

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

SAINT VINCENT AND THE GRENADINES

SVGHCV2021/0012

BETWEEN:

ANGUS LOUGHEED

Claimant

and

MECHEAL YVONNE LOUGHEED

Defendant

Appearances:

Mr. Ronald Marks for the Claimant

Mr. Duane Daniel and Ms. Jenell Gibson for the Defendant

2021: July 27;
September 21.

RULING

- [1] This is an application by the defendant Mecheal Yvonne Lougheed nee Mofford (“Mrs. Lougheed”) to strike out the claim form and statement of claim filed by the claimant Angus Allan Lougheed (“Mr. Lougheed”) on the basis that the claim is an abuse of the process of the court and does not disclose any reasonable ground for bringing a claim. The claim seeks to set aside a consent order made between the parties in divorce proceedings.

Background

- [2] Mr. Lougheed is the respondent in divorce proceedings instituted by Mrs. Lougheed.¹ By a consent order dated 16th March 2018, Mr. Lougheed was ordered to make monthly payments of \$1,500.00 to Mrs. Lougheed as maintenance

¹ SVGHMT2018/0008

pending suit. Mr. Lougheed paid as ordered in respect of five (5) months and then stopped.

- [3] Consequently, Mrs. Lougheed filed a request for the issue of a judgment summons in respect of the outstanding arrears of maintenance payments.
- [4] Mr. Lougheed filed the instant proceedings seeking, mainly, an order that the consent order be set aside on the basis that it is wrong in law having been obtained by mistake and/or misrepresentation, and an order that the divorce proceedings be stayed.
- [5] Mrs. Lougheed has not filed a defence to date. Instead, she has filed the instant application to strike out the claim as being an abuse of the process of the court and not disclosing a reasonable cause of action. By an amended application, Mrs. Lougheed also seeks an extension of time to file her defence pending the outcome of the strikeout application.
- [6] Mr. Lougheed, although opposing the application, has not filed an affidavit or submissions in opposition notwithstanding an order of the court to do so. At the hearing of the application, the court allowed learned counsel for Mr. Lougheed to make oral submissions.

Issue

- [7] The court must determine whether to strike out the claim.

The law

- [8] The notice of application is made pursuant to Part 26.3(1) (b) and (c) of the Civil Procedure Rules 2000 as amended (CPR 2000). Under this Rule, the court may strike out a statement of case or part of a statement of case if appears to the court that:
 - (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim; or

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is unlikely to obstruct the just disposal of the proceedings.

No reasonable ground

[9] Where an application is for the statement of case to be struck out for not disclosing any reasonable ground for bringing or defending a claim, the learned authors of *The Caribbean Civil Court Practice*² explain that this provision in CPR 2000 addresses two situations:

“(1) where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or

(2) where the statement of case, no matter how complete and apparently correct, will fail as a matter of law.”

[10] In **S & T Distributors Limited and Another v CIBC Jamaica Limited and Another**,³ as it relates to striking out a statement of case on the equivalent provision in Jamaica, the court stated:

“If a claim is not sustainable in law then part of managing the case effectively requires that such claims be struck out at the earliest possible time.”

[11] In another case out of Jamaica, **Elaine Dotting v Carmen Clifford and Another**,⁴ the court reinforced:

“In considering this application to strike out, I am mindful that such a course is only appropriate in plain and obvious cases. The authorities have established that a claim may be struck out where it is fanciful, that is, entirely without substance or where it is clear that the statement of case is contradicted by all the documents or other material on which it is based. **(Three Rivers District Council v Bank of England (No. 3) [2003] 2 A.C, 1)**. ... The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be, essentially, the

² 2011 Second Edition at paragraph 23.24

³ [2004] JJC 1901 at paragraph 62

⁴ 2006HCV0338 (unreported) at paragraph 10

same as that in granting summary judgment, that is: is the claim against the defendant one that is not fit for trial at all?"

Abuse of process

- [12] The concept of abuse of process is spelled out in Commonwealth Caribbean Civil Procedure,⁵ using a quotation from Lord Diplock in **Hunter v Chief Constable of the West Midlands Police**,⁶ as follows:

"The power in Rule 26.3(b) [CPR 26.3(c)] to strike out a statement of case which is an abuse of the court's process is one by which 'any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'."

- [13] There are no fixed categories of abuse of process. Examples of situations that have been held to amount to an abuse of process include attempts to re-litigate decided issues, a claim based on a document disclosed in a previous action and where the claimant delayed in progressing the claim without a reasonable explanation.⁷ The wholesale flouting or disregard of the rules and orders of court may be a sufficient basis for the striking out of a statement of case as an abuse of process.⁸

The claim

- [14] By the claim filed on 1st February 2021, Mr. Lougheed is asking the court to set aside the consent order dated 16th March 2018 because, according to him, it is wrong in law as it was obtained by misrepresentation of fact or law or by mistake.

Misrepresentation

- [15] Under this head, the claim states that Mr. Lougheed was led to believe that the divorce proceedings would be concluded within six (6) weeks, that he was led to believe that the sum of \$1,500.00 would be payable to Mrs. Lougheed as maintenance for the period up to the granting of the divorce, and that he was not

⁵ G. Kodilinye and V. Kodilinye, Third Edition at page 175

⁶ [1982] AC 529 at 536

⁷ See Halsbury's Laws of England/Defamation (Volume 32 (2019))/3, paragraph 717

⁸ See Commonwealth Caribbean Civil Procedure, Third Edition, at page 171

informed that he had liberty to apply and/or stay the order if he was not sure or dissatisfied or if he wished to have the consent order varied.

Mistake

[16] Given the nature of this application, I feel it necessary to do so and I reproduce verbatim paragraphs 8 to 22 of the statement of claim under the heading "PARTICULARS OF MISTAKE" as follows:

- "8. *The Claimant alleges that all parties to this transaction laboured under a mistake.*
9. *When the divorce proceedings were commissioned in 2018, the Claimant retained legal Counsel to represent his interests and relied and acted accordingly to the advice he received from Counsel.*
10. *Based on the said advice he received from Counsel, the Claimant understood and believed that a divorce takes an average of six (6) weeks under uncontested circumstances in Saint Vincent and the Grenadines.*
11. *The Claimant was notified that his presence was required for a hearing at the Registrar's chambers. The Claimant believed the hearing to be the hearing for the granting of divorce.*
12. *At the hearing in the Registrar's chambers, the purpose of the proceedings was explained to the Claimant, who then understood it to be for the purpose of determining a sum to be paid to the Petitioner as maintenance.*
13. *The Claimant believes he was put under duress and pressured in front of the Registrar and other parties in chambers to consent to the paying the sum of \$1,500.00 monthly to the Defendant.*
14. *The Claimant believes that the Defendant tricked the court to believe that she is unable to provide for herself.*
15. *Based on the advice received and certain statements made by Counsel for the Defendant, the Claimant was led to believe that the divorce proceedings would be concluded within six (6) weeks.*
16. *The Claimant believed that he was coerced by the Defendant by exerting undue influence and pressure on him to agree to the terms of the Consent Order, which was not properly explained to him.*
17. *The Claimant further believes that he was coerced and misled to pay the monthly sums without the court making a ruling on the points of law applicable pursuant to the Matrimonial Causes Act Cap 239 of the laws of*

St. Vincent and the Grenadines, revised edition 2009 and the Matrimonial Causes Rules 1977.

18. *A search of the divorce file was conducted at the High Court Office on the 23rd day of July 2018, which revealed that there was no mention of an order for the payment of maintenance to the Petitioner.*
19. *The Divorce proceedings were delayed for a significant period of time as no hearing date was allotted.*
20. *After the hearing for the grant of the divorce on the 17th day of December, 2018, the Decree Nisi was not filed until the 12th day of March, 2019, despite there being an order that that [sic] it be filed on or before the 3rd day of January, 2019.*
21. *The Decree Absolute was delayed even longer, and was filed the 22nd day of October, 2020 and entered on the 28th day of October, 2020.*
22. *To date the Claimant has not been served with the Decree absolute nor the Consent order, as such, the Consent order was not appeal [sic].”*

Defendant's/applicant's submissions

Mistake

- [17] Mr. Lougheed's position is that he was under the mistaken belief that the divorce would be concluded within six (6) weeks. On behalf of Mrs. Lougheed, it is submitted that Mr. Lougheed's pleadings reveal that his claim in mistake is both misconstrued and unsustainable in law. Learned counsel Ms. Gibson argues that the terms of the consent order are explicit and clear. The order states:

“BY CONSENT

IT IS ORDERED THAT –

1. *The respondent Angus Allan Lougheed shall pay to the Petitioner Mecheal Yvonne Lougheed nee Mofford the sum of \$1,500.00 per month as maintenance pending suit.”*

- [18] The draft consent order submitted to the court for approval was signed by Mr. and Mrs. Lougheed and their respective legal practitioners at the time. Both have since changed legal representatives.

- [19] Ms. Gibson points out that there is no indication on the face of the consent order as to a specific period for which the interim payments were to be made by Mr. Lougheed. In fact, Counsel submits, the consent order accords perfectly with Mr.

Lougheed's own proposal which he made in his affidavit in response to Mrs. Lougheed's application for maintenance pending suit in the divorce proceedings. At paragraph 20 of his affidavit filed on 26th February 2018 (exhibited to Mrs. Lougheed's affidavit in support of the instant application), Mr. Lougheed swore:

"In light of the above I do not believe that the Petitioner has any need for maintenance pending the dissolution of the marriage, however, I am willing to agree to the sum of \$1500 EC monthly until the conclusion of the divorce."

[20] Mr. Lougheed alleges that all parties to the consent order laboured under a mistake. This falls into the category of common mistake, that is, "where the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law".⁹ Other types of mistake which may render a contract void or voidable are mutual mistake, "where the parties misunderstood each other and were, in effect 'at cross purposes' when entering into the contract, so that there was no genuine offer and acceptance"; and unilateral mistake, "where only one of the parties was mistaken as to some material fact when entering into the contract, and the other knew or must be taken to have known of the mistake".¹⁰

[21] Ms. Gibson relies on **Jean v 1st National Bank of Saint Lucia (formally Known as Saint Lucia Co-operative Bank)**.¹¹ In that case, similar to the situation in the instant case, the claimant instituted fresh proceedings to set aside a consent order which had been entered in a previous suit. The said consent order had been negotiated and entered into on behalf of the claimant by his legal practitioner. The claimant alleged that the consent order was entered by mistake of counsel on the apprehension that the parties had reached a binding agreement. The court held that although the claimant relied on **Huddersfield Banking Co. Ltd v Henry Lister and Son Ltd**¹² to support his contention of the court's authority to impeach a consent order where common or mutual mistake had been established, his

⁹ Chitty on Contracts, 30th Edition, at paragraph 5-001

¹⁰ Commonwealth Caribbean Contract Law, G. Kodilinye and M. Kodilinye, at page 129

¹¹ LC 2012 HC 25; SLUHCv2010/0934

¹² [1895] 2 Ch 273

pleading wholly departed from the proposition and failed to establish any basis on which common mistake could be established.¹³ For this and other reasons, the court found that the statement of case raised an unwinnable case and that continuance of the proceedings was without any possible benefit to the claimant and would waste resources on both sides. The claim was struck out.

[22] Ms. Gibson submits that Mr. Lougheed has failed to establish in his claim the elements which must be present in a claim of common mistake to set aside a consent order.¹⁴

[23] The case of **Riverlate Properties Ltd. v Paul**,¹⁵ also cited by Ms. Gibson, is demonstrative of the principle that mistake will not be a sufficient ground to set aside a consent order where the terms are clear and where the defendant bore no responsibility for or contributed to the claimant's mistaken understanding. Further, **Shuttari v Solicitors Indemnity Fund Ltd**¹⁶ illustrates that where the defendant is not at fault for the claimant's mistake and where the mistake does not render performance impossible and the basic purpose of the agreement can still be achieved, the consent order will not be set aside. In the instant case, Counsel contends that the basic purpose of the consent order was to provide maintenance to Mrs. Lougheed pending the determination of the divorce proceedings. This basic purpose is still achievable, Counsel submits, and Mr. Lougheed ought to be required to comply with the order of the court.

[24] The consent order for maintenance pending suit was made on 16th March 2018. The decree nisi was granted on 17th December 2018. Counsel contends that Mr. Lougheed himself could have filed an application for the decree nisi to be made absolute any time after 29th January 2019 as either spouse can make such application.¹⁷ The filing of this application, Counsel argues, would have been sufficient to give effect to Mr. Lougheed's understanding. Having failed to do this,

¹³ Supra at note 10, at paragraph 17

¹⁴ See *Shuttari v Solicitors Indemnity Fund Ltd* [2005] All ER (D) 452 (May), at paragraphs 46-49

¹⁵ [1974] 3 WLR 564

¹⁶ Supra at note 14

¹⁷ See the Matrimonial Causes Rules 1977, r. 65(1)

there is no sensible basis upon which Mr. Lougheed can hope to set aside the consent order for mistake. Counsel submits that his cause of action in this regard is both hopeless and unwinnable.

Undue influence

- [25] Mr. Lougheed also alleges in his claim that he was put under duress and pressured in front of the Registrar and other parties in chambers to consent to paying the sum of \$1,500.00 monthly to Mrs. Lougheed, and that Mrs. Lougheed exerted undue influence and pressure on him to agree to the terms of the consent order. Ms. Gibson states that this incredulous suggestion is easily negated by the fact that it was Mr. Lougheed himself who proposed the sum of \$1,500.00 monthly in his affidavit in the divorce proceedings. Counsel says that it was this offer by Mr. Lougheed that Mrs. Lougheed accepted, and which formed the basis of the consent order he now seeks to set aside. As such, Counsel is adamant that the assertion that the consent order was procured by undue influence ought to be wholly disregarded and dismissed.

Misrepresentation

- [26] Mr. Lougheed alleges that he was induced by representations made to him, in particular, that he was led to believe that the divorce proceedings would be concluded within six (6) weeks and that the sum of \$1,500.00 was only payable up to the granting of the divorce; and that he was not informed that he was at liberty to apply to set aside or stay the order.
- [27] Ms. Gibson points out that Mr. Lougheed makes no allegation that these “misrepresentations” were made by Mrs. Lougheed. On the authority of **Dietz v Lennig Chemicals Ltd**,¹⁸ Counsel submits that inducement by a misrepresentation made by the defendant is an essential prerequisite to set aside a consent order on this basis. Therefore, Mr. Lougheed has no claim in misrepresentation which he can maintain against Mrs. Lougheed.

¹⁸ [1967] 2 All ER 282

[28] Learned counsel posits that the context and content of the claim reveal that these “misrepresentations” were made by his then legal practitioner. Having no cause of action against Mrs. Lougheed in misrepresentation, Counsel reasons that the only possibility of setting aside the consent order is on the basis of what Mr. Lougheed evidently considers to be bad legal advice. Whereas Ms. Gibson is of the view that it is correct legal advice by a legal practitioner that a divorce in this jurisdiction may be finalised after six (6) weeks of the decree nisi, Counsel urges upon the court that the case law establishes that poor legal advice will rarely, if ever, be a sufficient basis to set aside a consent order which has already been perfected. She uses the case of **Harris v Manahan**¹⁹ to show that it is only in the most exceptional case of the cruelest injustice, that bad legal advice could be a ground for interfering with a consent order, and contends that the case at bar is not so exceptional as to justify a departure from that principle, despite any injustice which Mr. Lougheed alleges to have suffered.

[29] Subsequently, in **Tibbs v Dick**,²⁰ the Court of Appeal considered a situation analogous to that in the case at bar. In that case, Mrs. Tibbs appealed a consent order providing her and her son with certain sums for financial provision on the basis that she was not advised that the sum was in full and final settlement. She had laboured under the misapprehension that the payment was only meant to be an interim sum. Dismissing the appeal, the Court found it “difficult to accept that Mrs Tibbs and her son, who were both present at the hearing, were led to believe by their advisers that the payments that were being made were interim payments as opposed to a final settlement of the claim. They were represented by experienced counsel and experienced solicitors. The consent order clearly provided that the payments were to be in full and final satisfaction of all claims against the estate”. The Court ruled that even if it could be said that it was clear that Mrs. Tibbs had received bad or negligent advice from her lawyers, that would not in that case be a ground for setting aside the consent order. Based on the foregoing, Counsel urges the court that Mr. Lougheed’s claim to set aside the

¹⁹ [1997] 1 FLR 205

²⁰ [1198] 2 FLR 1118

consent order for misrepresentation ought to be struck out as disclosing no reasonable cause of action.

Abuse of process

[30] In her affidavit evidence in support of this application, Mrs. Lougheed outlines in detail the manner in which Mr. Lougheed has conducted himself throughout the divorce proceedings. Ms. Gibson alleges that he has deliberately and consistently flouted the orders of the court in a deliberate attempt to stall and delay the substantive proceedings, to the grave prejudice of Mrs. Lougheed. Mrs. Lougheed's unchallenged evidence in this application is that at the first hearing after her request for a judgment summons in November 2020, Mr. Lougheed asked for an adjournment to permit him to file an affidavit in response. He was granted leave to do so and the court ordered him to file a response and also ordered the parties to file and exchange submissions by 16th December 2020. He did not file submissions. He filed an affidavit to which Mrs. Lougheed responded. On 21st December 2020, Mr. Lougheed requested and was granted another adjournment to file further affidavit evidence and an extension of time to 5th January 2021 to file his submissions. No submissions or affidavit in response were filed. The matter was listed for trial on 2nd February 2021. A few minutes before the trial was scheduled to begin, Mrs. Lougheed's legal practitioners were served with a notice of application for an adjournment of the trial and a courtesy copy of the claim in the instant proceedings. Mrs. Lougheed's attorneys objected to the application. However, the court granted the adjournment. Mrs. Lougheed is of the view that Mr. Lougheed is attempting to further stall the proceedings by virtue of this claim.

[31] Mrs. Lougheed highlights the background to the instant proceedings and the divorce proceedings for the purpose of demonstrating to the court the general attitude of Mr. Lougheed to the court's process. She states that he has unilaterally refused to continue making the maintenance payments pursuant to the consent order which they entered into.

[32] Learned counsel quotes from Commonwealth Caribbean Civil Procedure²¹ in support of the proposition that disobedience to the rules or to court orders may be a sufficient basis to strike out a statement of case. The learned authors discuss as follows:

“In *UCB Corporate Services Ltd v Halifax (SW) Ltd*, it was held that, under the CPR, it was appropriate to strike out an action as an abuse of process where it was a wholesale disregard of the Rules or court orders, and it was just to do so.”In the *UCB* case, the English Court of Appeal rejected the argument that, following *Biguzzi Rank Leisure plc*, a sanction other than striking out (for example, an order to pay money into court, a costs sanction or deprivation of interest on an award of damages) should be imposed. The court held that the correct approach in cases of wholesale disobedience of the rules or court orders was that established in the pre-CPR case of *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*, which the trial judge had rightly applied. Lord Lloyd said:

The judge regarded the flouting of the rules and court orders as sufficiently serious to justify striking out. In his view, it was the course justice required...That approach is entirely in line with the underlying purpose of the new rules. It would be ironic indeed if the Civil Procedure Rules and *Biguzzi* led judges to treat cases of delay with greater leniency than under the old procedure. That could not have been the intention of the Master of the Rolls in *Biguzzi*. He was pointing out that there were lesser sanctions in less serious cases, but in more serious cases striking out was appropriate where justice required it.”

[33] Learned counsel Ms. Gibson posits that Mr. Lougheed’s conduct during the divorce proceedings, his deliberate flouting of the court’s orders, and the scurrilous and frivolous basis upon which he has brought the instant claim amounts to an abuse of the process of the court, and that the claim is likely to further delay and obstruct the just disposal of the divorce proceedings. For the reasons outlined, Counsel submits, the claim should be struck out.

Claimant’s/respondent’s submissions

[34] As mentioned earlier, no written submissions were filed on behalf of Mr. Lougheed as ordered by this court. However, learned counsel for Mr. Lougheed, Mr. Marks was allowed to make oral submissions at the hearing. In addition, Mr. Lougheed did not file an affidavit in response to the application, for which Counsel requested

²¹ Third Edition, G. Kodilinye and V. Kodilinye, at page 171

time to do and the court so ordered. Therefore, the court will consider only the points of law raised by Counsel, and not any attempts to introduce facts relied on by Mr. Lougheed which are not stated by Mrs. Lougheed in her affidavit.

[35] Mr. Marks cites **de Lasala v de Lasala**²² as authority to set aside a consent order by appeal, or by initiating a fresh action as was done here. This claim is brought in the general civil jurisdiction of the court. Whereas **de Lasala** lays down the procedure in respect of a final order, as opposed to an interim order in divorce proceedings as is the situation in the instant case, learned counsel for Mrs. Lougheed did take a jurisdictional point.

[36] Mr. Marks argues that the claim raises triable issues. One of the allegations in the claim is that Mr. Lougheed was not served with the consent order and as such, it was not appealed. The consent order in dispute was not perfected until 2021. This is borne out in Mrs. Lougheed's affidavit. The consent order made on 16th March 2018 was settled and entered on 13th January 2021. Mr. Marks accuses Mrs. Lougheed of trying to enforce the consent order retroactively. This, he says, flies in the face of fairness, equity and the law in general. Counsel contends that Mr. Lougheed's allegations in the statement of claim, including that he was led to believe that the divorce proceedings would be concluded in six (6) weeks, trickery, and undue influence are issues to be determined by a tribunal of fact.

[37] Mr. Marks cautions the court that this is not an exercise to be approached lightly. He reminds that a court will strike out a claim when the claim taken at its highest cannot amount to a substantive cause of action. The defendant must show that it is fanciful and without substance. The court has to look at the claim form and statement of claim and determine whether a cause of action is made out. Counsel maintains that there are serious legal and factual issues to be tried and Mr. Lougheed must be given an opportunity to prove his case. It would be a travesty of justice, Counsel says, to strike out the claim at this point. Counsel emphasises that court cannot exercise the draconian power of striking out when there are live

²² [1979] 2 All ER 1146

triable issues. Nothing in this claim, he contends, justifies it being thrown by the wayside. He asks the court to determine that the matter will be ventilated and dismiss the application.

Analysis

[38] The court's reasoning incorporates some of the oral submissions in reply on behalf of Mrs. Lougheed.

[39] It is well settled that the exercise of the discretion to strike out under CPR 26.3(1) is to be exercised sparingly and that the court should assume that the facts alleged in the statement of claim are true. A party is only required to set out the general nature of his or her case in the statement of claim.²³ The pleaded case is presumed to be true. The court must proceed cautiously when dealing with an application to strike out. The court is not required to conduct a mini-trial. If there are triable issues, the matter ought to proceed to trial. I am further guided by the pronouncements of the Honourable Chief Justice in making the distinction between an application to strike out under CPR 26.3(1)(b) and one for summary judgment in **Didier v Royal Caribbean Cruises Ltd**.²⁴ At paragraphs 23 and 24 of the judgment, Her Ladyship stated:

"In disposing of a claim summarily, the court would essentially consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly. This will be a judgment on the merits.

On the other hand, an application for a party's statement of case to be struck out pursuant to CPR 26.3(1)(b) is decided by the court solely on the parties' pleaded case before it. No additional evidence is adduced. All facts pleaded in the statement of case are assumed to be true for this purpose."

[40] Applying the above principles, first, I assume that the facts pleaded in Mr. Lougheed's statement of claim are true. As to CPR 26.3(1)(b) I will proceed to consider whether a reasonable cause of action has been made out.

²³ See *East Caribbean Flour Mills Limited v Ormiston Ken Boyea and East Caribbean Flour Mills Limited v Hudson Williams* Civil Appeal No. 12 of 2006 (St. Vincent and the Grenadines)

²⁴ SLUHC VAP2014/0024 consolidated with SLUHC VAP2015/0004

- [41] The draft consent order is attached to the statement of claim. The consent order is in clear and simple terms for Mr. Lougheed to pay \$1,500.00 per month as maintenance pending suit. Mr. Lougheed is in effect saying that he signed this order because he mistakenly believed, as he was led to believe, that he would have to pay the monthly sum of \$1,500.00 to Mrs. Lougheed for a much shorter period than it turned out. The inference is that had he known that it would have taken so long, he would not have agreed to this.
- [42] Mr. Lougheed alleges that all parties to the transaction, that is, the consent order, laboured under a mistake. Whereas I accept that a claimant is only required to set out the general nature of his case in his statement of claim and subsequently develop his position by way of subsequent filings such as disclosure and witness statements, the claim must set out the substance of his allegations. A bare statement that the parties laboured under a mistake cannot be sufficient. Mrs. Lougheed is the defendant in this matter. To ground an allegation of mistake on her part, if Mr. Lougheed is alleging common mistake, he must state in his particulars, at least, the alleged facts to show or that allowed him to conclude that Mrs. Lougheed also operated under the same misapprehension that belied him. The elements of mutual mistake or unilateral mistake are also absent. Further, he has not stated if and how Mrs. Lougheed caused or contributed to his mistaken understanding. Therefore, on the law, I find that the claim of mistake is not made out.
- [43] Similarly, Mr. Lougheed cannot simply make bald allegations and assertions of duress and pressure in front of the Registrar without, at minimum, indicating the statements or actions that constitute these legal concepts. This would be akin to a situation where a claimant in a tortious action for assault simply states in his claim that the defendant assaulted him on a particular date and time, or in a claim for damages for breach of contract, to plead only that the defendant breached the contract in question.

- [44] To my mind, the allegation that Mrs. Lougheed tricked the court to believe that she was unable to provide for herself is of no moment in the setting aside of the order. By the fact of the consent order, there was no trial or finding by the court. The parties presented the draft consent order to the court for approval.
- [45] Learned counsel Mr. Marks belaboured the fact that the consent order was not perfected until January 2021 and the claim states that it was not served on Mr. Lougheed as at the date of the filing of the claim on 1st February 2021. It is also stated that in July 2018, the divorce file did not reveal any order for maintenance payments for Mrs. Lougheed. This appears to be justification for Mr. Lougheed's cessation of the maintenance payments after May 2018.
- [46] It is trite that an order of the court takes effect when it is made, unless there is a contrary provision. Therefore, the consent order made by the learned registrar on 16th March 2018 became of full force and effect from that date. On the face of the claim, Mr. Lougheed was present with "other parties in chambers" when the order was made, the draft order being signed by him, Mrs. Lougheed and their respective legal practitioners. Moreover, the statement of claim reveals that Mr. Lougheed was in compliance with the said order and paid a total of \$7,500.00 up to 21st May 2018, representing payments for five (5) months. On 23rd March 2018 he made the first payment of \$3,000.00, evidently for retroactive payments, since the order provided for monthly payments from 31st January 2018. Further, as Ms. Gibson stated, a copy of the consent order was required to be exhibited to Mrs. Lougheed's affidavit in her request for the judgment summons.²⁵ I fail to see how the delay in the perfecting and the alleged non-service of the order assist Mr. Lougheed in setting it aside. As pointed out by learned counsel for Mrs. Lougheed, Mr. Daniel, the claim of alleged mistake is not as to a mistake of the order not being perfected. This argument may well be better placed at the judgment summons hearing.

²⁵ Matrimonial Causes Rules 1977, r. 87(3)

- [47] The claim does not allege that Mrs. Lougheed made any misrepresentation to Mr. Lougheed. That allegation is made in respect of legal advice. In my view, even if Mr. Lougheed was wrongly advised that the entire divorce proceedings would be concluded within six (6) weeks, as opposed to this being the usual period between the decree nisi and the decree absolute, this would not amount to a case of the cruelest injustice as explained in **Harris v Manahan**. Again, as in **Tibbs v Dick**, the order was clear, Mr. Lougheed was present at the hearing and represented by counsel. In my view, on the authorities, the claim to set aside the consent order on the basis of misrepresentation cannot succeed.
- [48] In contrast to an application pursuant to CPR 26.3(1)(b) to strike out a claim as disclosing no reasonable ground for bringing the claim, in determining an application to strike out for abuse of process under CPR 26.3(1)(c), the court is allowed to consider the evidence adduced in support of the application. Mrs. Lougheed is asking the court to strike out the claim under this provision on the basis of Mr. Lougheed's consistent and deliberate flouting of the orders of the court.
- [49] In addition to the instances of breach highlighted in Mrs. Lougheed's affidavit mentioned earlier at paragraph 30 above, I note one such breach in these proceedings. When this application came up for hearing on 12th May 2021, learned counsel Mr. Marks requested time to respond to the application as he said was having difficulty contacting Mr. Lougheed. The court ordered that Mr. Lougheed file and serve an affidavit and submissions in response to the application on or before 26th May 2021. This was not done. At the hearing, Mr. Marks gave no reason for the breach of the court's order and simply requested that he make oral submissions. Requiring assistance in this matter, the court obliged. During Mr. Marks' oral submissions, Mr. Daniel rightly pointed out that there was no application for extension of time before the court for Mr. Lougheed to file written submissions and the claimant was taking the defendant by ambush. Further, of the three occasions this matter came on for hearing, Mr. Lougheed was present once when an application for an adjournment was made on behalf of Mr. Marks who

had been called suddenly to the Criminal Court under Special Measures provisions.

[50] Whereas the court is mindful that the application under CPR 26.3(1)(b) should be based on the pleaded claim, and is cautious not to engage in a mini-trial, the facts relied on by Mrs. Lougheed are certainly relevant in relation to CPR 26.3(1)(c). In the proceedings for the consent order Mr. Lougheed was represented by counsel. In his affidavit in response to Mrs. Lougheed's application for maintenance, he swore that he was willing to agree to the sum of \$1,500.00 until the conclusion of the divorce. He and his attorney signed the agreement to that effect. Mrs. Lougheed's evidence is that his offer formed the basis of the consent order which they agreed to before the registrar.

[51] The courts are wary to set aside a consent order even in circumstances with much more forceful scenarios than present here. In **Jean v 1st National Bank of Saint Lucia**,²⁶ the court refused to set aside a consent order where the claimant submitted in his pleadings that his counsel on record at the time entered a consent order which did not reflect his instructions and where he contended that his counsel did not consult him and obtain his consent to the terms of the consent order. In November 2020, the court in **Applewaite Lake v Barbara Hardtman et al**²⁷ dismissed an application to set aside a consent order which was signed by counsel on behalf of the parties for the claimant to pay the defendants the sum of \$4,000,000.00 plus \$600,000.00 in costs. The claimant unsuccessfully sought to set aside the consent order on the main ground that his lawyers did not provide him with certain advice and that they acted outside the scope of his instructions. These cases applied the principles relating to apparent/implied or ostensible authority of a legal practitioner. In light of the case law, it is difficult to see, in the circumstances of this case, how a court could interfere with the consent order. In my view, a setting aside of this order would bring the administration of justice into disrepute among right-thinking people. Mr. Lougheed swore an affidavit that he

²⁶ Supra at note 11

²⁷ NEVHCV2014/0031

would pay Mrs. Lougheed \$1,500 per month until the conclusion of the divorce. She agreed to this amount. This was the basis upon which the consent order was made. Now he seeks to set it aside. I am in full agreement with the submission of learned counsel on behalf of Mrs. Lougheed that the claim is scurrilous and frivolous.

- [52] With this combination of facts under the rubric of abuse of process, each of which in my view constitutes such, the claim ought to be struck out accordingly.

Conclusion

- [53] For the reasons I have stated, I am satisfied that the claim does not disclose any reasonable ground for bringing it. Apart from the claims of mistake and misrepresentation not being made out, even if the allegations in the statement of claim are proved, I cannot see how the claim can succeed. It appears to me to be an unwinnable case. I am also convinced and I find that the claim is an abuse of the process of the court and must find a place in the unfixed categories evidenced by the case law and highlighted by legal texts. It is high time that the divorce proceedings be concluded.

Order

- [54] Based on the foregoing, it is ordered as follows:
- 1) The claim form and statement of claim are struck out.
 - 2) The claimant shall pay the defendant costs of the application in the sum of \$1,500.00.
 - 3) The claimant shall pay the defendant prescribed costs of an unvalued claim in the sum of \$3,375.00.

- [55] I thank learned counsel for the defendant for their useful written submissions.

Tamara Gill
Master

By the Court

Registrar