IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No.: G 120 of 2022

BETWEEN

STEPHENSON TOMLINSON

Plaintiff

AND

SHYAM MICHAEL MASHUMBI EBANKS

Defendants

CHAMBERS

Appearances:	Ms. Cherry Bridges of Ritch and Conolly for the Plaintiff Mr. Brett Basdeo and Mr. Chaowei Fan of Walkers for the Defendant
Before:	**The Hon. Justice Marlene Carter (Actg.)**
Heard:	**18 January 2023**
Draft Judgment Circulated:	**01 February 2023**
Further hearing:	**10 March 2023**
Judgment Delivered:	**21 March 2023**

HEADNOTE

Civil litigation – Order 14 r. 1 - summary judgment - promissory note - defence and counterclaim

JUDGMENT

1. By Writ of Summons dated 1 June 2022, the Plaintiff claims a sum of money payable by the Defendant on a Promissory Note dated 31 July 2018 ("the Promissory Note").

2. The Plaintiff claims that the amount lent to the Defendant on the Promissory Note was the sum of CI$127, 475.00 with interest at the rate of 2.5 percent per annum for a term of five years together with all legal fees and disbursements arising from the preparation of the Promissory Note and including but not limited to any stamp duty payable thereon. Attached to the Promissory Note was a schedule for repayment. ("Schedule 1"). The Plaintiff states that the payment of the principal sum was in instalments.

3. On 4 October 2022 the Plaintiff filed a summons seeking summary judgment pursuant to Order 14 of the Grand Court Rules. The Plaintiff sought the following relief:

> "*1. The Defendant do pay to the Plaintiff forthwith the total of the sums pleaded in the Statement of Claim dated 1 June 2022 in the sum of at least CI$151,279.41 plus all other costs incurred from 1 June 2022 and continuing interest accruing from 1 June 2022 to the date of the judgment, the total amount to be calculated up to the date of judgment.*
>
> *2. The Defendant do pay the Plaintiff's costs of this application pursuant to the terms of the Promissory Note dated 31 July 2018 or alternatively, the Defendant do pay the Plaintiff's costs of this application to be taxed if not agreed.*
>
> *3. Such further or other relief as the Court shall think fit."*

4. In his first affidavit in support of the instant application the Plaintiff related that the actual sum advanced to the Defendant was some CI$229.30 less that the amount stated on the Promissory Note, or CI$127,245.70. ("the Principal Sum"). The Plaintiff also stated that the Defendant made some payments towards the Principal Sum. Between 17 October 2018, and 12 March 2020, the Defendant made payments to the Plaintiff totaling CI$19,160.53 in accordance with Schedule 1.

5. The Defendant has not filed a defence to the Statement of Claim. The Defendant contends that the acknowledgment of service to the Writ of Summons was filed within the stipulated time frame,

through the Court's online portal. However, the filed copy was issued from the Civil Registry with a date outside the statutory period for filing same. The Defendant has sought to highlight that there was no fault on his part. By summons dated 21 July 2022 the Defendant seeks leave to file a defence out of time. It is unclear why the this summons for extension of time was not listed for hearing before the application for summary judgment. Both summonses are before the court.

6. The Plaintiff indicates in his affidavit in support of the present application that having checked the electronic portal on the date upon which the acknowledgment of service was to have been filed and having noted that none appeared to have been filed, his attorneys issued an application for judgment in default. The Plaintiff has not pursued the application for default judgment. However, the Plaintiff does seek to refer to same where it may impact costs sought on the instant application.

7. The Plaintiff filed two affidavits in support of the application for summary judgment. The Defendant objects to summary judgment being granted. The Defendant has filed one affidavit in opposition.

8. In the first of the Plaintiff's affidavits, he refers to his claim as set out in paragraphs 2-4 above and states that he believes that there is no defence to his action on the Promissory Note.

9. The Plaintiff's second affidavit was filed "*in response to the first affidavit of the Defendant.*" The Plaintiff stated in response to matters set out in the Defendant's affidavit: *"It is simply not relevant to the issue of the Promissory Note and is merely an attempt to muddy the waters to give the illusion that the Defendant has some sort of Defence to this action on a Promissory Note. For the avoidance of doubt, I do not accept that the Defendant's allegations are true ..."*

10. The Plaintiff produced "*copies of all the cheques and corresponding cheque stubs evidencing all the payments made by way of loan to the Defendant in the total sum of $127,245.70 and in respect of which the Defendant executed the Promissory Note date 31 July 2018.*"

11. The Plaintiff reiterated his belief that there is no defence to his claim on the Promissory Note and asked the court to refuse to grant the Defendant an extension of time to file his defence to the claim.

12. In an action for summary judgment where the Plaintiff avers that there is no defence to his claim the burden is on the Defendant to show that there is a triable issue.

13. In his affidavit in opposition the Defendant states that he has a real prospect of success in defending the claim brought by the Plaintiff for the following reasons:

> *"a) Contrary to the allegations made in the statement of claim, the Plaintiff did not advance all the funds directly to me, nor at the time alleged, pursuant to the promissory note dated 31 July 2018.*
>
> *b) Some of the funds alleged to have been lent to me under the Promissory Note were actually paid by the Plaintiff directly to a certain contractor for the renovation of an office space for the mutual benefit of*
>
> *i. Tomlinson Printing Limited t/a PrintTek,("PrintTek") and*
>
> *ii. NCI Freight & Logistics Limited. ("NCI");*
>
> *c) The Promissory Note does not reflect a subsequent agreed amendment of the sums due to apportion those costs between PrintTek and NCI;*
>
> *d) The calculations of interest set out in the statement of claim are incorrect;*
>
> *e) In hindsight, I believe that I was improperly pressured into entering into the Promissory Note due to my personal financial circumstances arising from the Plaintiff's refusal to fund PrintTek as originally contemplated, and*
>
> *f) The Plaintiff is unable to recover his full legal fees of recovery action under the Promissory Note.*

14. In answer the Plaintiff does not deny that the funds were not advanced all at once to the Defendant. The Plaintiff agrees that some funds were paid directly to a contractor but insists that this was at the request of the Defendant and for his benefit. Any submission that the Promissory Note does not reflect a subsequent agreed amendment is deemed by the Plaintiff as irrelevant to the claim. In his second affidavit in support of the application, the Plaintiff agrees that the calculations of interest are incorrect and has recalculated same to take account of the Defendant's submissions in this regard.

15. The Plaintiff denies that he exerted any improper pressure on the Defendant to cause him to sign the Promissory Note. On the matter of the recovery of legal fees the Plaintiff submits that the court can determine whether all the legal fees sought are reasonable and recoverable in all the circumstances.

COURT'S CONSIDERATIONS

16. In ***re Sterling Macro Fund,*** Mangatal J. referred to the

> *"... the judgment of Lewison J. in **Easyair Ltd v Opal Telecom Ltd** (2009) EWHC 339 (Ch) at (15). The principles were set out by Lewison J. in the context of an application by a defendant for summary judgment dismissing a claim. These principles were subsequently approved by the English Court of Appeal in **AC Ward & Son v Catlin (Five) Ltd** (2009) EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at [24] on a case by a plaintiff for summary judgment. The principles are as follows:-*
>
> *i. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: **Swain v Hillman** [2001] 1All ER 91*
> *ii. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: **ED & F Man Liquid Products v Patel** [2003] EWCA Civ 472 at [8].*
> *iii. In reaching its conclusion the court must not conduct a "mini-trial": **Swain v Hillman**.*
> *iv. This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: **ED & F Man Liquid Products v Patel** at {10}.*
> *v. However, in reaching its conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: **Royal Brompton Hospital NHS Trust v Hammond** (No 5) [2001] EWCA Civ 550.*
> *vi. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict on the facts at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co** 100 Ltd [2007] FSR 63.*

vii. *On the other hand it is not uncommon for an application under Rule 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expect to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction:* ***ICI Chemicals & Polymers Ltd v TTE Training Ltd*** *[2007] EWCA Civ 725."*

17. The Defendant's case is that there are disputed questions regarding the issuance of the Promissory Note and that the Court could not determine with confidence that there was no answer to the claim as asserted by the Plaintiff.

18. The Court is mindful that on a summary judgment application, while the Court must determine whether there is a real as opposed to a fanciful prospect of defending the claim and the Court is permitted to consider what may or may not happen if the case proceeded to trial, the Court is not to make minute or protracted examination of the evidence that may be before a trail judge, and that "*the court should hesitate about making a final decision without a trial ...where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case*."

19. Regarding the basis for challenge to a Promissory Note, Butterworths Civil Court Precedents states:[1]

> *"The defences available to an action on a dishonoured bill or cheque are few. As a promissory note is treated for most purposes as a bill, summary judgment for dishonour is likely to be the rule. There are some technical defences based on formal irregularities in the bill or cheque or in its presentation or on forgery but,*

[1] Paragraphs [805] – [810]

as between the immediate parties, in the absence of such defences, the only real defence is to allege either a total failure of consideration or the obtaining of the bill by 'fraud, duress or force or fear or other illegal means or for an illegal consideration'."

20. With these strictures in mind, I have considered carefully the matters raised by the Defendant in his arguments as to the unsuitability of this claim for summary judgment. The matters raised by the Defendant, set out at paragraph 14 above, at ***a, b, d,*** and ***f*** appear to be merely technical issues. As to ***d*** and ***f***, these issues can be resolved and, to some extent, aspects highlighted by the Defendant have been accepted by the Plaintiff. The fact that the Principal Sum was not advanced all at once or at the time alleged in the Promissory Note, or whether a part of the Principal Sum was advanced to the Defendant or to a contractor at his behest and for his benefit, the issues at ***a.*** and ***b.*** are matters which would not amount to a total failure of consideration or vitiate the agreement. The Defendant agrees that he has received the monies advanced by the Plaintiff.

21. On the face of the pleadings and the affidavits and submissions of counsel the issue at ***e.*** seems a fanciful defence to the action. In oral arguments and the Defendant's skeleton argument, this aspect of the defence was put as *"economic duress"*. Counsel for the Defendant referred the court to the case of ***Times Travel (UK) Ltd v Pakistan International Airlines Corporation [2021] 3 W.L.R. 727.***

22. In that case Lord Hodge DPSC noted as follows:

"2. .the courts have developed the common law doctrine of duress to include lawful act economic duress by drawing on the rules of equity in relation to undue influence and treating as "illegitimate" conduct, which, when the law of duress was less developed, had been identified by equity as giving rise to an agreement which it was unconscionable for the party who had conducted himself or herself in that way to seek to enforce. In other words, morally reprehensible behaviour which in equity was judged to render the enforcement of a contract unconscionable in the context of undue influence has been treated by English common law as illegitimate pressure in the context of duress.

3. The boundaries of the doctrine of lawful act duress are not fixed and the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities. In any development of the doctrine of lawful act duress it will also be important to bear in mind not only that

> *analogous remedies already exist in equity, such as the doctrines of undue influence and unconscionable bargains, but also the absence in English law of any overriding doctrine of good faith in contracting or any doctrine of imbalance of bargaining power. As I will seek to explain, the absence of those doctrines in English law leads me to conclude that Times Travel's claim for unlawful act economic duress would not have succeeded in this case even if it had shown that Pakistan International Airline Corpn had made what Lord Burrows JSC has defined as bad faith demand.*
>
> *4. If one focuses on the few cases in which a remedy has been provided for what would now be analysed as lawful act duress, there are to date two circumstances in which the English courts have recognized and provided a remedy for such duress. The first circumstance is where a defendant uses his knowledge of criminal activity by the claimant or a member of the claimant's close family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution. The second circumstance is where the defendant having exposed himself to a civil claim by the claimant, for example, damages for breach of contract, deliberately manoeuvres the claimant into a position of vulnerability by means which the law regards as illegitimate and thereby forces the claimant to waive his claim. In both categories of case the defendant has behaved in a highly reprehensible way which the courts have treated as amounting to illegitimate pressure."*[2]

23. There is no claim by the Defendant to exploitation of knowledge of criminal activity on the part of the Plaintiff. The Defendant has not shown how the Plaintiff may have used "***illegitimate means***" to manoevre the Defendant into a position of weakness to force him to waive his claim or in this case, sign the Promissory Note. As Lord Hodge noted above, the doctrines of undue influence and unconscionable bargains are analogous remedies to the doctrine of lawful act duress, and there is no doctrine of good faith in contracting or any doctrine of imbalance of bargaining power in English Law. The same applies in Cayman Law. The Defendant's bare assertion in his affidavit that he believes that he was improperly pressured into being bound by the Promissory Note is not to this court's mind sufficient to raise this as a defence to the claim.

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[2] At page 731 of the Judgment, per Lord Hodge DPSC

24. The Defendant's submission centers on his being placed in a less advantageous position with regards to the fit out of his own business than that of the Defendant. This was an agreement between businessmen. At the stage at which the Promissory Note was issued, the Defendant was a successful businessman. The nature of the relationship between himself and the Plaintiff was not such as to attract an implication of improper pressure or influence to the extent suggested by the Defendant in his affidavit, without more. This issue as a defence to the claim has no real prospect of succeeding.

25. The remaining issue raised by the Defendant relates to the Principal Sum. The Defendant contends that the Principal Sum was amended by a further oral agreement between the parties, such that the Defendant would, in any event, not be liable for the entirety of that sum.

26. The Plaintiff does not address this matter directly, concentrating in his affidavits on the court's discretion to act on the Promissory Note and grant summary judgment and stating that other matters raised by the Defendant are not relevant to that application. The Plaintiff does however acknowledge that the payments made to the Defendant pursuant to the Promissory Note were made in connection with Phase 2 of the building referred to in the Defendant's affidavit.[3] The Defendant asserts with regard to the Phase 2 works that the further oral agreement between the parties was such that the principal sum was amended to reflect only the portion of the costs of the Phase 2 fit out works attributable to NCI, the Defendant's company.

27. The Defendant set out the following in his affidavit:

> "40. *Following completion of the Stage 2 Fit-out Works, the Plaintiff physically went to the Premises and calculated that the extent of the Phase 2 Fit-Out Works was 3,925.25 square foot of the Premises. He further calculated the proportion attributable to both NCI and PrintTek was as follows:*
>
> | | |
> |---|---|
> | *Fit-out space occupied solely by NCI* | *1,392.10* |
> | *Fit-out space shared between NCI and PrintTek* | *2,533.15* |
> | ***Total out-fit space*** | ***3,925.25*** |

[3] See paragraph 4 of 2nd affidavit of plaintiff.

Fit-out space attributable to NCI	*67.74%*
Fit-out space attributable to PrintTek	*32.23%*

41. These calculations were done by the Plaintiff on a hand-out that he provided to me on around the second quarter of 2019 at a meeting in his office, a copy of which is at page 30 of Exhibit SME-1. At the same meeting, the Plaintiff and I agreed that the Initial Principal Sum under the Promissory Note would be reduced to reflect only the amount payable by NCI (i.e. 67.74% of the Principal Sum) (the "Amended Promissory Note"). However, the Plaintiff never provided to me with even a draft of the Amended Promissory Note, let alone an execution version. Nevertheless, I consider that there was a concluded agreement between us to apportion the Initial Principal Sum in the matter described above."

28. The Defendant takes the position that *"the initial Principal Sum was amended to reflect only the portion of the costs of the Stage 2 Fit-Out Works attributable to NCI"*

29. The question for the court is whether this assertion amounts to a plausible defence to the claim for recovery of the amounts under the Promissory Note. This court must be satisfied that *there is a triable issue or question or that for some reason there ought to be a trial. Leave to defend ought to be given unless there is clearly no defence in law such as could have been raised...and no possibility of a real defence on the question of fact.*

30. In the case of *Bank Fur Gemeinwirtschaft v City of London Garages Ltd and others*[4], the appellants sought unconditional leave to appeal an order made for summary judgment on bills of exchange. The appellants submitted that the drawing, acceptance, and negotiation of the bills was affected by fraud and that transactions relating to some of the bills were tainted with illegality. Cairnes LJ noted:

> *"I readily accept that if on RSC 14 proceedings there is a real issue whether the bills were taken in good faith and for value that issue cannot be resolved at that stage and leave to defend must be given. But if there is clear evidence of value given in good faith, and no ground shown on which that evidence can be*

[4] [1971] 1 All ER 541

challenged, then the defendant's allegation of fraud does not constitute material which would afford a defence."

31. In the same case, Davies LJ stated that for summary judgment, *"...the bare assertion of being a bona fide holder for value is not enough, just as the bare allegation of fraud is not enough on the other side, and that if there is no more than such an allegation by the plaintiff the case should go to trial. But in my opinion, that cannot apply where the claim to be a bona fide holder for value supported by unchallenged or unchallengeable contemporary documents."*

32. The defendant has raised the issue of an oral agreement supplemental to the Promissory Note upon which the Plaintiff's claim is founded. The Defendant contends that this oral agreement may impact the amount of his liability on the Promissory Note and so affect the amount actually recoverable by the Plaintiff.

33. The authorities are clear that in an action for a dishonored bill of exchange or cheque or promissory note, ***save in exceptional circumstances*** a defendant is not allowed to set up a set off or counterclaim for damages. This is based on the principle that a bill, cheque or note is given and taken in payment as so much cash and not as merely giving a right of action for the creditor to litigate a counterclaim.

34. On this issue of what amounts to a counterclaim and its effect on a claim based on a promissory note the case of *Metallgesellschaft Hong Kong Limited v Omni Metals Trading*[5] involves similar considerations. The plaintiff in that case applied for summary judgment in an action on dishonored promissory notes. The defendant argued that it owed the plaintiff a lesser amount on the promissory notes and that it has been orally agreed between the parties that payment of one of the notes would be deferred. The defendant argued further that the Plaintiff was in breach of the oral agreement and sought to set off against the claim on the promissory notes, any damages due to it from the plaintiff.

35. The court held that:

"...an unliquidated counterclaim of the kind being made by the defendant could not be relied upon as a set-off against a claim on a promissory note. It was settled law

[5] [1992-93 CILR 48]

that an action on a negotiable instrument should not be held up in reliance on a counterclaim whether connected with or independent of the contract governing the instrument. The defendant would have to pursue its counterclaim in a separate action. The plaintiff's application for summary judgment would therefore succeed and the defendant would be required to repay the full sum claimed plus interest…"

36. Malone CJ noted at page 51:

> *"…if there is a basis for the counterclaim it is another contract. Admittedly, that other contract relates to the specific subject-matter of the initial contract but from that fact it does not follow that the counterclaim can hold up the promissory note. The Brown, Shipley case is authority against that proposition. So too, the learned editors of the White Book who, in dealing with the practice of not allowing a defendant to set up a set-off or counterclaim for damages, write in 1 The Supreme Court Practice 1988, para 14/3-4/14, at 146 as follows:*
>
> > *'This practice will obtain whether the counterclaim is connected with or arises out of or is independent of the contract in respect of which the bill, cheque or note was given, and whether or not the action is between the immediate parties to the bill…'*
>
> *At common law the position then is that if the defendant wishes to pursue its counterclaim it must do so separately."*

37. The defendant's submissions do not amount to a counterclaim. It is a defence in that the defendant alleges that the Defendant is not due the entirety of the amount under the Promissory Note.

38. The Supreme Court Practice 1999 states:[6] *"Leave to defend should be given where there is reasonable ground for an inquiry or account in order to ascertain the amount recoverable".* In such a case *"judgment may be given for part of the total sum which may be found to be due on an account, where it is clear that there is no defence as to that part with unconditional leave to defend as to the balance."*

[6] Paragraphs 14/4/14

39. The defendant shall have leave to defend. The defendant shall file his defence within 7 days of today's date. As a condition of the grant of such leave the defendant shall pay into court the amount equivalent to 67.74% of the amount now due under the Promissory Note with interest, at 07 February 2023. The sum to be paid into court is CI$82,138.57.

40. The promissory note states at paragraph 5:

> *"**Default***
>
> *Should the Borrower not make full payment by the date hereinbefore specified, this Promissory Note may be turned over for collection or such other legal action as may be deemed appropriate by the Lender's attorneys-at-law and the Borrower agrees to pay as soon as incurred in addition to the other amounts due hereunder all costs and expenses, including reasonable attorney's fees, incidental to the collection of this Promissory Note or in any way relating to the rights of the Lender hereunder."*

41. The court has heard further submissions from counsel as to what may be reasonable attorney's fees. After hearing same and in light of the court's decision to allow the defendant leave to file his defence, the court is not now minded to make a determination of the amount of such fees. In order to fix a figure by which a payment is to be made by the defendant as a further condition upon which leave to defend is being granted, the court will ***assume a figure*** that is 75% of the "reasonable attorney's fees" now claimed by the Plaintiff, (as at 7 February 2023) in order to set this further condition. [7] The reasonable attorney's fees stand at CI$44,502.05. The assumed figure is therefore CI$33,376,54. The defendant will pay into court a sum equivalent to 67.74% of the assumed reasonable attorney's fees. The sum to be paid into court is CI$22,495.78.

42. The final determination of reasonable attorney's fees including those related to the application for Default judgment and such costs as charged by Collas Crill is reserved.

43. If the defendant fails to file a Defence within 7 days of this judgment and/or fails to pay into court the amounts noted at paragraphs 39 and 41 herein, judgment shall be entered forthwith for the

[7] Since there is no agreement regarding costs of the default judgment application those costs of CI$1,130.00 are also to be included as part of the "reasonable attorney's fees".

Plaintiff for the principal sum and interest (calculated to 07 February 2023) due under the Promissory Note of CI$121,255.64. The Plaintiff will also be entitled to the assumed reasonable attorney's fees of CI$33,376.54 and post judgment interest, continuing on the final amount of judgment until judgment is paid in full pursuant to Section 34 of the Judicature Act (2021 Revision) and section 4 and/or5 of the Judgment Debts (Rates of Interest) Rules (2021 Revision) (as amended from time to time).

44. In the event of such default on the part of the Defendant, the plaintiff shall have liberty to apply to the Court in relation to all other costs, including but not limited to the costs charged by Collas Crill, the Plaintiff's total costs of these proceedings and the costs of the Default Judgment application.

Carter J. (Actg.)

THE HON. JUSTICE MARLENE CARTER
JUDGE OF THE GRAND COURT (ACTG.)