

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law & Equity Division**

**2019/CLE/gen/00211**

**BETWEEN**

**ANTHONY MYERS**

**Plaintiff**

**AND**

**LADY ALOMA DELORES ALLEN**

***(Representative of The Estate of Sir William Clifford Allen)***

**AND**

**ANDREW CLIFFORD ALLEN**

**Defendants**

**Before Hon. Mr. Justice Ian R. Winder**

**Appearances: Gail Lockhart-Charles QC with Lisa Esfakis for the Plaintiff**

**Craig Butler with Caleb Dorsett for the Defendants**

**10 November 2021**

**DECISION**

## WINDER, J

This is the Defendants' application seeking an order striking out the Plaintiff's claim pursuant to RSC Ord 18 r 19 of the Rules of the Supreme Court.

[1.] The action was commenced by the Plaintiff suing on promissory notes purportedly entered into by the Defendants. The Claim, as stated in the short Statement of Claim, at paragraphs 3-5, provides:

3. On 5 July 2012 the Defendants made and delivered to the Plaintiff a promissory note (the Note) by which the Defendants promised to pay the sum of \$210,000 on or before 28 February 2013.
4. The Plaintiff has made numerous demands for payment of the sum due; however the Defendants have failed to pay the said sum of \$210,000 which remains due and owing to the Plaintiff to date.
5. The Plaintiff is therefore entitled to and claims:
  - a. The sum of \$210,000 due under the Note.
  - b. Interest thereon pursuant to the Civil Procedure (Award of Interest Act) 1992.

[2.] The Defendants challenge the claim on the basis that it offends sections 3 and 4 of the Rate of Interest Act. Sections 3 and 4 of the Rate of Interest Act provides:

3. The rate of interest which may be charged by any person on any loan of money made after the commencement of this Act shall not directly or indirectly exceed twenty per centum per annum simple interest on loans of more than one hundred dollars, or thirty per centum per annum simple interest on loans of one hundred dollars or any less amount irrespective of the date fixed for repayment of the said loan.
4. Any contract, promissory note, bill of exchange, cheque, receipt or any other document entered into after the commencement of this Act, whereby a rate of interest higher than that authorised by section 3 of this Act purports to be payable either expressly or by implication in respect of any loan, shall be absolutely null and void, and no proceedings shall be entertained in any court either for the recovery of the loan or of any interest thereon.

[3.] The Promissory Note is settled in the following terms:

Amount Borrowed: One Hundred and forty four thousand dollars (\$144,000.00)

We SIR WILLIAM CLIFFORD ALLEN and ANDREW CLIFFORD ALLEN both of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas promise to pay to ANTHONY MYERS also of the Western District of the Island of New Providence aforesaid the sum of One Hundred and forty four thousand dollars (\$144,000.00) plus interest in the amount of sixty six thousand dollars totaling two hundred and ten thousand dollars (\$210,000.00) The said total of two hundred and ten thousand dollars (\$210,000.00) shall be paid on or before 28<sup>th</sup> February 2013 out of the proceeds of the sale of Crab Cay containing 163 acres more or less situate North of Green Turtle Cay one of the Abaco Cays in the Commonwealth of The Bahamas.

- [4.] The Defendants have produced expert evidence which demonstrates that the promissory note generates a pure interest rate of 45.83% and an effective annualized interest rate of 70.29%. In either case the rate exceeds the 20% allowed under the Rate of Interest Act.
- [5.] The expert calculation of the interest rate is not seriously challenged by the Plaintiff but he argues that, notwithstanding the pleading of the claim as a suit upon the promissory note, the sums reflected in the promissory notes were loaned to Sir William Allen over a period of time. In response to the application the Plaintiff has sought to amend the Statement of Claim to sue, in the alternative, for the recovery of sums loaned based on the loan agreements themselves.
- [6.] It seems clear that the claim as pleaded offends the Rate of Interest Act and must be struck out as frivolous and vexatious. If however a claim can be saved by amendment the Court ought to amend rather than strike out. I must now therefore look at the Plaintiff's application to amend.

[7.] Under the amended claim the Plaintiff seeks to plead particulars to demonstrate that the loans were advanced in smaller sums from 8 September, 2008 to 13 October, 2011. The Plaintiff accepts that the sums were advanced without any agreement or otherwise as to interest. He says that the amount of interest that was agreed to be paid in respect of these loans, as provided by the promissory notes, was \$66,001.43. This sum, the Plaintiff says, was offered by Sir William as a means of reward for his forbearance.

[8.] The first thing that appears clear in an amended claim is that there is no claim against the Second Defendant Andrew Allen who was not the recipient of any loan proceeds and apparently signed the promissory note to help his father. None of the alleged smaller loans are said to have involved him.

[9.] Secondly, if the promissory note falls away, the claim becomes one for recovery under several simple contracts which would attract a shorter limitation period of 6 years. Section 6 of the Limitation Act provides:

**Actions of Contract and Tort and Certain Other Actions**

5. (1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say —

- (a) actions founded on simple contract (including quasi contract) or on tort;
- (b) actions to enforce the award of an arbitrator where the submission is not by an instrument under seal;
- (c) actions to recover any sum recoverable by virtue of any written law;
- (d) actions to enforce a recognisance.

(2) An action upon an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued: Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

The limitation period for this claim, as a simple contract, may have expired prior to the commencement of these proceedings rendering the amended claim statute barred. It is open to the Plaintiff however, if he can show some acknowledgment of the debt, to permit the limitation period to be extended. There is some material in the affidavit evidence of the Plaintiff which may support this but ultimately that is a

matter for evidence and not one which would be the subject of a striking out application.

- [10.] In the premises therefore I will grant leave to amend the claim as sought in the draft provided. I will however strike out the claim seeking for the payment of \$210,000 and limit the Plaintiff to the amended alternate claim seeking the recovery of sums loaned as against the First Defendant in the aggregate sum of \$144,000. Paragraphs 3, 4 and 5 of the Statement of Claim are therefore struck out
- [11.] The claim against the Second Defendant is struck out with reasonable costs to the Second Defendant to be taxed if not agreed.
- [12.] The Amended Statement of Claim shall be filed within 21 days and the First Defendant shall have leave to file an amended Defence within 21 days thereafter. It is off course open to the Second Defendant to plead the Limitation Act as an issue for trial.
- [13.] The First Defendant shall have her reasonable costs of the application and any costs arising from the Plaintiff's amendment.

Dated this 13<sup>th</sup> day of January 2022.

A handwritten signature in black ink, appearing to read 'I. R. Winder', with a stylized flourish at the end.

Ian R. Winder  
Justice