

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2020/0409

BETWEEN:

SANDRA BRIGGS

Claimant

and

KEVIN BRANKER

Defendant

Appearances:

Mr. Kyle Kentish, Counsel for the Claimant

Ms. E. Ann Henry KC, Counsel for the Defendant

2023: January 17th; 30th.

DECISION

- [1] **MICHEL M:** This is the Court's decision on an application by the claimant, Sandra Briggs ("Ms. Briggs"), to strike out the defence and counterclaim of the defendant, Kevin Branker ("Mr. Branker").
- [2] The background to the matter can be set out briefly. Ms. Briggs and Mr. Branker were formerly husband and wife. They divorced in July 2016.
- [3] On 13th June 2016, the parties executed a document which Ms. Briggs purports is a promissory note. The said document provides:

"WHEREAS the undersigned KEVIN BRANKER and SANDRA BRIGGS BRANKER were married on June 15th, 1991

And

WHEREAS KEVIN BRANKER and SANDRA BRANKER were divorced on July 13th, 2016

As part of the Matrimonial Settlement pursuant to the divorce, the undersigned **KEVIN BRANKER** of Hodges Bay, St. John's, hereby promises to pay **SANDRA BRANKER** of Gambles, St. John's, Antigua, the sum of **TWO HUNDRED AND SEVENTY-FIVE**

THOUSAND UNITED STATES DOLLARS (\$275,000.00 USD) in full on or before May 31st, 2019.

Upon default in payment when due, the whole sum remaining unpaid shall, at the option of the holder become immediately due and payable.

Default shall include, but not limited to nonpayment of any respective installment thirty (30) days from the due date set out herein or nonpayment on three different occasions of any installments within fifteen (15) days subsequent to the due date therefore set out herein.”

- [4] Ms. Briggs, taking the view that the document was a promissory note, demanded payment from Mr. Branker on 6th November, 2020 and presented the document to him for payment on or around 10th November, 2020 and 13th November, 2020. Mr. Branker did not make payment to Ms. Briggs as demanded.
- [5] Ms. Briggs subsequently filed the underlying claim in this matter against Mr. Branker on 16th November, 2020 for the sums demanded under the purported promissory note. On 20th January, 2021 Mr. Branker filed a defence disputing Ms. Briggs’ claim and made a counterclaim against her. Ms. Briggs subsequently filed a reply and a defence to Mr. Branker’s counterclaim and Mr. Branker a reply to Ms. Briggs’ defence to counterclaim.

The Strike out Application

- [6] Ms. Briggs filed the present application on 12th September, 2022 seeking orders that: (i) the defence filed by Mr. Branker on 20th January, 2021 be struck out and/or dismissed; (ii) judgment be entered in her favour with costs to be assessed, if not agreed; (iii) the ancillary claim/counterclaim filed by Mr. Branker on 20th January, 2021 be struck out and/or dismissed; and (iv) costs. The application is made pursuant to rules 26.3(1)(a), (b), (c), and (d) and rule 18.10(1)(a) of the **Civil Procedure Rules 2000** (the “CPR”).
- [7] Ms. Briggs’ application consists of five grounds as extracted from her notice of application:
- “CPR 26.3(1)(a)
1. Failure to comply with rules 8.1(1), 8.2, 8.6(1)(a) and (b), 18.2(1) and/or 18.2(2).
- CPR 26.3(1)(b)
2. Non-disclosure of any reasonable ground for defending the claimant’s claim and/or for bringing the (ancillary) claim.
- CPR 26.3(1)(c)
3. The (ancillary) claim is an abuse of the process of the court.
- CPR 26.3(1)(d)

4. The ancillary claim does not comply with requirements of Part 8 (as required by 18.2(1)).
CPR 18.10(1)(a), and 18.10(2)(a), (b), (c) and (d)
5. All the circumstances of the case, including:
 - a. The explicit connection between the ancillary claim and the claim found in paragraph 10 of the defence filed 20th January, 2021.
 - b. The ancillary claimant is not seeking substantially the same remedy which some other party is claiming from the ancillary claimant.
 - c. The ancillary claimant does not want the court to decide any question connected with the subject matter of the proceedings:
 - i. other than that between the existing parties; nor
 - ii. to which the proposed ancillary defendant is already a party but also in some further capacity.
 - d. The facts in the ancillary claim are substantially the same and/or are closely connected with, the facts in the claim.”

[8] Based on the written submissions filed on behalf of Ms. Briggs in support of her application and the oral submissions made by Counsel for the Parties, it is evident that the gravamen of Ms. Briggs’ application is that Mr. Branker’s defence discloses no reasonable ground for defending her claim and that his counterclaim being so inextricably linked with the defence that it too must be struck out as disclosing no reasonable ground for bringing the claim.

Applicable Law on Strike out Applications

[9] CPR 26.3(1) gives the court the power to strike out a statement of case or part of it. The rule provides as follows:

“In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) there has been a failure to comply with a rule, practice direction, order of direction given by the court in the proceedings;
- (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- (c) the statement of case or the part to be struck out is an abuse of process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.”

[10] The law on striking out is well settled. Striking out a party’s statement of case is a drastic step and must be used sparingly and only in the clearest of cases. In the case of **Real Time System Limited**

v Renraw Investments Limited and others,¹ the Judicial Committee of Privy Council described striking out as the ‘nuclear option’. The principles on striking out have been stated and restated in several decisions of the Court of Appeal. Recently, the principles were helpfully summarised by Farara JA in **Ian Hope-Ross v Martin Dinning et al**.² At paragraph 21 of the judgment, Farara JA [Ag.] states:

“As with every discretion conferred upon the court by the CPR, the discretion to strike out must be exercised in accordance with law and with a view to furthering the overriding objective. [See rule 1.2 of the Civil Procedure Rules 2000]. The central principles which undergird the court’s jurisdiction to strike out all or part of a statement of claim are now settled, have been consistently cited and applied by this Court, and need not be extensively recited. In brief, these principles are as follows:

- (i) The court must 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 case in the sense that it has no real prospect of succeeding at trial. [*CITCO Global Custody NV v Y2K Finance Inc* [2009] ECSCJ No. 165 (delivered 19th October, 2009)].
- (ii) A statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence. Further, a statement of claim should not be struck out where the dispute between the parties involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the strength of the case may not be clear because it has not been fully investigated. [*Ian Peters v Robert George Spencer* [2009] ECSCJ No. 212 (delivered 22nd December, 2009), per Pereira CJ; *Tawney Assets Limited v East Pine Management Limited and others* [2012] ECSCJ No. 284 (delivered 17th September, 2012) per Gordon JA [Ag.].
- (iii) On hearing an application to strike pursuant to CPR 26.3(1)(b), the pleadings alone are to be examined. The trial judge should assume that the facts alleged in the statement of claim are true unless they are manifestly incapable of proof. [*CITCO Global Custody NV v Y2K Finance Inc* [2009] ECSCJ No. 165 (delivered 19th October, 2009) per Edwards JA at para. 13, and *Martin Didier G.C et al v Royal Caribbean Cruises Ltd. SLUCVAP consolidated appeals*

¹ [2014] UKPC 6 at para. 17.

² AXAHCVAP2020/0005 consolidated with Christopher Liss et al v Martin Dinning et al AXAHCV2020/0006 and Satay Limited et al v Martin Dinning et al AXAHCV2020/0007 (delivered 30th April 2021, unreported).

2014/0024 and 2014/0004 (delivered 6th June 2016, unreported) per Pereira CJ at para. 28.].

- (iv) Striking out is a draconian step or “nuclear option” and ought only to be deployed sparingly, in the clearest of cases. The reason for proceeding cautiously is that the exercise of the jurisdiction to strike out deprives a party of its right to a trial and of its ability to strengthen its case through the process of disclosure, the filing of witness statements or witness summaries and other procedures such as requests for further information. [*Ian Peters v Robert George Spencer ANUHCVP2009/0016 (delivered 22nd December, 2009) per Creque JA; see also HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and another [2014] EWCA Civ 1106.*]
- (v) As striking out is a draconian step, the court must consider whether the interests of justice are better served by permitting an amendment to pleadings or deploying some other sanction, instead of striking out the statement of claim. [*Pereira CJ in The Attorney General of Saint Lucia v Darrel Montrope [2020] ECSCJ No. 235. (delivered 9th July, 2020); See also Peerless Limited v Gambling Regulatory Authority and others [2015] UKPC 29 and Real Time Systems Limited v Renraw Investments Limited and Others [2014] UKPC 6.*].”

[11] The strike out principles have also been summarised in by Pereira CJ in **Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina et al.**³

[12] In **Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al.**⁴ Byron CJ [Ag.] underscored the principle that striking out should be used sparingly and stated that the operative issue for determination in the context of a strike out application must be whether there is ‘**even a scintilla of a cause of action.**’ (Emphasis added). However, His Lordship went on to observe that where there is no cause of action the court should be just as decisive in striking out. Byron CJ [Ag.] explained that:

“Regardless of the length or difficulty of the argument, which has already been concluded the operative issue for determination must be whether there is ‘even a scintilla of a cause of action’. If the pleadings disclose any viable issue for trial then we should order the trial to proceed but if there is no cause of action we should be equally resolute in making that declaration and dismissing the appeal.”

³ ANUHCVP2016/0009 consolidated with ANUHCVP2016/0010 (delivered 18th January 2017).

⁴ Antigua and Barbuda Civil Appeal No. 20A of 1997 (delivered 8th April 1998, unreported) at p. 8.

- [13] As I previously stated, the thrust of Ms. Briggs' application is brought pursuant to CPR 26.3(1)(b), that Mr. Branker's defence and counterclaim disclose no reasonable ground for defending the claim/bringing the counterclaim. The authorities are clear that, on a strike out application brought pursuant to CPR 26.3(1)(b), the court will consider the application in the context of the pleadings. In **Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina et al**, Pereira CJ stated that 'in treating with an application to strike out made pursuant to CPR 26.3(1)(b), the trier of the application should proceed on the assumption that the facts alleged in the statement of case are true'.
- [14] With the above principles in mind, I will now examine Ms. Briggs' statement of claim and Mr. Branker's defence and counterclaim.

The Pleadings

- [15] In her statement of claim, Ms. Briggs pleaded that, prior to their divorce, the parties entered into a promissory note by which Mr. Branker agreed, as part of the matrimonial settlement, to 'pay her, on demand in default of payment, US\$275,000.00 in full on or before 31st May, 2019' to compensate her for any claims she may have in relation to the dissolution of their marriage.
- [16] She further pleaded that she demanded payment from Mr. Branker by letter dated 6th November, 2020 and presented the note for payment to him on or around 10th November, 2022 and on 13th November, 2020 and that to date the note has not been paid.
- [17] Mr. Branker in his defence pleaded that the agreement on which Ms. Briggs has brought these proceedings is not in law a promissory note, but that the agreement is a contract between the Parties which was subject to a condition that Mr. Branker would be bound to perform the contract only if he received the proceeds of a contract made between himself and a company ("the business transaction") and that, as known to Ms. Briggs, the business transaction failed in December 2017, and in the premises the performance of the agreement by Mr. Branker was rendered impossible. Mr. Branker then went on to plead further or in the alternative that it was an implied term of the agreement that, in consideration of the payment of the monies under the agreement, Ms. Briggs would transfer to him her interest in the former matrimonial house and a parcel of commercial land and relinquish her claims for spousal support and at the trial of the matter he (Mr. Branker) would rely on the full terms of the agreement.
- [18] Mr. Branker then went on in his defence to give the particulars of the agreement that he pleaded was made between the parties. In his counterclaim, Mr. Branker asked, if the court makes a finding that the agreement between the parties was not conditional on the successful performance of the business transaction, that the court 'give effect to the full terms of the agreement between the parties' and that upon payment by Mr. Branker of the amount under the agreement, that Ms. Briggs be

ordered to perform her part of the agreement and relinquish her interest in the jointly owned matrimonial home and the commercial property. He also asked that the order for spousal support in Suit No. 115 of 2015 be discharged and that all sums paid by Mr. Branker thereunder be set off against any amounts to be paid by Mr. Branker to Ms. Briggs.

Submissions on behalf of Ms. Briggs

- [19] Learned Counsel for Ms. Briggs, Mr. Kyle Kentish, submitted that the document signed by the Parties is in law a promissory note as it meets all the requirements of a promissory note under section 84 of the **Bills of Exchange Act**.⁵ That is, he contended, the agreement is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specific person, or to bearer.
- [20] Learned Counsel submitted that, as a matter of law, Mr. Branker cannot challenge his liability under the promissory note based on it being conditional on something that is not in the promissory note. In support of this submission, Mr. Kentish relied on the English Court of Appeal decision in **Arab Bank Ltd. v Ross**.⁶ He strenuously argued that the note is not conditional. He argued that Mr. Branker's defence is not a defence in law to a promissory note. He stated that a defence to a promissory note must allege something intrinsic in the note, not anything external.
- [21] Mr. Kentish also referred the court to the decision of Rawlins J in **Townsend et al v Persistence Holding Ltd.**,⁷ where His Lordship stated at paragraph 25 of the decision that 'oral evidence that seeks to defeat or contradict the clear terms of a written promissory note is not admissible where, as in this case, the exact terms of the Note that was signed by the parties are not ambiguous'. Learned counsel submitted that oral evidence by Mr. Branker seeking to defeat or contradict the clear terms of the promissory note is not admissible in this case as the exact terms of the note are not ambiguous.

Submissions on behalf of Mr. Branker

- [22] Learned King's Counsel, Ms. E. Ann Henry, on behalf of Mr. Branker submitted in response that Mr. Branker's case is that the agreement between the Parties is not promissory note but a contract between the Parties that expressly states on its face that it is part of a matrimonial settlement, the full terms of which Mr. Branker has set out in his defence.

⁵ Cap. 48, Laws of Antigua and Barbuda.

⁶ [1952] 1 All ER 709 at p. 714.

⁷ BVIHCV2002/0116.

- [23] Learned King's Counsel submitted that the circumstances of this case are different from that of **Townsend et al v Persistence Holding Ltd.** She argued that, unlike in **Townsend**, in this case there is ambiguity on the face of the alleged promissory note in the sense that it imports a matrimonial settlement between the Parties. Learned King's Counsel further submitted that for the Court to make a determination in view of the defence, it must take into account the other terms that impact on the payment under the agreement. She contended that it would be inappropriate for the Court at this stage to make a finding that it does not believe the facts pleaded by the Defendant. Learned King's Counsel argued that the agreement relied upon by Ms. Briggs refers to a matrimonial settlement in which there are terms that were between the Parties. In the circumstances, the matter should proceed and the Court make a determination on the claim after a trial. She posited that the Court should not drive a party away from defending a claim at this stage especially in circumstances where Mr. Branker has set out a properly pleaded defence that sets out the full terms of the agreement that the Court should consider.

Submissions on behalf of Ms. Briggs in Reply

- [24] In reply, learned Counsel Mr. Kentish for Ms. Briggs submitted that what Mr. Branker has pleaded in his defence as being the purported full terms of the agreement between the Parties does not amount to a condition under the note, nor does the statement on the alleged promissory note, that as part of a matrimonial settlement that Mr. Branker has promises to pay sums to Ms. Briggs. Mr. Kentish argued that the reference on the document to the matrimonial settlement is simply the reason for the Parties executing the alleged promissory note and is not conditional. He submitted that, in the circumstances, the agreement does not need to be investigated because it does not show that there is a condition.

Discussion

- [25] I will first address Mr. Kentish's submission in relation to what constitutes a defence to an action under a promissory note. He argued that a defence must traverse and deny some matter of fact, e.g. the making or indorsement of the note. He placed much emphasis on the case of **Arab Bank** in support of this submission. In **Arab Bank** Somervell LJ stated that 'a defendant sued on a bill must allege the facts on which he relies in disputing his liability on the bill or note'. However, in my view the requirement of pleading such a defence arises where there is no real contention as to whether the alleged document is otherwise a valid promissory note. This is not the situation in the case at bar.
- [26] Mr. Branker has pleaded that the document is not in law a promissory note. The argument presented by his Counsel is that the very face of the document references a contract between the Parties and in those circumstances, the document is not unconditional. In discussing the requirement of a promissory note being unconditional, the learned authors of **Halsbury's Laws of England** refer to

the case of **Jury v Barker**,⁸ where an instrument was in the following form: 'I promise to pay to JS or his order, at 3 months after date, £100 as per memorandum of agreement. HB'. It was held by the English court that a promissory note in such form was, on the face of it, an unconditional promise to pay, and that **if the effect of the agreement was to make the promise conditional, it was for the defendant to show that, by setting out the agreement in his plea.** (Emphasis added).

- [27] In **Wirth v Weigel Leygonie & Co Ltd**,⁹ the English Court of Appeal had to consider a document in the following form: 'Reference A.C.3 T.R./W.L.1 S. Kischner, London, W.C.1. We confirm herewith that we undertake to pay irrevocably the sum of £200 to you or into your banking account on May 25, 1935, in respect of the above reference'. The English Court of Appeal held that the letters were not a promissory note within the meaning of the **Bills of Exchange Act**. At page 70, the Court stated:

"Supposing that somebody had attempted to deal with these promissory notes, or, to put it another way, supposing that they were produced to a judge who had not yet been told of the surrounding circumstances, and it was for him to adjudicate whether or not they were promissory notes...He would at once ask: "What do those words mean? Is this a confirmation of something which the parties have apparently agreed?" It relates to a man named Kischner, and, if I read to the end of the document, I find that it is in respect of the reference to Kischner that there is an undertaking to pay this sum. That may mean that it is to be paid if Kischner does not pay it, or it may mean that it is to be paid, to put the matter in a slightly different way, unless Kischner pays it first. That is to say, Messrs Weigel Leygonie & Co and Kischner were all liable to pay, or are both liable to pay. It would depend on there being an account between Kischner and Messrs Weigel Leygonie & Co, which may be subject to all sorts of stipulations and difficulties, and I cannot believe that anyone can take this as an entirely unconditional promise to pay that sum. On the other hand, if I consider the surrounding facts and circumstances, then I know that it was a writing which confirms, as it purports to do, something which had been orally agreed, and that it was part of the working of these transactions that the defendants were promising to pay this sum upon payment by Mr Wirth. In other words, they were saying: "We will repay you."

- [28] I now turn to the circumstances of this case. Firstly, as I stated above, it is evident that Mr. Branker's defence to Ms. Briggs' claim is not seeking to defeat what would otherwise be a valid promissory note, rather, his defence is that it is not a promissory note, but an agreement as part of a contract between the Parties pursuant to the Parties' matrimonial settlement.

- [29] I agree with Ms. Henry KC that, at this stage, the Court ought not to discount the facts pleaded by Mr. Branker. It is clear that at this stage of the proceedings the Court only has before it the pleaded cases of the Parties and the Court ought to presume that the facts pleaded are true. In so presuming,

⁸ (1858) EB & E 459.

⁹ [1939] 3 All ER 712.

it seems to me that there is sufficient ambiguity on the face of the document alleged to be a promissory note that it would not be appropriate for the Court at this stage to strike out the defence.

[30] As indicated above, the alleged promissory note states that: '**As part of the Matrimonial Settlement pursuant to the divorce** the undersigned Kevin Branker...hereby promises to pay Sandra Branker...the sum of two hundred and seventy five thousand United States Dollars (\$275,000.) in full on or before May 31st, 2019' (Emphasis added). The words '**As part of the Matrimonial Settlement pursuant to the divorce**' used in the document signed by the Parties gives sufficient pause to guard against the use of the nuclear option to strike out Mr. Branker's defence. I do not consider it clear cut or plainly obvious that the document is unconditional thereby rendering Mr. Branker's defence unsustainable or concluding that his defence discloses no reasonable ground for defending the claim. Indeed, the question of whether or not the document signed by the Parties is a valid promissory note not yet having conclusively been determined in Ms. Briggs' favour, it would be difficult to strike out the defence and counterclaim and enter judgment at this stage. Furthermore, despite this claim having been filed in 2020, it is still at the stage of pleadings and no evidence has been filed in the matter. The Parties have not yet received case management directions; there has been no disclosure and no witness statements or affidavits have been filed. The complexion of the case may well change when further documents and evidence is before the Court. At that juncture, Ms. Briggs may be better placed to have a summary determination of the matter.

[31] In light of the foregoing, I am unable to conclude that Mr. Branker's defence and counterclaim does not disclose reasonable grounds for bringing or defending the case. In my view, it would therefore not be appropriate to strike out Mr. Branker's defence at this stage in the proceedings.

[32] I would therefore make the following orders:

- (1) The application filed by Ms. Briggs on 12th September, 2022 to strike out Mr. Branker's defence and counterclaim is refused.
- (2) Ms. Briggs shall pay Mr. Branker's costs of this application in the sum of \$1,000.00.
- (3) The matter shall be listed for further case management on a date to be fixed by the Registrar.

[33] I wish to thank learned Counsel on both sides for their helpful submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar