

**EASTERN CARIBBEAN SUPREME COURT  
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE  
(CIVIL)**

Claim Number: **AXAHCV2019/0049**

Between:

**PAUL REY**

Claimant/Respondent

and

**HUGO REY**

Defendant/Applicant

**Appearances:**

Mrs. Jacinth Jeffers of Counsel for the Claimant/Respondent  
Ms. Tara Carter of Counsel for the Defendant/Applicant

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**2020: March 16;  
March 31.**  
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**JUDGMENT**

**Introduction**

[1] **SANDCROFT, M. [Ag.]**: This is an application by Mr. Hugo Rey, the Defendant/Applicant for summary judgment to be granted in favour of the defendant or in the alternative, for the claim to be dismissed as having disclosed no cause of action. The application was strenuously resisted by, Mr. Paul Rey the Claimant/Respondent.

[2] The novel concept of saving expense, conserving resources and achieving expedition is an appealing one, even more so today when trial dates are far away and the cost of going to trial can be significant. In striving to achieve this concept many litigants apply for summary judgment in instances where it appears that the other party has no reasonable prospect of success.

[3] The dicta of Lord Wolfe in **Swain v Hillman** [2001] 1 All ER 91 provides guidance on how a judge should exercise his discretion in deciding whether or not to grant summary judgment. In assessing the provisions of Part 24 of the Civil Procedure Rules of the United Kingdom which are similar to Part 15 of the Civil Procedure Rules of the Eastern Caribbean States, Lord Wolfe MR enunciated at paragraph 7 of that decision:

**"It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success ... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."**

**At paragraph 14 he continued:**

**"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In so doing he or she gives effect to the overriding objectives contained in Part 1. It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add, generally that it is in the interest of justice."**

## **Background/Chronology**

[4] The claimant/respondent commenced proceedings claiming breach of contract by the defendant/applicant. The defendant/applicant is the brother of the claimant/respondent. The claimant/respondent alleges that he borrowed the sum of USD\$79,800.00 for the defendant's/applicant's son at the defendant's/applicant's request and on the oral promise that the defendant/applicant would repay the monthly payments. In response the defendant/Applicant filed an Application for Summary Judgment and/or to Strike out the Claim as having disclosed no cause of action and an Affidavit in Support. The latter was followed by written submissions in support filed by the defendant/applicant specifically asserting that there was no consideration provided and no intention to create a binding relationship between the defendant/applicant and the claimant/respondent.

[5] The claimant/respondent secured a loan of USD\$79,800.00 to assist his nephew, Marvin Rey at a time when he was in the midst of a foreclosure. The defendant/applicant, his brother signed as a guarantor to the claimant's/respondent's loan and would make the monthly payments but there was no written agreement or contract for the defendant/applicant to repay the said loan.

[6] The claimant/respondent stated that he obtained the said loan to pay off the arrears of the defendant/applicant son's loan at the request of the defendant/applicant who orally promised to make the monthly payments. For the most part, the defendant/applicant made payments to the bank himself except for the periods as stated in the statement of claim when the defendant/applicant failed to do so and the monies were taken from the Claimant's/Respondent's Term Deposit in order to pay the aforesaid loan.

### **Defendant's/Applicant's Submissions**

[7] Counsel for the defendant/applicant, Ms. Tara Carter argued that:

- i. The claimant/respondent had no real prospect of succeeding on the claim and that the claim did not disclose any reasonable cause of action.
- ii. The matter in dispute is a matter of law. The claimant could only succeed on the claim if there was a legally binding contract between the claimant and the defendant. The claimant was seeking to rely on a breach of contract as the underlying cause of action.
- iii. To find a legally binding agreement this Honourable Court must find that the elements of contract existed at the material time.
- iv. The claimant sought to establish the contractual terms in paragraph 2 wherein he said that the Applicant requested that he obtained a loan to assist a third party (Marvin Rey) by payment of his arrears. The claimant asserted that he obtained a loan on a promise that the applicant would make the payments. The claimant attached a copy of a Loan Agreement. These allegations are untrue and disputed. There was no such contract and no evidence of such a contract in existence between the parties.
- v. The court should consider the attached Loan Agreement in light of the fact that there was no reference to any interest or benefit to the defendant/applicant thereunder. There was no reference

to the defendant/applicant in the contractual terms between Paul Rey and the Bank. The defendant/applicant did not derive any benefit whatsoever from this Loan Agreement.

[8] Ms. Carter also submitted that the law was clear as to the distinction between the summary judgment rule and the strike out rule. The summary judgment rule, while not to be a mini-trial, is a determination on the issue before the court. The issue before this Honourable Court was whether the elements of contract existed on the face of the pleadings that would create a reasonable prospect of succeeding if this claim were to proceed.

[9] Counsel respectfully submitted that there was no binding or enforceable contract on the pleadings. There had been no pleaded facts in respect of any consideration between the defendant/applicant and claimant/respondent. There was no intention to create a binding relationship between the defendant/applicant and claimant/respondent.

[10] Ms. Carter further contended inter alia, that the pleadings before this court were deficient. The particulars of breach in the claim stated that the defendant/applicant had failed to make monthly payments to the claimant's/respondent's loan. Notwithstanding this complaint, there is no privity of contract between the defendant/applicant and the bank. There is no binding contractual duty upon the defendant/applicant that required him to make any payments on behalf of the claimant/respondent. If he did so that was purely a gift and not a legally binding contract. The evidence clearly exhibited a loan agreement executed solely by the claimant/respondent and there was no benefit thereunder to the defendant/applicant.

[11] Ms. Carter also posited, that the essence of the claimant's case is that he obtained a loan in reliance on a purported oral promise that his brother would help to repay the loan. The claimant's position was not complex on the law or the facts. The essence of the case is for the court to determine whether this claim rises to the level of creating a reasonable prospect of winning at trial.

[12] Ms. Carter further submitted that it would be impossible to make this argument at trial and the overriding objective should be to determine the claim summarily on the basis that-

- There was no consideration provided for the loan.

- The Defendant/Applicant derived no benefit from the Claimant/Respondent's agreement with the bank.
- The Respondent entered into the agreement freely and voluntarily and on his own.
- The only thing legally that can be done with respect of this claim is for the Defendant/Applicant to be called upon by the bank under the guarantee he executed in favour of the bank.

[13] Ms. Carter additionally posited that if the Court was not minded to grant summary judgment on the issue before it, then the court should exercise its discretion to strike out the claim as having disclosed no cause of action. Ms. Carter further argued that the claim was grounded in breach of contract and the only way to sustain that claim was to find that a contract existed. And she further argued that the court would be unable to come to the conclusion of a contract on the facts and pleadings as presented.

### **Claimant's/Respondent's Submissions**

[14] Mrs. Jeffers counsel for the claimant, submitted that the claimant/respondent as the promisee has offered consideration by taking the loan at the request of the defendant/applicant (promisor) and the defendant's/applicant's oral promise to pay the monthly payments was to his detriment, loss or responsibility given or suffered as he had undertaken the contractual liability and provided security for obtaining the loan from the bank. The claimant/respondent averred that he obtained the loan in paragraph 4 of his Statement of Claim and as such by obtaining the loan the claimant/respondent accepted the offer and had provided consideration.

[15] Mrs. Jeffers also argued that it was settled law that consideration must move from the promisee and as such this was adhered to by the claimant/respondent in the instant case.

[16] Mrs. Jeffers also posited inter alia that the Defendant's/Applicant's submission in urging the Court to try the case on an issue of fact could only be determined by a trial Judge where witness statements, cross examinations and other documents would be produced.

[17] Mrs. Jeffers further posited that this was a case of mixed fact and law, as it was only in determining the facts that one could conclude whether or not a contract exist. More so as this was an oral agreement and it appeared that the parties disputed the facts such a case must be ventilated in a trial to determine the matter. Therefore, this was not a case for summary judgment and/or strike out of the claim.

[18] Mrs. Jeffers additionally submitted that the overriding objective of the rules of the CPR (as amended 2000) is to ensure that cases are dealt with justly, ensuring that justice is done by all the parties involved, Mrs. Jeffers also submitted that if the claim was struck out at this stage, the claimant would be the one to be prejudiced, the claimant would have been deprived of the right to a hearing on the merits of the case before the court.

[19] Mrs. Jeffers therefore submitted that the present Application be dismissed to further the overriding objective of the CPR, that costs be granted to the claimant/respondent and that further directions be given for the matter to proceed to trial.

### **Issue**

[20] The main issue for me to determine is whether or not the claimant/respondent has a real prospect of succeeding on the claim or the issue.

### **Court Analysis**

[21] CPR 15.2 gives the court the power to grant summary judgment on the claim or on a particular issue if it considers that, either the Claimant has no real prospect of succeeding on the claim or the issue or that the defendant has no real prospect of successfully defending the claim or the issue. In dealing with evidence for the purpose of the summary judgment hearing CPR 15.5 requires an applicant to file affidavit evidence in support of the application as well as it requires a respondent who wishes to rely on evidence to file affidavit evidence.

[22] In **Celador Productions Limited v Melville and another and Conjoined Cases** [2004] EWHC 2362 (Ch), Sir Andrew Morritt V-C in his examination of the principles which govern applications for summary judgment said:-

“...The relevant test is laid down in CPR r 24.2. The court may give summary judgment against a claimant or a defendant if it considers that the claimant or defendant has “no real prospect of succeeding” on its claim or defence as the case may be and that “there is no other compelling reason why the case or issue should be disposed of at a trial”. I have been referred to a number of relevant authorities ...namely Swain v Hillman [2001] 1 All ER 91, 94-95, Three Rivers District Council v Bank of England (No.3) [2003] 2 AC 1, 259- 261, [2000] 3 All ER 1 paras. 90-97 and ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ. 472 paras. 8-11. In addition I was referred to the notes in Civil Procedure 2004 Vol.1 paras. 24.2.1, 24.2.3-24.2.5. [7] From these sources I derive the following elementary propositions: a) it is for the applicant for summary judgment to demonstrate that the respondent has no real prospect of success in his claim or defence as the case may be; b) a “real” prospect of success is one which is more than fanciful or merely arguable; c) if it is clear beyond question that the respondent will not be able at trial to establish the facts on which he relies then his prospects of success are not real; but d) the court is not entitled on an application for summary judgment to conduct a trial on documents without disclosure or cross-examination.”

[23] In the early days of **CPR 1998** in the United Kingdom, in **McPhilemy v. Times Newspapers Ltd.**

<sup>1</sup>Lord Woolf MR gave guidance upon the statements of case (and the Court dares to add similarly where an affidavit is used to support a fixed date claim instead of a statement of claim) under the CPR 1998 regime when he said:

“The need for extensive pleading including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of

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<sup>1</sup> [1999] 3 AER 775, p.792-793.

**proceedings identification of the documents upon which a party relies, together with copies of the party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."**

[24] CPR 15.6 (1) sets out the power of the court on an application for summary judgment, and confirms that the court has a discretion whether to grant summary judgment. It provides that on hearing an application for summary judgment-

**"The court may give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end."**

[25] An application for summary judgment is a process for ridding the courts of cases that are doomed to fail. Parties are therefore obliged to demonstrate, upon such an application that the prospect of their case succeeding is realistic.

[26] At page 64 of the **Commonwealth Caribbean Civil Procedure**, 3<sup>rd</sup> edition, the learned authors pointed out that: "[On] an application for summary judgment the claimant must satisfy the court of the following:

(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.

(b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.

(c) There must be no real prospect of oral evidence affecting the court's assessment of the facts."

[27] It is now settled that cases that are hopeless should not be allowed to continue. The foremost issue in this case is whether the claimant's/respondent's case has a real prospect of succeeding. If it has, the judge would be correct in determining that it is not an appropriate case for summary disposal.

[28] Lord Woolf's MR oft cited statement in the English case, **Swain v Hillman and another** [2001] 1 All ER 91 reads:

**"... The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success ... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."**

[29] More recently in **Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright** [2018] UKPC 12, the Privy Council provided further clarification on the issue. Lord Briggs, who delivered the judgment on behalf of the Board, said at paragraphs 16 and 17:

**"16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and**

fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.

17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense." (Emphasis added)

[30] The Board examined "the criterion for deciding whether a trial is necessary" as stated in Part 15.2 of the CPR above and concluded at paragraphs 18 through 21 that:

"18. That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue. The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.

19. The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows:

(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.

(2)...

(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.

**Para.8.9A further provides: The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.**

**20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim: see para 61 of the judgment of the Court of Appeal in this case.**

**21. The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b)." (Emphasis added)**

[31] As plainly stated by the Board, summary judgment hearings are designed to determine whether a trial of the "issues will generally be nothing more than an unnecessary waste of time and expense". And to deal with issues which "do not themselves require a trial." Their Lordships therefore drew a clear distinction between a summary judgment hearing and a trial.

**Whether the Claimant/Respondent has a real prospect of success**

[32] The burden of proof in applications for summary judgment rests on the applicant. In **ASE Metals v Exclusive Holidays of Elegance Limited** [2013] JMCA Civ. 37 Brooks JA sets out what he found to be the requisite burden of proof in this fashion:

**“The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). The applicant must assert that he believes that the respondent’s case has no real prospect of success. In *ED & F Man Liquid Products Ltd v Patel and Another* [2003] EWCA Civ. 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment: “...the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success...” [15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case “which is better than merely arguable” (see paragraph 8 of *ED & F Man*). The defendant must show that he has “a ‘realistic’ as opposed to a ‘fanciful’ prospect of success.”**

[33] The granting of summary judgment is an exercise of a discretionary power conferred on a judge by way of CPR 15. In exercise of this power I must concern myself with whether or not the claimant has a real prospect of successfully defending the claim. Among the material presented by the claimant in support of his application is the signed loan agreement which is being challenged by the defendant. In the face of this challenge it was open to the claimant in the application for summary judgment to provide further evidence as to the circumstances under which the defendant entered into this oral agreement. In a summary judgment application based on the wording of CPR 15 it is incumbent on the court to consider not only the pleadings but also the supporting affidavits.

[34] Ms. Carter submitted inter alia, that the essence of the claimant's/respondent's case was that he obtained a loan in reliance on a purported promise that his brother would help to repay the loan. The claimant's position is not complex on the law or the facts. The essence of the case is for the court to determine whether this claim rises to the level of creating a reasonable prospect of winning at trial. Counsel further argued that it was legally impossible to make this argument at trial and the overriding objective should be to determine the claim summarily.

[35] Ms. Carter also submitted that there was no consideration provided because the defendant/applicant derived no benefit from the claimant's/respondent's agreement with the bank. The claimant/respondent entered into the agreement freely and voluntarily and on his own. The only thing legally that can be done with respect of this claim is for the defendant/applicant to be called upon by the bank under the guarantee he executed in favour of the bank. It is not unusual for parties to provide guarantees of payment. This did not operate to render them liable under the loan agreement to make the payments as a contractual obligation to the lender.

[36] The question to be determined by the court would it be correct to find that there was no contract between the parties. In order to answer that question it is necessary to consider whether there were any relevant material which would not be considered or having been considered would be misinterpreted by a judge, from which it could have reasonably been concluded that there was an agreement between the defendant/applicant and the claimant/respondent whether expressed or implied. It is also necessary to consider whether, if there was such an agreement, there was an intention to create legal relations at the time it was made.

[37] How should a court approach the issue of considering whether there is a valid contract in existence?

Firstly, if it is in writing, then it is normally not necessary to look beyond the four corners of the

document to find the terms of the contract. In the absence of any written document, where the contract is alleged to be oral, the court must look for the intention of the parties in the words said at the time the contract was alleged to have been made, the conduct of the parties to the contract and any evidence of the negotiations at the time of the contract. What the court cannot do is create a contract where none existed. However, as in this case, where one party is asserting that there was an oral contract, it is the duty of the court to thoroughly examine all the circumstances and determine whether or not the parties, by their words, conduct and negotiations, intended their actions to have legal consequences. But this is a process which can only be undertaken at a trial and not at a summary stage of the matter.

[38] However, where the subject matter of the agreement is commercial rather than domestic, it is not necessary for the person asserting the agreement to prove that there was an intention to create legal relations and for the purpose of this principle, it is accepted that there can be commercial agreements between members of a family. There is a rebuttable presumption that the parties to a commercial agreement intended that agreement to have legal consequences and the onus is on the party asserting that there was no such intention for the agreement to have legal consequence, to prove it. See **Edwards v Skyways Ltd** [1964] 1 WLR 349 at 355-357 and **Chitty on Contract** 25<sup>th</sup> edition at paragraph 123.

[39] In the Jamaican Court of Appeal case of **Garvey v Richards**, [2011] JMCA Civ 16, Harris JA, in discussing when an agreement will be considered to have legal effect, stated at paragraph [10] that:

**“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the**

**contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.”**

[40] In **Balfour v Balfour** [1918-19] All ER Rep 860, the parties were husband and wife who entered into a domestic agreement for the maintenance of the wife and after the parties separated, the wife sued for the monies she claimed was due to her under the agreement. The English Court of Appeal held that there was no contract in the legal sense, as the parties were in a domestic arrangement and did not intend to make a bargain which could be enforceable at law.

[41] Therefore, in order to satisfy a court that there is an intention to create legally binding contractual relationships there should be an agreement on all the essential terms. Put another way, there should be certainty. The need for certainty of contract has also been addressed in the Privy Council decision of **Western Broadcasting Services v Edward Seaga**, Privy Council Appeal No 43 of 2005 where Lord Caswell in reliance on **Chitty on Contracts, 29th ed.** (2004) para 2- 110, pointed out at paragraph 19 of the judgment that it is trite law that although parties may reach agreement on essential matters of principle, if important points are left unsettled their agreement will be incomplete. Although the facts of that case were entirely different from the present case, the principle highlighted is generally applicable to contracts.

[42] In deciding whether or not the parties possessed the requisite intention to create a binding contract the question is essentially one of fact. In the case **RTS Flexible Systems Ltd. v. Molkerei Alois Muller GmbH & Co. KG UK (Productions)** 2010 3 ALL ER 1 Lord Clark extrapolated the applicable test at paragraph 45 of the judgment to be as follows:

**“whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon what was communicated between them by words or by conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”**

[43] Guidance as to how to treat with this issue can also be gleaned from the case **Jones v Padavatton**

[1969] 1WLR 328, where a mother and daughter entered into an agreement for the mother to pay the daughter \$200 per month to go to London to study for the bar. The daughter was required to give up her job which was a well-paying job which she did and proceeded to London and the mother bought her a house with rooms that she could let for rental income. The daughter failed to complete her studies and the mother sued her for recovery of possession of the house.

[44] The main questions that arose for the Court’s determination as set out by Danckwerths L. J. were as follows:

**“(1) Were the arrangements (such as they were) intended to produce legally binding agreements, or were they simply family arrangements depending for their fulfilment on good faith and trust, and not legally enforceable by legal proceedings? (2) Were the arrangements made so obscure and uncertain that, though intended to be legally binding, a court could not enforce them?”**

[45] He also highlighted the presumption against an intention to create legal relations that exist in domestic arrangements by saying;

**“Of course, there is no difficulty, if they so intend, in members of families entering into legally binding contracts in regard to family affairs. A competent equity draftsman would, if properly instructed, have no difficulty in drafting such a contract. But there is possibly in family affairs a presumption against such an intention (which, of course, can be rebutted).”**

[46] Danckwerths L.J. found that the arrangement between the mother and daughter was a domestic arrangement which raises the presumption that there was no intention to create legal relations, a presumption for which there was no evidence to rebut. I have set out below some of the factors that the Court took into account:

**“...Mrs. Jones and her daughter seem to have been on very good terms before 1967 so much so that the mother was arranging for a career for her daughter which she hoped would lead to success. This involved a visit to England in conditions which could not be wholly foreseen. What was required was an arrangement which was to be financed by the mother, and was such as would be adaptable to circumstances, as it in fact was. Then there was a later arrangement with respect to the house which the Court found was not a completely fresh arrangement, but an adaptation of the mother's financial assistance to her daughter due to the situation which was found to exist in England. It was not a stiff contractual operation any more than the original arrangement.”**

[47] The arrangement in the present case does not share the aforesaid similar characteristics. It seems to be that this was an agreement that was based on mutual trust, good faith, honour and as between family members, with set parameters within which the terms would be carried out. Additionally and on a prima facie basis, I find that there was certainty with respect to all pertinent aspects of the agreement and that there is some evidence to rebut the presumption of a lack of an intention to create legal relations. I therefore find that in these circumstances a binding contract would have been

created. However, this preliminary finding only strengthens my previous position; that there are triable issues in the present case which can only be properly ventilated before a court at a trial.

[48] Therefore, it is for a trial judge after hearing the evidence of the witnesses, examining any documents exhibited and assessing the credibility of the witnesses to determine:

- (i) whether or not the re-payment of the loan and the provision of the guarantee represented parole evidence or some indicia of an agreement; and
- (ii) whether the claimant/respondent pursuant to an oral agreement with the defendant/applicant lost monies on the loan to his detriment.

[49] The pivotal question being whether the Claimant/Respondent and the Defendant/Applicant had a valid Agreement for the repayment of the loan from April 29, 2013. This, as I stated before is for the judge I at a trial stage to determine and not at a Summary stage of the proceedings.

[50] Also, the credibility of a witness is also a matter entirely for the judge trying the matter. It's a matter for him or her as to which of the witnesses' evidence he or she will believe. It is that judge who will have to see and hear them. There was no written agreement between the parties and the claimant/respondent depended, on an oral contract.

[51] Mrs. Jeffers posited that the Loan Agreement showed that the claimant/respondent took the loan to pay off the arrears of the defendant's/applicant's son. This she argued was consistent with what he averred in his Statement of Claim and what the terms of the contract were. Hence, the Loan Agreement would not reference the defendant's/applicant's name as the contract was made orally and the claimant/respondent was the only one in the family, who was not indebted to the Bank and

therefore, his brother, the defendant/applicant asked him to obtain the loan and the defendant/applicant would make the monthly payments.

[52] Mrs. Jeffers also submitted that the claimant/respondent as the promisee had offered consideration by taking the loan at the request of the defendant/applicant (promisor) and the defendant's/applicant's oral promise to pay the monthly payments as it was to his detriment, loss or responsibility given or suffered as he had undertaken the contractual liability and provided the security for obtaining the said loan from the bank. It was the claimant's/respondent's claim that he obtained the loan and as such by obtaining the loan the claimant/respondent accepted the offer and had provided consideration. It is settled law that 'consideration must move from the promisee' and as such she submitted was adhered to by the claimant/respondent in the instant case.

### **Summary Judgment & Striking Out Analyses**

[53] The scope of the power of a court to grant summary judgment was considered by the House of Lords in **Three Rivers District Council v Bank of England (No. 3)** [2001] 2 All ER 513 in which it was held that a claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based. Specifically Lord Steyn in discussing the criteria for granting summary judgment at paragraph 95 enunciated:

**“For example it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of the court as soon as possible”**

[54] On a proper consideration of all the information before the court in the instant case, I find that the claim is more than just ‘fanciful’, bearing in mind the contention that the defendant/applicant did not enter into the loan agreement with the claimant/respondent.

### **The Striking Out Application**

[55] The court’s power to strike out statements of case is exercisable under its inherent jurisdiction and is also governed by rules of court. In **Biguzzi v Rank Leisure Plc** [1999] 4 All ER 934, the English Court of Appeal noted that the English Rules of Civil Procedure, 1999, confer a very wide discretion upon judges to strike out statements of case. According to Lord Woolfe MR:

**“The fact that a judge has the power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of the case. The advantage of the CPR over the previous rules is that the Court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.”**

However, the Court has frowned upon statements of claim or defence or parts therein that are frivolous and vexatious, that are likely to obstruct the just disposal of the proceedings.

[56] In **Blackstone’s Civil Practice, 2010**, the learned authors in commenting on Rule 3.4(2) (a) of the English Civil Procedure Rules, which is the equivalent of our CPR Rule 26.3(1) (c), state at paragraph 33.7 that:

**“Applications ... may be made on the basis that the statement of case under attack fails on its face to disclose a sustainable claim or defence. Traditionally, this has been**

regarded as restricted to cases which are bad in law, or which fail to plead a complete claim or defence...”

[57] In discussing the court’s power to strike out pleadings, the learned authors of Halsbury’s, Laws of England, 4th Edition, at paragraphs 430-435, stated, inter alia, that:

“... the powers are permissive...and they confer a discretionary jurisdiction which the court will exercise in light of all the circumstances concerning the offending pleading. . . Where a pleading discloses no reasonable cause of action... it would be ordered struck out or amended, if it is capable of amendment. . . No evidence including affidavit evidence is admissible on an application on this ground and since it is only the pleading itself which is being examined, the court is required to assume that the facts pleaded are true and undisputed. . . .However, summary procedure... will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable. . .Nor will a pleading be struck out where it raises an arguable, difficult or important point of law.”

[58] The claim at bar, therefore should not be struck out since it discloses a cause of action. In **Baptiste v Attorney General** GD 2014 HC 15, and. in **Tawney Assets Limited v. East Pine Management Limited and Ors** Civ Appeal HCVAP 2012/007, Mitchell JA at paragraph 22 stated: -

“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 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.”

[59] Lord Kilbrandon, in giving the advice of the Board in **Yat Tung Investment Co. Ltd. v Dao Heng Bank** [1975] AC 581 at 590, noted that the court has a duty not to deny a litigant his or her right to bring a claim before the court ‘**without scrupulous examination of all the circumstances.**’

[60] Striking out of a claim, should always be a matter of last resort and thus, should only be ordered by a court in plain and obvious cases: **Three Rivers District Council v Bank of England** (No. 3) – [2003] 2 AC 1, esp. at 96 – 97.

[61] In determining whether the claimant’s statement of case or part thereof does not disclose any reasonable cause of action, it ought to first be recognized that rule 26.3 (1) (b) gives this court the power to strike out a statement of case or part thereof if it does not disclose any reasonable ground for bringing or defending the claim. As stated in **Hunter v Chief Constable of the West Midlands Police**, by Lord Diplock – [1982] AC 529, at 536,

“this is a power, ‘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.’”

[62] This court cannot though, at this stage of these proceedings, strike out the claimant’s claim as not disclosing a cause of action. This is so because, as stated by the authors, in the text – **Blackstone’s Civil Practice, 2014**, at paragraph 33.12 – ‘Applications to strike out for abuse of process should be made shortly after service.’

[63] Where a statement discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (b) however, will only be applied

to cases which are “plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable , or where the case is unarguable.”

[64] In considering the issue of whether the present claim does not disclose any reasonable ground for bringing or defending the claim, I am guided by the authorities that show that a litigant ought not to be denied his or her right to bring a claim before the court “without scrupulous examination of all the circumstances.”

[65] Cause of action has been held to mean every fact which is material to be proved to entitle the plaintiff to succeed, or all those things necessary to give a right to relief in law or equity. See **Letang v Cooper** (1965) 1 Q.B. 232 at p.242. It cannot be seriously contended because the defendant/applicant did not provide consideration is a necessary ingredient in the claimant's/respondent's proof of the oral agreement or contract complained of. The foundation of the claimant's/respondent's action is the oral agreement entered into by the defendant/applicant and himself based on an oral promise by the Defendant to repay the loan by monthly installments. It is not the oral agreement per se. There would have been no cause of action if the oral agreement had been breached- See **Chotterton v. Secretary of State for India in Council** (1893) 2 Q.B. 189. Therefore, I have not been persuaded that there is no cause of action in the case at bar.

[66] Once the defendant has filed an acknowledgement of service and or a defence and defended on the merits, he is taken as having acquiesced and it will then be too late to successfully pursue the defendant's contention that the claim discloses no reasonable ground for bringing the action or claim. In that regard, see: **Johnson v Gore Wood and Co.** [2002] 2 AC 1 and **Coca Cola Co. v Ketteridge**

[2003] EWHC 2488 (Ch). In the circumstances, the defendants' application to strike out this claim on the basis that it discloses no reasonable ground for bringing the claim must and does fail.

[67] Wooding CJ in **Baptiste v. Supersad** 1967 12 WIR 140 p. 144, which was cited in the Montserrat case of **Kevin Weste et al v. Shamrock Industries Ltd.** by Redhead J. stated:

"The law is not a game nor is it an arena. It is the function and duty of a judge to see that justice is done as far as may be according to the parties."

Redhead J also said in that case that the attainment of true justice is "over the highway of reality and not through the alley of technicalities."

[68] Saunders J. in CCJ CD 2 of 2006 **G Watson v Fernandes** at paragraph 39 said:

"Courts exist to do justice between litigants, through the balance of interest, an individual litigant against the interest of litigants as a whole. Justice is not served by depriving parties of the ability to have their cases decided on the merit because of a technical procedure breach committed by their attorney. With the greatest of respect to the court below we disagree that anything in the rules suggest that there is a time limit on the court's ability to excuse non-compliance with the rules or permit to be remedied if the interest of justice so required. The Court retains that jurisdiction at all times."

[69] Ms. Carter submitted that if the court is not minded to grant summary judgment on the issue before it, the court should exercise its discretion to strike out the claim as having disclosed no cause of action. The claim is grounded in breach of contract and the only way to sustain that claim is to find that a contract existed. I am unable to come to this conclusion on the facts and pleadings before me.

[70] An examination of the pleadings, in my view shows that serious issues have been raised and these can only be properly determined at a trial 'on the hearing of the evidence. The statement of case as pleaded by the Claimant, in my opinion, could not be said to be 'obviously unsustainable' and neither is it 'unarguable'. In fact, if I understand correctly the gravamen of the Defendant's/Applicant's submission, the contention is not that the statement of case discloses no reasonable grounds for bringing a claim, but rather that there is no cause of action as against the named defendant.

[71] Additionally, I have considered, as Bingham and Millett LLJ stated in the case of **Johnson v Gore Wood Co. Limited** 1 All ER 481, 2 WLR 72, UKHL 65, that a court must hesitate, think deeply and carefully, before turning away a litigant who has not had his claim heard on the merits. I therefore accept that striking out is a draconian measure which a court should be reluctant to take and should only take in the clearest of cases as the consequence is that a party who has had his claim struck out is barred from proceeding and find that the claimant's statement of case discloses some cause of action and raises some questions fit to be decided by the court and it therefore ought not to be struck out.

[72] Accordingly, the claim, as pleaded, clearly shows that the claimant is seeking damages for breach of contract in relation to a loan agreement that he executed in favour of the defendant's son and he is also claiming for the loss of his security.

## Discussion & Conclusion

[73] The defendant/applicant also contended that the present claim did not disclose a cause of action and that there are no reasonable grounds for bringing the claim. The court is therefore being asked to examine the conduct of the Claimant in filing the instant claim. The Claimant on the other hand is asking the court to consider that the issues raised in the claim have not been litigated.

[74] In considering the issue of whether the present claim discloses any reasonable ground for bringing the claim, I am guided by the authorities which demonstrably show that a litigant ought not to be denied his or her right to bring a claim before the court “without scrupulous examination of all the circumstances.”

[75] In conclusion, it is therefore not appropriate for present purposes, for this court to give any consideration to either the defendant’s defence, or his counterclaim if any, or the respective parties’ witness statements, for the purpose of determining whether the claimant’s statement of case discloses any reasonable grounds for bringing the claim. It is either that the claimant’s statement of case discloses reasonable grounds for bringing the claim, or it does not. The answer as to whether the same does so or not, must be found from a careful consideration of only that which is, to use a descriptive phrase, ‘within the four (4) corners of the claimant’s statement of case.’

[76] I wish to reiterate for emphasis at this juncture that where a statement of case discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (b) however, will only be applied to cases which are “**plain**

**and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable , or where the case is unarguable”.**

[77] In the final analysis, it is apparent to this court, that the claimant’s/respondent’s statement of case does disclose reasonable grounds for bringing this claim against the defendant/applicant. I have borne in mind that the Court should only exercise its power to strike out in “plain and obvious” cases. This power is to be exercised with caution, as striking out will have the effect of depriving a litigant of the opportunity to have his claim tried by the court: **Kwa Ban Cheong**, citing **North West Water Ltd v Binnie & Partners** [1990] 3 All ER 547 at 553.

[78] I am also fully cognisant that the role of the court at this stage is not to carry out a minute and protracted examination of the documents and the facts of the case: see **Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others** [1997] 3 SLR(R) 649 at [18] and The “**Osprey**” [1999] 3 SLR(R) 1099 at [6]. Otherwise, the Court hearing the striking out application would effectively be usurping the proper function of the trial court, and conducting a trial of the case in chambers on affidavits only, without discovery and without evidence tested by cross-examination in the ordinary way: see **Ko Teck Siang and another v Low Fong Mei and another and other actions** [1992] 1 SLR(R) 22 at [15], citing **Wenlock v Moloney** [1965] 2 All ER 871 at 874. Instead, the correct question for the Court to ask is whether the commencement of the present suit constitutes a plain and obvious case of a claimant bringing a claim which discloses no reasonable ground for bringing the claim.

[79] Additionally, unlike applications to strike out pleadings under **CPR 26.4**, where the court is concerned solely with the form of the pleading and where, if the application is successful, leave may be granted

to amend to plead in proper form, in applications under this rule the court is not limited to a consideration of the form of the pleading but receives evidence to determine whether the claimant's claim has any prospect of success. If it has, but the claim is not adequately expressed in the pleading, the court should not dismiss the proceedings or the particular claim, but should grant leave to the plaintiff to file an amended statement of claim or cross-claim (in the case of an application in respect of a cross-claim).

[80] I have also borne in mind that while the claim as filed, are only allegations at this stage and could be completely cleared away at a trial; there is the need for a full hearing on the merits so it would be unwise to shut the claimant out at this stage.

[81] The courts exist to adjudicate and determine disputes between parties and therefore litigants ought not to be denied the opportunity of having their issues decided on the merits by the court. In light of the fact that there was no trial in the present claim, I am of the view that it would be a draconian step to strike out the claim as disclosing no reasonable ground for bringing the claim.

[82] In view of the foregoing, I find that it would be unjust in all the circumstances to strike out the claim on grounds that it discloses no reasonable ground for bringing the claim. Similarly, in this case I find that there are real issues to be tried. Among the issues is whether the defendant entered into this oral agreement on 29<sup>th</sup> April 2013 with the claimant regarding the said loan agreement. Those issues should be subject to trial. In light of that, I am of the view that the claimant has a real prospect of successfully defending the claim. I find, therefore, that this is not an appropriate case for the grant of summary judgment. The application for summary judgment is dismissed.

[83] Having looked at the facts and circumstances of this case and examined the issues and allegations before the court in the claim, and having given careful consideration to the written submissions of both counsel, I will adopt the approach of the Court of Appeal in **Rudd v Crowne Fire Extinguishers Services**, SCCA 48/89, unreported, delivered 20<sup>th</sup> December 1989, where Downer JA, while making reference to the case of **Dyson v The Attorney General**, stated, inter alia, that:

**“Even if the case is not a strong one, it merits an examination of the law and facts...”**

[84] Finally, I wish to thank learned counsel for their written submissions in this matter.

[85] The defendant’s/applicant’s application to strike out the claimant’s/respondent’s statement of case is not granted and these are the orders that follow:

[86] **Orders**

- (i) Summary judgment is refused.
- (ii) The defendant’s/applicant’s application to strike out the claimant’s statement of case is refused and as such, the claimant’s statement of case stands.
- (iii) The costs of the defendant’s/applicant’s application to strike out are awarded to the claimant and such costs shall be assessed, if not sooner agreed.
- (iv) No reference to this judgment should be made in front of any judge who may try this case hereafter. This ruling is only on the question whether there was a contract or agreement between the parties. It is quite possible that the trial judge may think otherwise and the

tribunal of fact will reject that there was a contract in existence: dictum of Neill, L.J. in **Keays v Murdoch Magazines** adopted in part.

- (v) The defendant is granted leave to file his defence with respect to the claimant's particulars of claim, if necessary, within 28 days of the lifting of the present emergency curfew orders.
- (vi) The Claimant shall file a Reply to the Defence if necessary within 14 days of service of the Defence.
- (vii) The Claimant shall file and serve this order.

**Ricardo Sandcroft**  
Master [Ag]

**By the Court**

**Registrar**