether the Claimant's statement of case discloses reasonable grounds for bringing this claim. In other words, whether, if all facts stated in

the statement of case are taken as true, a complete cause of action is disclosed against the Third Defendant.

## **Background**

- [1] The claim is about the alleged breach of a loan agreement made between the Claimant and Tomato Café Ltd (the "Loan Agreement"). The Claimant seeks to recover outstanding debt because the Defendants; (1) are jointly and severally liable for the debt; and (2) have failed and/or refused to meet their payment obligations under the credit agreements, notwithstanding a demand for payment being made. The Claimant also claimed further and/or in the alternative an order that the mortgage properties be sold in accordance with the procedure outlined in the Title by Registration Act, Chapter 56:50. It alleges liability for the debt jointly to the third Defendant as a party to this action through a guarantee she executed as personal guarantor of the Loan Agreement.
- [2] The Claimant's case is that an agreement was executed between the parties on 18<sup>th</sup> March 2013 wherein the Claimant agreed to lend the first Defendant as primary borrower and, the second and third Defendants as guarantors a loan in the amount of \$1,452,000.00. That based on that agreement, the Claimant made a credit card facility with a limit of \$54,000.00 available to the Defendants and in acknowledgement of this credit facility, the Defendants also agreed to repay and executed a promissory note.
- [3] These loan amounts were to be repaid on Loan Account No. 106984117 in the principal amount of \$1,033,053.23 over 82 monthly instalments of \$18,393.32 commencing 30<sup>th</sup> November 2016; and Loan Account No. 107016283 in the amount of \$847,000.00 over 120 monthly instalments of \$6,649.00 commencing 30<sup>th</sup> November 2016.
- [4] The Third Defendant has raised an issue in defending the claim. She admits executing a guarantee with the Claimant for loan facility granted and disbursed to the first and second Defendants but contends that when she did so, it was as director of the companies, Tomato Cafe Ltd and Pinnacle Developments respectively, and not as a personal guarantor of the indebtedness of the loan agreement and therefore she is not a correct or proper party to the action.

## **The Grounds of the Strike Out Application**

- [5] The third Defendant contends that the two companies, Tomato Café Ltd and Pinnacle Developments Ltd, are separate legal personalities from their individual directors and as such, she did not contract with the Claimant to be a guarantor, but rather that when she executed the said loan agreements and ancillary documents she did so solely in her

capacity as director of the first and second Defendant companies and not as signatory to the guarantee in her personal capacity. Therefore she cannot be held personally liable for any of the obligations of the first and second Defendants.

- [6] The third Defendant contends further that, on its face, the Loan Agreement cannot reasonably be construed as reflecting an intention on the part of the Claimant or the third Defendant to create a legal relationship between the Claimant and Whitney I. Sommers in her personal capacity. That the third Defendant executed the Loan Agreement in her capacity as director of Tomato Café Ltd and director of Pinnacle Development Ltd., Pinnacle Developments Ltd. which is the only signatory to the guarantee and therefore, the third Defendant cannot be held personally liable for any of the obligations of Tomato Café Ltd or Pinnacle Developments Ltd under the Loan Agreement.
- [7] It is also her argument that the Claimant has made no allegations in its pleadings that the third Defendant used Tomato Café Ltd or Pinnacle Developments Ltd to commit fraud or some other inequity so as to permit piercing the corporate veil of those entities and that no privity of contract exists between Claimant and the third Defendant.
- [8] She further contends that a novation of the Loan Agreement occurred on 16<sup>th</sup> November 2016 when the original loan was restructured, and new agreements were executed without her consent. Accordingly, even if she had signed a guarantee in 2012 in her personal capacity - which she did not - any alleged obligation under that 2012 agreement would have been extinguished on 16<sup>th</sup> November 2016.

### **The Law on Striking Out**

- [9] In striking out a statement of case in proceedings, the test to be applied is set out in Part 26.3(1) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 as amended and in case law<sup>1</sup>. Part 26.3(1) of the CPR which confers a discretion on the court to strike out a statement of case in a proceeding sets out the following circumstances:
  - a) Failure to comply with a rule or practice direction, order or direction given by the court in the proceedings;
  - b) The statement of case does not disclose any reasonable ground for bringing or defending the proceedings;
  - c) It is an abuse of the process of the court or likely to obstruct the just disposal of the proceedings; or
  - d) The statement of case is prolix or does not comply with the requirements of Part 8 or 10.

---

<sup>1</sup> See for example *Ian Peters v Robert George Spencer* HCVAP2009/016

[10] A court may be inclined to exercise its power to strike out the whole or part of a statement of case where that statement of case discloses no reasonable grounds for bringing the claim. Such cases include particulars of claim which do not set out facts indicating what the claim is about, or they, do not disclose any legally recognisable claim against the other party.

[11] This power to strike out is well established to be a “nuclear action” on the part of the courts and is allowed only in obvious cases. In the case of **Citco Global Custody v Y2K Finance**<sup>2</sup> Edwards JA warned that:

“It is also well settled that the jurisdiction to strike out ought to be used sparingly since the exercise of the jurisdiction deprives a party of as right to a fair trial and the ability to strengthen as case through the process of disclosure and other court procedures such as request for information; and the examination and cross-examination often change the complexion of the case. Also, before using CPR 26.3 (1) to dispose of 'side issues', one should be taken to ensure "that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in any application must be exercised in accordance with the overriding objective of dealing with cases justly.”

[12] Thom JA in **Agnes Danzie et al v Cecil Anthony SLUHC VAP2015/0009** at paragraph 13 stated:

“It is a well-established principle that the court’s power to strike out a statement of case should only be used sparingly (Real Time Systems Limited v Renraw Investments Limited and Others [2014] UKPC 6). Also, in *Salfraz Hussain v Birmingham City Council and Others* the English Court of Appeal, in considering the exercise of discretion to grant relief from sanctions where judgment was entered in default, stated: ‘it must be kept in mind that discretionary powers are not to be exercised in order to punish a party for incompetence – they must be exercised in order to further the overriding objective’. In exercising his discretion, the learned judge was required to consider what was the appropriate response having regard to all of the circumstances, including whether there were other alternatives available that would be just in the circumstances.”

[13] When a strike out application is successful, either the proceedings are struck out in their entirety or some part of the pleading is struck out. A successful strikeout application may lead the court to enter judgment in favour of the other party, bringing an end to the issues and disputes before the court.

---

<sup>2</sup> BVI CVA 2212008

- [14] To determine this, Pereira CJ in **Dr. Martin Dider et al v Royal Caribbean Cruises Ltd et al**<sup>3</sup> at paragraph 28 outlined the approach the court ought to take in an application to strike out:

“Therefore, for the strike out procedure, the pleadings alone are examined and if the court finds that they are untenable as a matter of law a party may have his/her claim or defence struck out. This does not preclude that party however, from remedying the faults of their claim or defence and bringing further legal proceedings in relation to the same dispute. They are perfectly entitled to do so. The situation is different, however, with the summary judgment procedure since this procedure gives a judgment on the merits which operates as issue estoppel. No further litigation on the same issue(s) will be entertained by the court”.  
**[Emphasis mine].**

- [15] Accordingly, in making the assessment to strike out, the court will assume that each of the allegations pleaded are true. The court is not at this stage required to do an extensive or in-depth analysis of the facts as pleaded or carry out a full investigation or trial. In fact, in dealing with the application the court is to be mindful that to strike out a Claimant's claim is a drastic step to be taken only in exceptional circumstances where it is plain and obvious to do so.

## ANALYSIS

- [16] In relation to this application to strike out, on the law, the determination that has to be made is whether or not the Claimant's application discloses no ground for bringing this action or the claim is bound to fail; and in that regard, this court is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing the claim or that there has been an abuse of process which consequence is that the claimant ought not to be permitted to continue to pursue a case which has no real prospect of success.
- [17] I have examined the Statement of Case in the instant claim and find that the drastic step applied for by the third Defendant is only to be taken in exceptional circumstances where it is plain and obvious to do so.
- [18] The nub of the Claimant's claim is that the third Defendant signed the purported loan agreement on behalf of Tomato Café Ltd and [Pinnacle Developments Ltd] and personally guaranteed repayment of the loan pursuant to a Guarantee and Postponement Agreement dated 12<sup>th</sup> December 2012.

---

<sup>3</sup> SLUHCVP2014/0024

The Claimant claims that the loan agreement between the Claimant and the Defendants has been breached. The agreement was based on the Defendant's request to the Claimant in or about November 2012 and the Claimant agreed to provide a loan to the First Defendant as the primary borrower and the Second and Third Defendants as guarantors.

[19] This raises a mixed question of fact and law to ascertain whether the Third Defendant signed the guarantee in her own capacity and/or as a director of the First Defendant. There is also raised the tangential issue of the effect of the 2016 novation, if any, on the guarantee.

[20] The third Defendant counterclaim that her signature was made for Pinnacle Developments Ltd., a corporate body and not an individual signature and that Whitney Sommers, as director of a disclosed principal, Pinnacle Developments Ltd., acting within the scope of her authority, is not liable under the Guaranty Agreement unless the intent to bind herself personally clearly appears from a reasonable construction of the Guaranty Agreement.

[21] Counsel for the third Defendant contends further that no such intention can be reasonably discerned from the Guaranty Agreement neither is there any admissible evidence upon which an intent of Whitney Sommers to be bound personally for the obligations of Tomato Café can be gleaned and that there is no privity of contract. These, in the Court's view, are not issues to be resolved in a striking out application. They are triable issues that require a finding of fact for determination. An application to strike out is not a mini trial and ought not to be used to resolve facts outside of the regular trial process.

[22] The Bank contends that the Defendants executed the loan transaction documents including the promissory note acknowledging receipt of the aforementioned loan and promised to repay it. In or about November 2016, the Claimant, at the Defendants' request, agreed to refinance the said credit facility to provide the Defendants with a demand instalment loan, a corporate credit card facility and an Overdraft facility. The parties further agreed that an equitable mortgage over specific land parcels including the property of the third Defendant would be used to secure the credit facilities. However, the Defendants have failed and/or refused to meet their payment obligations in accordance with the aforementioned credit agreements and on this basis debt recovery proceedings were instituted against the Defendants.

[23] In the Court's view, the instant claim cannot be deemed a groundless claim. On its face, a reasonable cause for bringing and defending the instant claim is shown. The authorities

have established that what needs to be pleaded are the material facts that provide the basis for leading evidence on each element of the cause of action. All the Court is concerned with at this stage is whether the claimant makes an allegation of each element of the cause of action pleaded. If a single essential allegation is omitted, the statement of case will be amenable to being struck out.<sup>4</sup> It is my view that such a case has been made out by the Claimant on the papers. The drastic step applied for by the Third Defendant is only to be taken in exceptional cases where it is plain and obvious to do so.

- [24] The third Defendant admitted she signed the agreement but contends in her pleaded case that the only reasonable construction of the Guaranty Agreement establishes that the Guaranty Agreement does not bind her personally. Whitney Sommers further avers that any alleged obligation under the purported Guaranty Agreement was effectively extinguished when the Claimant later refinanced the loan facility in 2016.
- [25] The Court is of the view that this contention, whether Whitney Sommers intended to bind the companies only, and not Whitney Sommers individually is a question which requires a finding of fact for a proper determination of the issue raised. Reliance on the signature block of the Guaranty Agreement on its face, which shows above "Name of Guarantor" listed "Pinnacle Developments Ltd." and above "Signature of Guarantor" the seal of "Pinnacle Developments Ltd." which appears immediately adjacent to the signature "Whitney Sommers" only is not sufficient to ascertain the third Defendant's case.
- [26] A guarantee is a classic example of a secondary obligation<sup>5</sup>, and as such, on, its face, it is not enough to strike out the claim against the third Defendant on this basis only. To ascertain liability or not based on the terms of the transaction; the intention of the parties and the conflict of evidence as to the circumstances in which the loan and the directors' alleged guarantees were entered into must be examined based on disclosure and evidence to ascertain the statement's truthfulness and the intention of the parties.
- [27] This is not required for a striking out application. In a striking out application, the Court's only enquiry is to ascertain whether the Claim Form and Statement of Case filed by the pleadings on its face are fundamentally flawed and where the claim is based on incoherent facts which do not give rise to a legally recognisable claim. The Court cannot take into consideration aspects of the evidence in the determination of this application such as the guarantee upon its face which the third defendant seeks to ground its reasons for her application to be struck out of the claim. The legal principle is that only where a

---

<sup>4</sup> See *Bruce v Odhams Press Ltd* [1936] 1 KB 679.

<sup>5</sup> BVIHC (COM) 2020/0047: *RENISTON LTD v NEDLANDSOVERSEAS INC*

statement of case does not amount to a viable claim or defence or is beyond cure that the court may strike out”: **Robert Conrich v Ann Van Der Elst<sup>6</sup> per Rawlins J.**

- [28] The Court notes the reference of Counsel for the third Defendant to the United States of America case of **Salzman Sign Co v Beck<sup>7</sup>** on the principle of intention stated therein. However, whilst the argument advanced and the proposition cited in this authority is one for which the court must deliberate, the Court is mindful that this is not the appropriate stage for this argument to be advanced.
- [29] In seeking to implement the parties' intentions a court is required to examine whether the document, without more, represents the formal arrangements between the parties or whether there were omissions in a later, formal contract in writing.<sup>8</sup> This ought properly to be advanced at the trial and cannot be made at this stage on the face of the guarantee alone.
- [30] Accordingly, concerning the Defendant's contention that on its face, the loan agreement cannot reasonably be construed as reflecting an intention to create legal relations between the Bank and the third Defendant in her personal capacity makes it clear that this is not a claim to be struck out, but discloses reasonable grounds for further investigation. The agreement dated 16<sup>th</sup> November, 2016 contains a condition that “Upon acceptance, this agreement replaces all existing credit agreements (if any) between you and the Lender. Outstanding amounts (and security) under any such agreement will be covered by this Agreement. The Commitment letter has what appears to be the initials of the third Defendant.
- [31] On the point raised by Counsel for the Defendants that refinancing of an original loan facility extinguishes a guarantor's liability held in the case of **First Caribbean International Bank (Barbados) Limited (FCIB) v Sunsplash<sup>9</sup>** at para 47 as relied on by Counsel for the third Defendant being directly on point with the case at bar, is distinguished. Again, making a finding on this point would be determining one triable issue in isolation without evidence being tested. I decline to accept the invitation to do so. These are all issues that were determined at trial, not by an interlocutory application.
- [32] In this case at bar, particularly where the third Defendant in her pleadings admits that she was aware of the Loan Agreements, admits that she signed them, but claims that she

---

<sup>6</sup> AXAHCV2001/0002

<sup>7</sup> 10 NY2D 63, 67 (1961)

<sup>8</sup> See *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493; *Birch v Paramount Estate* (1956) 16 EG 396).

<sup>9</sup> SLUHCV2015/0799 - *First Caribbean International Bank (Barbados) Limited and Sunsplash Island Tours Inc., Robert Ramjeawan, Anthony Alexander*



signed them because of undue influence by her late husband and that the restructuring of the loan agreement in November 2016 included new funds, and on that basis created novation deserves examination and the full benefit of disclosure and evidence. Whether the third Defendant was privy to or given an opportunity to intervene in the restructured facility also requires an investigation on disclosure and evidence.

- [33] In the case of ***Tawney Assets Limited and East Pine Management Limited, et al***<sup>10</sup> relied on by Counsel for the Defendant, wherein “the Court of Appeal reiterated that a claim may be properly struck out where, as here, the terms pleaded do not arise either as a matter of construction of a written agreement or by implication”, it is stated that striking out is a drastic step to be used only in clear and obvious cases. Mitchell JA cautioned that the exercise of this discretion is to be sparingly used unless it is pellucid that the statement of case or any portion of it is doomed to fail or is otherwise abusive. His guidance on the approach to be taken by the court in applications to strike a claim is set out<sup>11</sup> below -

"The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. *The court must therefore be persuaded either that a party is unable to prove allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.* The proper approach to be taken in striking out a statement of case as disclosing no facts upon which the court can proceed has been described by Pereira CJ [Ag.], in her judgment in the interlocutory appeal in ***Ian Peters v Robert George Spencers*** where she found that *a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence.*" [Emphasis mine]

- [34] In ***Walsh v Misseldine***<sup>12</sup>, a Bahamian case, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in light of the overriding objective, take into account all the relevant circumstances and make ‘a

---

<sup>10</sup> HCVAP2012/0007 (BVI): *Tawney Assets Limited and East Pine Management Limited, Guildron Trading Limited, SI Capital Partners Limited, Rudy Amirkhanian, Elena Lokteva*

<sup>11</sup> See also Thom JA in *Agnes Danzie et al V Cecil Anthony* SLUHCVP2015/0009 at paragraph 13

<sup>12</sup> [2000] CPLR 201, CA

broad judgment after considering the available possibilities.’ The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.<sup>13</sup>

[35] On the court’s overriding objectives, when exercising the power to strike out, in the case of **Michael Baptiste v Yolanda Bain-Joseph**<sup>14</sup>, Edwards JA (Ag.) at paragraph 10, indicates, “The only expressed statutory criteria for the court’s exercise of the discretion [to strike out] under CPR 26.3(1)(a) are provided by CPR 1.1 and 1.2 which sets out the overriding objective of the rules is to enable the court to deal with cases justly that the court is to seek to give this effect when it (a) exercises any discretion given to it by the rules; or (b) interprets any rule.

[36] In the circumstances of the pleadings making clear the general nature of the case of the pleader, it is the Court’s view that the case as pleaded discloses reasonable grounds for this claim. The court is obligated to look at the evidence as a whole to determine the claim brought including against the third Defendant. The claim is not fanciful or speculative but has live issues which ought not to attract the relief sought on this application.

## CONCLUSION

[37] I do not consider the claim to be clear and obvious to be struck out. In the words of Kokaram, J as he then was, in the case of **UTT v Kenneth Julien an ors**,<sup>15</sup> “looking at the case in the round striking out the case is too draconian a remedy and disproportionate to the issues that require investigation.” It would be premature in the Court’s view to strike out the third Defendant from this claim.

[38] The application by the third Defendant for the claim against her to be struck out is therefore dismissed and the matter to proceed to trial.

[39] The Court thanks Counsel for their helpful written submissions and legal authorities to which the Court gave careful consideration.

## COSTS:

[40] On the issue of costs, the general rule is costs follow the event. However, the Court has determined that costs shall be costs in the cause.

---

<sup>13</sup> See also **Brian Ali v The Attorney General** CV2014-02843

<sup>14</sup> HCVAP 2006/0026

<sup>15</sup> CV 2013-00212 TnT

**DISPOSITION:**

[41] In the circumstances, it is hereby ordered that –

1. The Third Defendant's application to strike out the claim filed on 22<sup>nd</sup> July, 2022 is dismissed; and
2. The costs of this application shall be the costs in the cause.

**Jacqueline Josiah-Graham  
High Court Judge**

**By the Court,**

**Registrar**