EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2013/0235

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED
Formerly CIBC Caribbean Limited

Claimant

and

[1] PAULA MARGARET ROSE FREDERICK
(Personal Representative in the Estate of Francis Monlouis)
[2] EMMY ULINA MONLOUIS

Defendants

Before:
Ms. Agnes Actie — Master

Appearances:
Ms. Zinaida C. Mc Namarra for the Claimant
Mr. Winston Hinkson for the 2nd Defendant

2015: August 24.

Case management powers – striking out of defence and counter claim- authentic writings- improbation of authentic writing- parties to deed not made parties to the claim- article 1139 of civil code- article 150 of code of civil procedure-Rule 26.3 of the Civil Procedure Rules 2000 (CPR 2000)

JUDGMENT

[1] **ACTIE, M.:** This is an application to strike out the defence and counterclaim of the second defendant and to enter summary judgment pursuant to CPR 26.3 and CPR 15(2) respectively.

Background Facts

[2] It is instructive to give brief background facts so as to put the matter into perspective. On 19th March 2013, the claimant, First Caribbean International Bank (Barbados) Limited (First Caribbean), filed a claim with statement of claim against the defendants for the sum of $77,168.17 with interest due and owing by virtue of a loan granted by the claimant to the defendants which said balance remains unpaid despite numerous demands made for payment. The loan was secured by deed of hypothecary obligation and registered on property owned by the defendants, husband and wife.

[3] The husband, Mr. Francis Monlouis, the first defendant, passed away and a representative party has since been appointed.

[4] On 8th May 2013, the second defendant filed a defence and counterclaim in response to the claimant's claim. The second defendant in her defence, avers that she had no knowledge of the hypothecary obligation and denies having borrowed money from the claimant bank. The second defendant contends that the first defendant (her husband) had deserted her and that they were separated at the time of the execution of the hypothecary obligation. The second defendant counterclaims for the removal of the charge against her.

[5] By notice of application dated 24th September 2014, the claimant applied for the defence and counterclaim to be struck out and further or in the alternative for summary judgment to be entered in favour of the claimant. The claimant avers that hypothecs are deemed to be authentic and can only be impugned by way of improbation. The claimant contends that the second defendant disputes the authenticity of the notarial instrument which forms the basis of the counterclaim but has failed to initiate improbation proceedings in accordance with the **Civil Code**[1] and **Code of Civil Procedure**[2]. It is the claimant's contention that the

[1] The Civil Code Cap 4.01 of the Revised Laws of Saint Lucia 2001
[2] Code of Civil Procedure Ch 243

second defendant has not disclosed any reasonable ground for defending the claim or any real prospect of successfully defending the claim and/or bringing the counterclaim.

[6] The second defendant in submissions filed on 27th February 2015 in response states as follows: (1) that a notarial document such as a hypothecary obligation cannot be considered among the genre of authentic writings contemplated under Article 1138 of the **Civil Code** as the article in its contemplation only gives regard to certain writings executed or attested with the requisite formalities by a public officer; (2) the hypothecary obligation purportedly executed between First Caribbean, a limited liability company, does not involve a public officer attesting to the document as neither the claimant nor defendants are public officers; and (3) the writing is therefore not an authentic writing under Article 1142 of the **Civil Code**.

[7] Counsel for the second defendant contends that summary judgment should not be granted as the second defendant will be denied an opportunity to be heard on the facts of her defence and counterclaim. Counsel posits that although Article 1142 of the **Civil Code** stipulates that an authentic writing may be impugned and set aside by action for improbation; these instructions he states are not mandatory as the **Code of Civil Procedure** provides alternative methods for challenging signatures of a private writing without the need for improbation action. Counsel referred the court to Article 150 of the **Code of Civil Procedure** which he says provides an alternative method for challenging an instrument. Article 150 states:

> "Every denial of a signature to a bill of exchange, promissory note or other private writing or document upon which the claim is founded, must be accompanied with an affidavit of the party making the denial, or some person acting as his agent or clerk or cognizant of the facts in such capacity, that such instrument or some material part thereof is not genuine, or that his signature or some on the document is forged, or in the case of a promissory note or bill of exchange, that the necessary protest, notice and service have not been regularly made, stating in what with irregularity consists; without prejudice however to the recourse of such party by improbation ……. "

[8] Counsel for the claimant contends that even article 150 of the **Code of Civil Procedure** allows the contestation of a promissory note without the need for improbation action, it is a requirement that evidence on affidavit be given. The claimant contends that the second defendant has not complied with the requirement for evidence on affidavit to support her denial.

Law and Analysis

[9] Section 11 of the Ninth Chapter of the **Civil Code** provides for proof of writing and outlines what is considered to be authentic writings.

[10] Contrary to the assertion of counsel for the second defendant, Article 1139 of the **Civil Code** makes it clear that a notarial instrument other than a will is authentic if signed by all the parties, though executed before one notary.

[11] Article 1141 of the **Civil Code** states that an authentic writing is complete proof between the parties to it, their heirs and legal representatives of the obligations expressed in it.

[12] Article 1142 of the **Civil Code** states that an authentic writing may be impugned and set aside as false in whole or in part, upon an improbation in the manner provided in the **Civil Code of Procedure** and in no other manner.

[13] Section IV of the **Code of Civil Procedure** makes provisions for the improbation of deeds. Articles 173 to 189 outline the manner in which a notarial instrument can be impugned.

[14] Improbation may be brought by petition as a principal or direct action by a party who seeks to nullify a notarial document. However the code allows incidental improbation to be commenced by any party in a suit against any notarial document produced by the other party. Article 173 of the **Code of Civil Procedure** states:

> "Besides the action of improbation which may be drought as a principal and direct action, by which a plaintiff seeks to have a notarial produced by

himself null, any party in a suit may proceed by improbation against any notarial document produced by the opposite party."

[15] The manner by which incidental improbation may be commenced is set out in Article 174 of the **Code of Civil Procedure.** Article 174 provides as follows:

> "incidental improbation is begun by petition to the judge, praying that the party be allowed to proceed by improbation against the document therein designated, and that the opposite party be held to declare whether he intends to make use of such document"

[16] Article 177 of the **Code of Civil Procedure** allows improbation proceedings to be initiated at any stage of the suit until the closing of the evidence and even afterwards but before judgment, upon proof that the falsity was not ascertained until after the evidence was closed. The initiation of incidental improbation proceedings has the effect of suspending the proceedings in the principal claim until the improbation is adjudicated upon by the court.

[17] Section IV of the **Code of Civil Procedure** makes provisions for direct or incidental improbation proceedings to challenge the validity of notarial documents. However, the nullity of a deed may be invoked by way of defence without the necessity of filing a direct or incidental action. This is clearly articulated in Article 134 of the **Code of Civil Procedure** which states:

> "Notwithstanding anything contained in articles 101 to 133 and articles 173 to 189 it shall not be necessary for a defendant in any cause or proceeding to take or urge any matter by way of preliminary or exception, or by way of incidental improbation, but any matter which might have formally been so taken or urged may be relied on by way of defence to such cause or proceeding".

[18] A defendant's challenge of the validity of a notarial deed in his defence, without the need to first commence direct or incidental improbation proceedings, can only be achieved if all the parties to the deed are parties or made parties to the claim. This is clearly articulated in Article 148 of the **Code of Civil Procedure** which states:

> "The nullity of a deed may be invoked by any pleading. All the parties thereto having been put in the case, judgment may be given without it being necessary to bring a direct action."

The second defendant in this instant case is challenging the authenticity of the notarial document. She asserts that she was not a party to the negotiations with the claimant for the loan neither did she signed the hypothecary deed. The court notes however that the executing notary is not named as a party to the proceedings before this court. It is the requirement under article 148 of the **Code of Civil Procedure** that all parties to the deed must be parties to the claim for the defendant to avail himself/herself of this procedure.

[19] The Court of Appeal in **Marguerite Desir et al v Sabina James Alcide**[3] states that a deed in Saint Lucia may only be improbated if all parties to it are joined in the litigation. Mitchell JA [Ag] stated:

> "[41.] Then, there is the question whether the Notaries were required to be made parties to the action. Neither the **Civil Code** nor the **Code of Civil Procedure** of Saint Lucia contains a provision that a Notary must be made a party to an action to improbate a deed. However, there are authorities which appear to establish that such is the necessary procedure to be followed. So, in the **Immeubles Canton** case [[1975] J.Q. no. 51 – Opinion of Turgeon J. at paragraphs 8-13] in the Quebec Court of Appeal, the court cited with approval the textbook **Nadeau and Ducharme**, *Traite de droit civil du Quebec, tome 9, no 330*, where they wrote:
>
> > ". . . the notaries have a great interest, professionally and in their capacity as public officials, not to have parties who have come to an agreement state that their instruments are false, without themselves being heard to support, if necessary, the authenticity of the instrument they have notarised."
>
> [42] And, in **Gingras v Poulin [**[1929] Q.J. no. 3 or 48 B.R. 410 or No 1873 (S.C. 1452) – Opinion of Mr Justice Howard at paragraph 31] in the Quebec Court of Appeal, Howard JCA said at paragraph 31:

[3] SLUHCVAP 2011/0030

> "31. Another point was submitted by the appellant which I think is also well founded, and that is, that the action in improbation should have been directed against all the persons who had an interest in having the validity of the deed of acquittance upheld, chief among whom obviously is the original debtor of the obligation or his legal representatives. The record discloses that the original debtor, Augustin Gingras, was the father of the appellant and that he has departed this life. But, that is not sufficient to create a presumption that the appellant is his sole legal representative. As a matter of fact that has not been alleged by the respondent nor has the appellant been impleaded except as the tiers detenteur of the property in question."

[43] And, from **Brossard v Brossard**, [[1926] J.Q. no. 6 or 41 B.R. 484 – Notes of Dorion J. at paragraph 11] we see that the fact that the Notaries appeared as witnesses at the trial is not a sufficient substitute for their being named as parties to the suit. From the notes of Dorian J at paragraph 11:

> "11. There is another serious objection to the action of improbation: it cannot be granted without all of the parties to the deed being present. Heir appearance as witnesses cannot substitute for their impleading, because their subpoena to testify did not constitute official notice and because there is no *res judicata* between them. They had no opportunity to present any potential legal arguments against the action of improbation."
>
> Similarly, **Burland v Moffatt** [[1885] 11 S.C.R. 76.] is authority for the proposition that the nullity of a deed should not be pronounced without putting all the parties to it *en cause en declaration de jugement commun*."

[20] It follows from the provisions of the **Civil Code**, the **Code of Civil Procedure** and the Court of Appeal decision in **Marguerite Desir et al v Sabina James Alcide** that a notarial instrument can only be improbated by way of defence in a claim where all the parties to the notarial deed are made parties to the claim. This mandatory requirement has not been satisfied in the claim before this court. The court notes that the executing notary is not a party to this claim which is fatal to second defendant.

Striking Out

[21] Counsel for the claimant contends that the second defendant's defence should be struck out or in the alternative for summary judgment to be entered.

[22] The court pursuant to CPR 26.4 has general power to strike out a statement of case. This approach however has been described as draconian and should only be utilized as a last resort.

[23] The second defendant in the case before this court has raised a viable defence but has failed to comply with the procedural requirements of the **Civil Code** and the **Code of Civil Procedure** when contesting the authenticity of a notarial document purportedly made between the claimant and the second defendant.

[24] The Privy Council in relation to striking out in **Real Time Systems Limited *v* (1) Renraw Investments Limited (2) CCAM and Company Limited (3) Austin Jack Warner**,[4] states:

> "17. The court has an express discretion under rule 26.2 whether to strike out (it "may strike out"). It must therefore consider any alternatives, and rule 26.1(1)(w) enables it to "give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective", which is to deal with cases justly. As the editors of *The Caribbean Civil Court Practice* (2011) state at Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period.
>
> 18. The Centre could in the present case have applied not under rule 26.2 to strike out, but under rule 26.3 for an "unless" order, requiring Real Time to serve an amended statement of case or adequate details within a specified period, failing which the statement of case would be struck out.

[4] [2014] UKPC 6

> Since the Centre's interest was in getting rid of the proceedings, it did not so apply. But it would again be very strange if, by choosing only to apply for the more radical than the more moderate remedy, a defendant could force the court's hand, and deprive it of the option to arrive at a more proportionate solution."

The discretion to strike out is very wide and flexible and is to be exercised as the justice of the case requires. The matter as it stands can give the second defendant the opportunity to put matters right instead of utilizing the nuclear weapon of striking out. As stated by Privy Council in **Real Time Systems Limited,** the court must consider alternatives and give any other direction or make any other order for the purpose of managing the case. **CPR 2000** Part 26.2(w) enables the court to take any other step or to give any other direction or make any other order for the purpose of managing the case and furthering the overriding objectives, which is to deal with cases justly.

[24] The core of this matter before the court is the need for compliance by the second defendant with the provisions of the relevant articles of the **Civil Code** and the **Code of Civil Procedure** with respect to challenging the validity of a notarial instrument.

[25] The law is clear that a notarial deed may not be impugned unless the person challenging the authenticity of the instrument complies with the relevant procedures. The court is of the view that the second defendant has a viable defence once it can be substantiated by evidence. The court is also of the view that the interests of justice would be better served and would be more in keeping with the overriding objectives of the **CPR 2000,** if an opportunity is given to the second defendant to put matters right rather than striking out the defence and counter claim at this point**.**

[25] Accordingly I make the following order:

(1) Unless the second defendant takes action to put matters right with respect to the challenge of the validity of the notarial deed in the manner prescribed by

the **Civil Code** and the **Code of Civil Procedure** respectively within 21 days from today's date, the defence and counter claim filed shall be struck out with judgment to the claimant.

(2) The second defendant shall serve the parties to this claim with all documents filed within 21 days of today's date.

(3) The second defendant shall pay costs to the claimant in the sum of $500.00.

Agnes Actie
Master