BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 1164 of 2018

BETWEEN:

JUNE TURNER **CLAIMANT**

AND

WILLIAM GUY NORTON **DEFENDANT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing: 2020: 31st July

Date of Decision: 2020: 09th October (oral);
15th October (written)

Appearances:

Mr. Anthony Francis-Worrell for the Claimant

Mr. Alrick Scott Q.C. in association with Ms. Rickeda Taylor for the Defendant

Application to strike out claim – Sufficiency of pleadings - CPR Rule 26.3(3)(a) – Statement of Case an abuse of process or likely to obstruct just disposal of claim – CPR Rule 26.3(3)(b) – No reasonable Ground for Bringing Claim.
Application to discharge injunction – Basis to discharge or vary – Material change in circumstances, fraud or mistake.
Overriding Objective - Permission to amend in lieu of striking out claim.

RULING

Introduction

The Claim

1. This is a claim (*inter alia)* for damages for breach of contract, filed in August, 2018. The claim originates with an oral contract made between the Claimant June Turner and Defendant, William Guy Norton, whereby Ms. Turner lent Mr. Norton approximately 1.57 million dollars. The monies are alleged to have been advanced over twelve payments in just under one year (November, 2010 – November, 2011). This oral agreement included a term for repayment of principal with interest at the rate of 10% per annum. The purpose of the loan was for the Defendant to engage in development of property known as Jupiter Gardens in St. Peter.

2. The Claim pleads that the parties' oral agreement was reduced into writing and termed a 'promissory note', which was executed in November, 2011. The Claimant says that prior to executing the promissory note, the Defendant represented to her that he could and would repay the sums loaned. It was further pleaded, that the promissory note provided that the Defendant acknowledged receipt of the sum of 2.25 million dollars; time was to have been of the essence for repayment; and the loan was to have been repaid in

total on the 30th December, 2012. The Defendant's repayments were to have been made from sale of lots in the development of Jupiter Gardens.

3. The Claimant then pleads that further to a request by the Defendant for additional funds, she loaned him a further $798,454.73 between 21st November, 2011 and 10th May, 2012, however the Defendant is alleged to have failed to repay any monies by the stipulated 30th December, 2012. Consequent upon this failure, the Claimant alleges that the Defendant induced her into signing a second contract, by falsely representing to her that he would offer her security for the monies lent. The Claimant signed this second contract on the 15th July, 2013 - these allegations are set out in the Statement of Claim up to paragraph 16.

4. From paragraphs 17 through 33, the Statement of Claim (SOC) goes on to make further allegations under the heading 'Particulars of Fraudulent Misrepresentation'. This section of the SOC repeats facts pertaining to the oral agreement, the 'promissory note, the Defendant's failure to pay, as well as the Defendant's inducement of the Claimant to enter into the agreement of July 15, 2013, knowing that he had no intention of repaying the Claimant's monies. It was asserted that this July, 2013 agreement did not accurately represent what the understanding of the parties was in relation to intended repayment and security.

The SOC further raised an agreement executed on 6th September, 2013 which like the July, 2013 agreement, provided that the Claimant's monies were owed by a Trust referred to as 'the William Guy Norton Trust'.

5. The Claimant alleges that the Defendant's actions throughout the course of their dealings were deliberate, and calculated to deceive and manipulate her into accepting terms (of repayment) which were to her detriment. The SOC repeats an assertion of 'breach of the original agreement' under a heading 'particulars of breach'. Penultimately, under a heading 'particulars of special damage', the Claimant claims the sum of $2,888,454.73, being sums invested in the property. There is a final prayer for relief which claims:-

   (i) Repayment of the sum of $2,888,454.73;

   (ii) Further or in the alternative, damages for breach of contract;

   (iii) Interest

   (iv) Damages

   (v) Further or in the alternative general damages for fraudulent misrepresentation.

Additional Procedural History

6. In September, 2018 the Claimant applied for a freezing injunction to restrain the Defendant from dealing with or disposing of his assets within the jurisdiction, along with an order for disclosure of assets.

The parties respectively filed affidavits in support of and in response to the application. On October 1st, 2018 an order of Court was made requiring certain information to be filed by both parties, along in effect, with an injunction, which required the Defendant's former attorneys to hold the proceeds of sale of lots sold from Jupiter Gardens, less monies due to the mortgagee and legal fees. This order of restraint was expressed to remain in force until further order of the Court. Further orders were made during subsequent proceedings, which required the Defendant to file affidavits producing documentation pertaining to the sale of the properties and expenditure of monies arising from such sales. Information was also required to be filed to support the Defendant's assertions regarding the involvement of the William Guy Norton Trust in the matter. The Defendant complied in part with such orders, but not in relation to the Trust.

7. Subsequent to the application for injunction and the order which was issued on the 1st October, 2018, the Defendant filed its Defence in the Claim on 5th November, 2018. The Defence in the round, acknowledges the Defendant's receipt of moneys from the Claimant; as well as the existence of the original (oral) agreement, the promissory note and the two respective agreements in July and September, 2013.

The Defence denies any fraudulent misrepresentation and contends that the 2013 written agreements altered the original agreement and the promissory note. The Defendant further denied owing the Claimant any monies as alleged, on the basis that by virtue of the 2013 agreements, it was the Trust that owed the monies to the Claimant. At the end of November, 2018, the Claimant filed an application to strike out the Defence however that application was not pursued. There was a further order made by the Court on 11th December, 2018 for the Defendant to (inter alia), file affidavits pertaining to the mortgage on the property; his personal account statements; and property owned by and monies paid to the Trust. Again, the information ordered to be filed by the Defendant was satisfied only in part.

The Defendant's Applications

8. In January, 2019 there was a change of attorney for the Defendant and in March, 2019 an application was filed on his behalf seeking the following relief:-

(i) Trial of a preliminary issue to determine which of the agreements pleaded is the agreement governing relations between the parties;

(ii) Striking out of the claim pursuant to Rule 26.3(3) on the bases:-

(a) Failure to properly plead particulars of fraudulent misrepresentation

(b) The SOC is an abuse of process and/or likely to obstruct just disposal of the proceedings;

(c) The SOC discloses no reasonable grounds for bring the claim

Alternatively to (i) & (ii) above

(iii) Permission to amend the Defence pursuant to Rule 20.1(2) (a draft defence was attached to the affidavit in support of application);

(iv) An order setting aside paragraph 4 of the freezing order of October 1st, 2018

(v) Costs.

The Defendant's Application and Submissions of Counsel

Application to Strike Out

9. The grounds of the Application to Strike Out attack both the form and substance of the Claim. In relation to the former (grounded in Rule 26.3(3)(a)), it is asserted that the statement of claim is unreasonably vague, uncertain and incoherent, so much so that it amounts to an abuse of the Court's process or is likely to obstruct the just disposal of the proceedings. In relation to the latter (grounded in Rule 26.3(3)(b)), it is asserted that the claim for fraudulent misrepresentation has not been specifically pleaded and particularized.

In illustrating this position, Queen's Counsel for the Defendant took the Court through the statement of claim in detail, in particular through paragraphs 24 through 33, and urged the Court to find that there were no statements pleaded capable of amounting to misrepresentations in law. Further, that given the allegation of fraud, the strict requirement for fraud to be clearly pleaded has not been satisfied. Queen's Counsel relied on direct precedents of pleadings – **Atkins Court Forms Vol 27(2) para 522**, which specifies the need for strict pleading as to misrepresentation, particularly where as in this case, there is the allegation of fraud. Queen's Counsel also relied on **Three Rivers District Council et anor v Bank of England (No. 3)**[1], in illustration of this point. It is contended that the SOC falls short of the desired pleading illustrated by the precedent.

10. Further in relation to the attack on form, Queen's Counsel for the Defendant contended that the SOC was vague and confusing, also that it was impossible to ascertain which agreement was being relied on as grounding the claim for damages. As a result, it was asserted that the Defendant could not properly respond to the claim as pleaded. It was also contended that the oral agreement was improperly pleaded, having regard to the absence of any time stipulated for repayment or even agreed.

[1] [2001] 2 All ER 513 HL

In illustration of this point, Queen's Counsel once more relied on formal authority on pleading - **Bullen & Leake & Jacobs Precedents of Pleading**. It is contended that the Claimant failed to distinctly plead the details of the oral contract alleged.

11. Further, Queen's Counsel pointed out that inasmuch as there are two 2013 agreements pleaded, it is not clear which one is alleged to have been breached. It is also submitted that this lack of clarity is exacerbated by the apparent reference of the promissory note as an agreement in writing. A promissory note says Queen's Counsel, is not a contract and misrepresentation does not apply in relation to it. Finally, it was submitted that whilst the SOC concedes that the parties' earlier agreement was substantially changed by the subsequent 2013 agreements, a claim is nonetheless pleaded for breach of the 2010 agreement, once again illustrating the lack of clarity in the pleadings.

12. In the round, Queen's Counsel's submission is that there are multiple defects in the Claimant's statement of case, which are understood by the Court in the following terms:-

    (i) Throughout the statement of claim, there are no statements amounting to representations of fact which are identified as false and having induced the Claimant into entering any of the agreements referred to;

(ii) Insofar as fraudulent misrepresentation is pleaded, there are no particulars of fraud set out which discharge the strict requirements for pleading fraud;

(iii) Insofar as there are references to multiple agreements, the pleading does not distinctly identify which agreement is being relied on as giving rise to the claim for damages;

(iv) The 2010 oral agreement is not properly particularized in keeping with the requirements of pleading;

(v) The promissory note is being relied upon as an agreement, which it is not;

(vi) There are numerous references throughout the statement of claim to 'agreement' where it is not clear precisely which agreement is being referred to;

(vii) There is reference to a 'security agreement' in circumstances where it is unclear whether there was a separate agreement that was formed, outside of the other agreements identified;

(viii) The remedies sought are not properly identified relative to the agreements pleaded or otherwise relied upon.

13. The effect of all of these flaws, says Queens Counsel, is that the Defendant is unable to effectively answer the claim and that they are too many irregularities to warrant any other course besides striking out the Claim. Reference was made to **Maria Agard v Mia Mottley et al.**[2] in which the claim therein was struck out as a consequence of an accumulation of defects in the claim form and statement of claim. With respect to the case at bar, Queen's Counsel contends that there are more defects herein than in ***Maria Agard***, as a consequence of which the claim ought to be struck out.

14. With respect to the specific grounds of his application, Queen's Counsel cited the case of **Tower v Wills**[3] as illustration of pleadings condemned as an abuse of process and bound to obstruct the just disposal of the claim. With respect to the deficiency in pleading in relation to fraud, Queens Counsel cites **Medcalf v Weatherhill**[4] and **Wallingford v Directors of the Mutual Society**[5] in support of his contention that the claim ought to be struck out for failure to meet the high threshold of pleading particulars of fraud. Queen's Counsel also makes the point that the Court ought not to allow the Claim to be amended as the Claimant has failed, having been faced with the application to strike out, to put forward any proposed amendment for consideration.

---

[2] Barbados Supreme Court CV1753/2015
[3] [2010] All ER (D) 257 @ para 19.
[4] [2002] UKHL 27
[5] (1880) 5 App Cases 685

As a consequence, the Court is not seized of whether any such proposed amendment would have any reasonable prospect of success.

15. In response to the Application to Strike, Counsel for the Claimant stands by the SOC as pleaded and contends that the agreement upon which the Claimant relies is clearly set out in the statement of claim at paragraph 13. Further, the inducements and misrepresentations which make up the plea of fraudulent misrepresentation, are set out in paragraphs 16 through 33. Matters of pleading aside however, Counsel for the Claimant asks the Court to have regard to Claim in total. In this regard, Counsel for the Claimant points out that the Defendant does not at any point deny receiving the monies as alleged from the Claimant, nor the initial obligation to repay those monies. Insofar as the Defendant now alleges on the strength of the September, 2013 agreement, that the Trust and not he is not the proper party to the Claim, Counsel for the Claimant points to the affidavits filed by the Defendant as contradicting that position. In particular, Counsel for the Claimant refers to the Defendant's affidavit of October 26th, 2018 in which he lists his First Caribbean bank account, attaches bank statements and gives an explanation for certain expenditures. Counsel for the Claimant submits that the expenditure identified by the Defendant arises from proceeds of the sale of the properties and amount to significant expenditure for his personal benefit –

- namely, the payment of legal fees and medical expenses. On this basis Counsel for the Claimant submits that the Defendant has a substantive case to answer in relation to his obligation to repay the Claimant a sum of what would now amount to almost 6million dollars, once interest in added to the principal.

16. Additionally, as pertains to the Defendant's assertions that the Claim is vague, uncertain and embarrassing, Counsel for the Claimant points out that the Defendant has already filed a defence to the Claim and the Defendant's conduct in defending the Claim should be taken into consideration in relation to assessing the bona fides of the Application to Strike Out. Counsel for the Claimant contends that having filed his Application to Strike Out four months after filing his Defence, six months after the first Court hearing, and after six court hearings, the Defendant should not now be allowed to take objection to the claim form and statement of claim. Counsel for the Claimant stands by his pleadings as properly identifying the agreements which give rise to the claim for damages as well as having properly substantiated and particularized the claim for fraudulent misrepresentation. Counsel urges the Court that the substance of the Claimant's case is clear, namely, that she loaned monies to the Defendant, which he agreed to and has failed to repay.

Preliminary Issue to Determine Applicable Agreement

17. The Court understands Queen's Counsel's position to be that the issue of whether the Defendant is a proper party to the claim, should be determined upon trial of a preliminary issue. Queen's Counsel's submission however, is that trial of such a preliminary issue, hinges on a determination of which agreement governs the claim. As a result, the Court should determine what agreement governs the Claim, before embarking upon any trial of the issue of whether the Defendant is a proper party to the Claim. In this regard, the Defendant relies on the September, 2013 agreement which establishes that the monies are owed to the Claimant by the Trust, hence the Defendant's position, that he is not the proper party to the Claim.

18. Counsel for the Claimant's position in respect of this contention was not directly addressed in written or oral submissions. However, Counsel's arguments in relation to which agreement is the operative agreement or whether the Defendant is a proper party to the Claim, can be extrapolated from his submissions in response in general to the Application to Strike Out the Claim. As understood by the Court, the Claimant's position is that the promissory note establishes the Defendant's liability, whilst the agreements of July and September, 2013 are to be set aside on the basis of the Defendant's fraudulent misrepresentations (as pleaded from para 16 – 33 in the SOC).

As pertains to the issue of whether the Defendant is the proper party, the Court understands Counsel for the Claimant's argument, to be that the Defendant is the proper party, given the claim for the set aside of the 2013 agreements on the basis of fraudulent misrepresenation.

Discharge of Injunction

19. The third aspect of the Defendant's Application is for the injunction contained in paragraph 4 of the order granted by the Court on 1st October, 2018 to be set aside. By this order there is a restraint on the proceeds of the lots sold from the property Jupiter Gardens, which is the subject of the disputed loan. In practical terms, it is contended that the order is ineffective as it is not directed towards a legal person (namely the law chambers of the Defendant's previous attorneys). Further, the order affects third parties, namely Alleynedale Hall Ltd. and Alleynedale Plantations Ltd. which are legitimate companies unable to meet their ordinary business expenses due to the restraint. Also in relation to third parties, it is contended that the assets frozen (the proceeds of sale of lots of Jupiter Gardens), do not belong to the Defendant. Finally, the order does not contain any undertaking as to damages, nor does it expressly make provision for its vary or discharge.

20. Substantively however, the submissions on behalf of the Defendant seek to impugn the freezing order with reference to the usual grounds upon which an injunction is considered and granted by a Court. Particularly, the existence or not of a good arguable case and the risk of dissipation, neither of which are said to be satisfied in this case. In response to the Application to discharge the injunction, Counsel for the Claimant firstly asserts that the order was made *inter partes* with the full participation of the Defendant's previous counsel. As a result, it should not be permissible for the Defendant now with new counsel, to seek to relitigate the grant of the injunction with respect to the substantive grounds of whether there is an arguable case or a risk of dissipation of assets. Counsel for the Claimant says that the Defendant ought to have appealed the order. If however the Court is minded to vary the order, Counsel submits that a risk of dissipation can be inferred, given the Defendant's own evidence of use of the proceeds of sale from the lots, for his personal expenses.

The Court's Consideration

Issues

21. Having set out the material aspects of the Claim and the Defendant's Application filed on March 4th, 2019, the Court considers the primary issues to be determined on the Application as follows:-

(i) Given the existence of pleadings as well as evidence before the Court, what is the scope of the Court's inquiry in relation to the various prayers for relief sought in the Defendant's Application?

(ii) In relation to the Application to Strike Out, do the Claim and Statement of Claim amount to an abuse of the Court's process, or are they likely to obstruct a just disposal of the Claim?

(iii) If yes to either of (ii) above, should the Claimant's case be struck out or should the Claimant be afforded the opportunity to amend?

(iv) Should the freezing injunction granted in the terms stated in paragraph 4 of the Court's order of 1st October, 2018 be varied or discharged?

The Court will also deal with the following other issues, in brief

(v) Is there a need for trial of a preliminary issue to determine which agreement is applicable to the parties' dispute, or whether the Defendant is a proper party to the Claim?

(vi) Should the Defendant be afforded the opportunity amend his Defence?

(i) Scope of Inquiry

22. The Application prays several kinds of relief which call for different lines of inquiry by the Court. It is therefore necessary to be clear as to how the Court is obliged to engage in the process of determining the varying relief sought.

(a) The Application to Strike Out is based on Rules 26.3(3)(a)&(b). In relation to (b) – 'no reasonable ground for bringing the claim' – it is established that this ground to strike out a statement of case is determined with reference to pleadings only. In this case therefore only the Claim and Statement of Claim arise for consideration upon determination of this ground of the Application to Strike;

(b) The Application to Strike Out also invokes Rule 26.3(3)(a) – that the statement of case is an 'abuse of process' or 'is likely to obstruct just disposal of the claim'. The latter of these two grounds ('just disposal') evidently must likewise be confined to the pleadings.

(c) In relation to 'abuse of process' however, matters pertinent to the pleadings alone certainly arise for consideration, however the nature of abuse of process as judicially defined, invokes other facts or circumstances which give rise to the abuse of process. Consideration under the abuse of process limb of Rule 26.3(3)(a) need not be limited to the pleadings only;

(d) Consideration of the need for trial of preliminary issues, namely, the governing agreement between the parties, and/or whether the Defendant is a proper party to the claim, is a case management issue. The Court's consideration of this aspect of the Application must bear reference to the overriding objective of the Rules, having regard to factors such as the degree of intertwinement of issues; whether the same or separate evidence is necessary to prove such issues; and the time and expense which any separate trial of issues would occasion;

(e) The discharge of the injunction is obviously to be considered with reference to evidence as well as the respective statements of case of the parties.

(ii) Application to Strike Out

23. The Application is grounded in Rules 26.3(3)(a) and (b) which provide as follows:-

> *"(3) The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court*
>
> *(a) That the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *(b) That the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim;*

(c) ....."

24. Queen's Counsel for the Defendant has referred the Court to **Towler v Wills**[6] in relation to the striking out as an abuse of process, a statement of case which is vague and incoherent. When considering what amounts to an abuse of process, reference is generally made to Lord Diplock in **Hunter v Chief Constable of the West Midlands Police**[7] in which the power to strike out that which is an abuse of process is stated as one:-

> *"...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"*

The categories in which an abuse of process are determined to exist are not closed, and where established, (the abuse of process) it is considered not a matter of discretion whether or not to strike out a case, but a duty, in order to safeguard the court's process[8].

25. Where the grounds 'abuse of process' and 'or likely to obstruct the just disposal of the claim' as expressed in **Rule 26.3(3)(a)** are disjunctive – they are obviously not mutually exclusive.

---

[6] Fn 3, supra
[7] [1982] AC 529 @ 536
[8] Ibid

However, they are not necessarily mutually inclusive either. As correctly illustrated by Queen's Counsel for the Defendant, a poorly drafted case would properly fall under the ground of 'likely to obstruct the just disposal of the claim' - particularly, where an opposing party is precluded from knowing what case to answer as was the case in **Towler v Wills**[9]. However, it is not every poorly drafted claim that would necessarily rise to the level of an abuse of process.

26. Insofar as ***Towler v Wills*** was dismissed on the basis of abuse of process, the Court firstly observes that the pleadings in that case were categorized as 'unreasonably vague and incoherent'. Further, that state of affairs had remained notwithstanding that the claimant had been given multiple prior opportunities to amend his particulars of claim. The failed attempts to amend the claim had resulted in the application to strike out, and at the conclusion of that hearing, the claimant had applied once more to amend his claim. That late application was granted, and the resulting amendment was still regarded as vague and incoherent.

27. Even further, the subject matter of the claim arose out of a shareholder agreement wherein the bulk of relief sought by the Claimant was by established authority, unavailable for recovery.

---

[9] Supra

In those circumstances, the repeated failures to properly amend the claim along with its inherent weakness, clearly justified the finding of an abuse of process. The pleadings and the circumstances of the case at bar do not in the Court's view fall to be viewed in the same light as the ***Towler v Hill*** abuse of process; and there have not been any prior requirements or opportunities to amend. It is therefore considered that the sufficiency or not of the pleadings of the Claimant's case are more appropriately assessed on the basis of whether they would be 'likely to obstruct the just disposal of the claim'.

28. Having determined that the question of obstructing the just disposal of the claim is the ground to be appropriately considered, it is accepted that a poorly drafted statement of case may be struck out under this ground, where it is unclear and not readily cured by amendment[10]. With reference to Queen's Counsel for the Defendant's comprehensive examination of the statement of claim, the Court finds that there is merit to the complaint levelled of poor drafting which could likely obstruct the just disposal of the claim. In paragraph 3 of the SOC the Claimant pleads an oral agreement entered into with the Defendant sometime in 2010 whereby she lent money to be repaid with interest.

[10] ***Sube et anor v Newsgroup Newspapers Ltd et anor*** [2018] EWHC 1234 (QB) para 13 per Warby J.

In paragraph 6 it is pleaded that the oral agreement was subsequently reduced into writing, headed 'promissory note', executed on 10th November, 2011.

29. Thereafter, there are several interchangeable uses of 'agreement/contract' in circumstances where it is appears that reference is being made to the promissory note. Queen's Counsel for the Defendant is correct in his statement of the law that a promissory note is not an agreement. It is a bill of exchange (a negotiable instrument), executed by one party, the maker, undertaking to pay a sum to another, in the future, on demand or at an appointed date[11]. The causes of action which flow from an agreement for repayment of monies loaned and a promissory note are different and give rise to different remedies. A problem therefore does exist regarding just disposal, where it is clear that the terminologies adopted are at odds with the rights which are pleaded and capable of being enforced.

30. As a result of that discrepancy in terminology, there is therefore confusion legitimately said to arise whenever the term 'agreement' is used, as up to the point of pleading of the promissory note, there is only one agreement alleged, which is the oral agreement. Additionally, in paragraph 16, it is pleaded that the Claimant 'was deceived into signing a second contract executed by both parties on the 15th day of July, 2013.'

[11] Bills of Exchange Act, Cap. 304, section 84, Laws of Barbados.

Inasmuch as it appears that the promissory note is often incorrectly referred to as an agreement, the introduction in paragraph 16 of a second signed contract, does not assist the clarity of the pleadings on their face. Up to paragraph 16, any signed agreement at that time is on the face of the pleadings, the first signed agreement between the parties – as a promissory note is not an agreement – nor was it signed by the Claimant.

31. From paragraph17 to 33 the SOC by heading, seeks to set out 'particulars of fraudulent misrepresentation'. The pleading therein repeats allegations regarding the advancement of monies, repeats tangentially the onset of the parties' oral dealings, and refers to the promissory note – still erroneously used interchangeably with the term 'agreement'. Within this section, there are free standing references to 'agreement to offer security' which by inference from subsequent paragraphs is seen to be the agreement of 15th July, 2013. The Court agrees with Queen's Counsel for the Defendant that there is a lack of clarity where it is stated in paragraph 25 of the SOC, that the July, 2013 agreement substantially altered the original contract. One has either to infer that the reference to original contract means the means the promissory note erroneously referred to as a contract; or to equate 'original contract' with the first agreement pleaded, which is the oral agreement.

It cannot be acceptable having regard to the requirements and purpose of pleadings[12], for a party to have to assume or determine by inference, what is being pleaded. The Court also agrees with Queen's Counsel for the Defendant that the manner in which the original contract is altered is not specified, and it should be so specified.

32. There is then the further pleading in paragraph 27 of the SOC of a 'further agreement' executed on 9th June, 2013. It is accepted that there is an easily detected and uncontroversial typographical error, where the date should be the 6th of September, 2013 and not 9th June, 2013. Again, however, there is an unspecified assertion that this last agreement altered the 'original contract'. The same observations made in the preceding paragraph regarding paragraph 25 of the SOC remain applicable to paragraph 27 of the SOC. After paragraph 33 of the SOC, there is then a heading of two paragraphs, titled 'particulars of breach'. Under paragraph 1 of this heading, it is pleaded *'In breach of the Original Agreement the Defendant has failed to satisfy the sums due and owing to the Claimant'*. On the face of the pleadings, the original agreement is the oral agreement. On the presumed meaning given the continued misuse of the terminology 'promissory note', it is assumed that this is what is referred to as 'the original agreement'.

[12] Per Barrow JA in **East Caribbean Flour Mills v Ken Boyea**, SVG Civ. App. No. 12 of 2006 @ paras 33-42

33. The SOC then goes on to a separate heading titled 'particulars of special damage of the claimant'. Thereunder the sum of $2,888,454.73 is pleaded as the sum claimed. What the relevance of 'special damage' is in the heading within the circumstances of the contractual claim or the promissory note, is not evident. There is a separate claim for interest and the SOC concludes with a final prayer for relief in the following terms:-

    (i) Repayment of the sum of $2,888.454.73
    (ii) Further and/or alternatively, damages for breach of contract;
    (iii) Interest
    (iv) Damages
    (v) Further or alternatively general damages for fraudulent misrepresentation whereby the Claimant was induced to enter into the Agreement
    (vi) Costs
    (vii) Further or other relief.

34. In light of the several agreements pleaded; the lack of clarity between 'original agreement' and the first oral agreement; the existence of two written agreements in September, 2013; the erroneous labelling of the promissory note as an agreement – the prayer for relief as set out above is not clear. There is no discernable reason for any difference in the claims at paragraphs (i) and (ii), given the Claimant's treatment of the promissory note as a contract throughout the SOC.

Further there is no discernable difference between the relief for damages for breach of contract (paragraph ii) and damages (paragraph (iv); or damages (paragraph iv) and general damages for fraudulent misrepresentation (paragraph v).

35. The Court is of the view that the Statement of Claim lacks clarity, having regard to the number of agreements pleaded therein. Against this background, the Court would also attribute a lack of clarity to the Claim Form, which alleges only 'monies for breach of contract'. According to the SOC, the Claim is either based on the promissory note with an additional or alternative claim for breach of contract, and/or a claim for damages for fraudulent misrepresentation under one or both of the 2013 agreements. The claim form expressed as solely 'breach of contract' is therefore also unclear. This represents the Court's assessment in relation to the lack of clarity alleged. The question would now be whether the statement of case can be remedied or whether it should be struck out as being likely to obstruct a just disposal of the claim.

36. The Court has already distinguished ***Towler v Wills*** with reference to the abuse of process arising in context of multiple prior opportunities given to amend, and the finding that the particulars of claim were 'unreasonably vague and incoherent'.

The Court also refers to **Maria Agard v Mia Mottley et anor**[13], which was referred to by Queen's Counsel for the Defendant in support of the Application to Strike Out. In ***Maria Agard***, the Court considers that there were a number of errors of a technical nature, but there was also a grave error by which the capacity or authority in which the Defendants were sued was found wanting. This factor, compounded with the several additional breaches of a technical nature, led that court to its determination that the claim ought to have been struck out and the claimant start afresh. In that case, the defendants had filed no defence, their response to the claim from the inception was to file their application to strike out.

37. In this case, the Court has already expressed the view that the state of the pleadings is not such that they can be described as 'unreasonably vague or incoherent'. Instead it is found that there is a lack of clarity arising from incorrect categorization of a promissory note as an agreement; as well as multiple agreements being referred to without in all instances, properly identifying which agreement is being referred to. The question of whether this deficiency in pleading warrants the claim being struck out as being likely to obstruct the just disposal of the claim will await the Court's consideration of the other ground advanced by the Defendant for the strike out of the Claim.

[13] Fn 2, supra

38. The other ground relied on is that there is no reasonable ground disclosed for bringing the Claim. Queen's Counsel for the Defendant contends that the Defendant is not the proper party to the Claim, the proper party should be the Trust (as per the agreements of July and September, 2013). More importantly however, it is contended that the claim for fraudulent misrepresentation is in no way supported in the statement of case and as such the claim must be struck out. The Court tends to agree with the conclusion reached by Queen's Counsel based upon his detailed assessment of paragraphs 16 through 33. The Court considers that the issue arises from the manner of expression of the pleading, but it is patent that the Claimant is alleging dishonesty on the part of the Defendant, so the requirement for particularity in pleading must be adhered to. There is no specific statement whether direct or reported speech, which is said to have been made by the Defendant as a representation. The manner of pleading is in the form of a narrative of the Defendant's actions, as well as the Claimant's perceptions and speculations as to the motives and intentions of the Defendant.

39. These statements level accusations of dishonesty and lack of bona fides on the part of the Defendant regarding his receipt of funds and presumed lack of intention to repay, however they are not unequivocally set out as

representations, known to be or reckless as to whether they are false[14], so as to amount to misrepresentations. It is also accepted that the manner of how the fraud alleged is to have occurred is not adequately particularized according to the degree of particularity required for substantiating any claim based on fraud. Queen's Counsel for the Defendant makes a strong argument for striking out, based on the onerous responsibility to particularise fraud. It is his position that no amendment should be permitted, especially given the absence of material before the Court from which to assess whether or not a revised case adheres to the strict requirements for pleading fraud.

40. The Court appreciates the stringent requirements appended to claims alleging fraud – namely, that fraud (or dishonesty) must be directly alleged and cannot be equivocal[15]. Whilst the standard of proof for fraud is the same civil balance of probabilities, it is well known that that standard *'is not easily discharged in practice.'*[16] However, whilst the Court agrees with Queen's Counsel for the Defendant in relation to the lack of adequacy of the pleadings in relation to any statements capable of amounting to false representations, the Court's position is nonetheless that the Claim is not only one of fraudulent misrepresentation.

---

[14] Chitty on Contracts, 30th Ed. Paras 6-042 – 6-045

[15] **Three Rivers District Council et anor v Bank of England (No. 3)** supra, per Lord Hope of Craighead @ paras 53 –55

[16] Hornal v Neuberger Properties Ltd [1957] 1 QB 247 per Denning LJ @ 258-259.

There is also a claim for damages for breach of contract in addition to or in the alternative to a claim for monies based upon a promissory note. It therefore cannot be said that there is no reasonable ground for bringing the claim.

41. Queen's Counsel for the Defendant makes further reference to **Three Rivers District Council v Bank of England (No. 3)**[17], in relation to the test to be applied on a strike out application on the basis of there being no reasonable ground for bringing a claim. The test to be applied is whether the case would be bound to fail even if taken at its highest; or, bound to fail even if all the facts alleged in the statement of case were to be proven. On the case for breach of contract or on recovery under the promissory note, the Claimant's case clearly does not fall within the realm of 'bound to fail'. The success or not of the Claimant's case would depend upon the validity or otherwise of the agreements alleged on the part of the Claimant, which are capable of proof upon evidence as may be provided by the Claimant. As a consequence, the Court will not accede to striking out the Claim on the ground that there is no reasonable ground for bringing the Claim.

42. The Court is now left to answer the question posed above, i.e. whether to strike out the statement of case as being likely to obstruct the just disposal of the proceedings.

---

[17] supra

In **Clutterbrook v Brook Martin & Co (a firm)**[18] the Court considers the state of pleadings as described therein as an example of the standard which must be in found to be in existence before the drastic action of striking out the claim on the basis of poor pleadings should be taken. The pleadings therein were described (inter alia) as prolix, difficult to follow and incomprehensible. This is not the situation in the case at bar. In the Court's view there is merit to the view expressed by Counsel for the Claimant that the Defendant has already been able to file a defence to the Claim (and the Defendant also now asks the Court to file an amendment to that Defence already filed). The Claim has already proceeded on the basis that there is a case answerable by the Defendant thus the Court is not of the view that it would be just to consider the remedy of striking out the Claim. Moreover, the Court is of the view that the deficiency of clarity identified by the Court is capable of being remedied and can appropriately be remedied by means of amendment.

43. Insofar as Queen's Counsel for the Defendant submits that the Court should decline to afford the opportunity to amend on the basis of the absence of any draft pleading that can assist the Court in assessing whether or not to permit the amendment, there is sufficient evidence filed throughout the proceedings thus far, as well as arising from the Claimant's statement of case itself that

[18] [2019] EWHC 1040 (Ch)

satisfies the Court that there is a sufficient factual basis for the Claimant to pursue her Claim, once satisfactorily pleaded. The absence of a draft amended claim or statement of claim therefore do not preclude the Court from affording an opportunity to the Claimant to amend her Claim. In fact, the Court will be making a direction that the Claimant amends her Claim.

(iii) Discharge of Injunction

44. The injunction granted by paragraph 4 of the court order of October, 2018 is in the following terms:-

> "*Juris Chambers is directed to hold any moneys received from the sale of properties at Jupiter Gardens, St. Peter less moneys due to be paid to the mortgagee and legal fees until further order of the Court, and counsel for the Defendant shall file and serve a statement with respect to such monies on or before Thursday the 4th day of October, 2018.*"

By way of general principle, an injunction granted 'until further order' continues until it is expressly or by necessary implication discharged by an order of the court.[19] Further, where an interim order is made after an *inter partes* hearing on the merits, a court will not entertain an application to set aside that order or part thereof, or make any other order inconsistent with it, unless there has been a material change of circumstances[20].

[19] Cantor Index Ltd v Lister, [2001] All ER (D) 339
[20] Gee on Commercial Injunctions, 6th Ed, para 21-057; **Peak Hotels and Resorts Ltd. v Tarek Investments Ltd.** [2015] EWHC 1997 @ paras 66 et seq.

The interim order can also be set aside if there was some relevant misrepresentation or mistake which renders it just to do so[21].

45. The order made by the Court (as differently constituted) on 1st October, 2018 was firstly made *inter partes*. The order is also expressed to be 'until further order of the court'. Thirdly, there has been no material change in circumstances put before the Court which inform the Defendant's application for the discharge of the injunction. The only change the Court notes which does not qualify as a change much less material change in circumstances, is that the Defendant is represented by different counsel. It is also noted by the Court that all of the arguments being advanced in relation to the discharge of the injunction are matters which were within the grasp of the Defendant and his counsel when the application for the injunction was initially made.

46. The same arguments relating to the feasibility or lack of practicality relating to the arrangements involving the chambers of the Defendant's former legal counsel were available for consideration when the application was heard and determined in 2018. In light of the law and absence of any change in circumstances, the Court declines to discharge the injunction. There has also been no alternative put forward in relation to any possible variation.

[21] Gee, supra.

Subject to any substantiated application for discharge or variation or by the consent of the parties, the order of the 1st October, 2018 remains in force.

(iv) & (v) Preliminary Issue, Amendment of Defence

47. The Court is not in agreement with Queen's Counsel for the Defendant in respect of the need for trial of any issue as a preliminary issue in this Claim. The issues of the operative agreement and whether the Defendant is a proper party to the claim are intertwined and will require proof upon the same evidence as will arise in the substantive determination of the Defendant's liability. There is therefore nothing to be gained in terms of saving time or expense by dealing with either issue as a preliminary issue. The trial of all issues will thus be ventilated at the single substantive hearing. In relation to whether or not to permit the Defendant to amend his defence, the requirement to do so will arise in any event, having regard to the Court permitting the Claimant to amend its claim form and statement of claim.

Disposition

Costs

48. The Defendant has been partially successful in its application to strike out, given that the Court has accepted the deficiency in pleading of the Claim and Statement of Claim and has directed the amendment of the Claimant's statement of case.

The Defendant was however unsuccessful in his bid to have the injunction discharged and to force a separate preliminary trial on the governing agreement between the parties. In the circumstances the Court considers that the Defendant should recover 50% of its costs upon disposal of the Application filed on the 4th March, 2019, to be assessed pursuant to ule 65.11. Failing agreement, the Court will hear the parties on the Defendant's costs arising from this Application at the Case Management Conference.

Orders on Disposal

49. The Defendant's Application filed on the 4th March, 2019 is disposed of in the following manner:-

(i) The Application to Strike Out the Claimant's case pursuant to Rule 26.3(3)(b), on the basis that it discloses no reasonable ground for bringing the claim, is refused;

(ii) The Claim and Statement of Claim are found to be lacking in clarity and likely to obstruct the just disposal of the claim;

(iii) The Application to Strike Out the Claimant's case pursuant to Rule 26.3(3)(a) is refused, however the Claimant is directed to file and serve an amended statement of claim on or before the 9th November, 2020;

(iv) The Defendant will be at liberty to file an amended defence in accordance with the time limited by the Rules, upon receipt of service of the amended Claim;

(v) The Application for discharge of the injunction granted in paragraph 4 of the Court's order of 1st October, 2018 is refused;

(vi) The Application for a separate determination of the issue of which agreement governs the dispute between the parties is refused. The matter is to be determined in a single trial of all issues;

(vii) The Defendant is awarded 50% of his costs arising from his Application filed on the 4th March, 2019, to be assessed if not agreed;

(viii) The matter is adjourned for Report on the 12th February, 2021 via Zoom.

SHONA O. GRIFFITH
Judge of the High Court