



# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2011 No: 414**

**BETWEEN:-**

**GIANNI VIGILANTE**

**Plaintiff**

**-v-**

**CHRISTOPHER TROTT**

**Defendant**

**JUDGMENT**

**(In Court)**

Date of hearing: 6<sup>th</sup> March 2013

Date of judgment: 12<sup>th</sup> April 2013

Mr Craig Rothwell, Cox Hallett Wilkinson Limited, for the Plaintiff

Ms Simone N Smith-Bean, Charter Chambers, for the Respondent

## **Introduction**

1. By a specially endorsed writ of summons dated 1<sup>st</sup> November 2011, the Plaintiff, Gianni Vigilante, claims that on or about 1<sup>st</sup> September 2003 the Defendant, Christopher Trott, signed a promissory note whereby he promised to pay the Plaintiff \$200,000 plus interest at 7 per cent per annum, accrued on a quarterly basis. The principal and interest were allegedly payable upon maturity of the note on 1<sup>st</sup> September 2008. The purpose of the promissory note was allegedly to secure repayment of \$200,000 that the Plaintiff had purportedly loaned to the Defendant.
2. The Plaintiff is unable to produce the promissory note, although he has produced a draft. The text of the draft note states that the promise by the Defendant to pay the Plaintiff \$200,000 is made “[p]ursuant to loan for value received”. The Plaintiff alleges that the note was removed from his office by the Defendant’s wife, Andrea Trott. Mrs Trott denies this, and the Defendant denies executing the note. There is some limited circumstantial evidence on which the Plaintiff relies. But the case boils down to a conflict of evidence between the Plaintiff and his witnesses on the one hand and the Defendant and Mrs Trott on the other.

## **The law**

3. Promissory notes in Bermuda are governed by the Bills of Exchange Act 1934. A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or bearer [section 75(1)]. The note is not effective unless and until it is indorsed by the maker [section 75(2)] and delivered to the payee or bearer [section 76].
4. The note must be presented within a reasonable time of the indorsement, and if it is not so presented the indorser is discharged [section 78(1)]. The maker

of a promissory note by making it engages that he will pay it according to its tenor [section 80(a)].

5. Many of the provisions in the Act that apply to bills of exchange also apply to promissory notes [section 81]. Two of them are of particular relevance to the present case. First, valuable consideration for a promissory note may be constituted by any consideration sufficient to support a simple contract or by an antecedent debt or liability [section 26].
6. Second, in any action or proceeding upon a promissory note, the Court may order that the loss of the note shall not be set up, provided an indemnity is given to the satisfaction of the Court against the claims of any other person upon the note [section 69].
7. The Stamp Duties Act 1976 is also relevant. Head 37 of the Schedule to the Act provides that stamp duty is payable on a promissory note at 1/30<sup>th</sup> per centum of the amount promised. Subject to certain exceptions that for present purposes are not material, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever unless it is duly stamped [section 9(1)]. However the Tax Commissioner may give his special permission for the late stamping of an instrument [section 10].
8. The best evidence of the promissory note would be the production of the note. As the Plaintiff is unable to produce the note he must produce secondary evidence of its existence. I accept the summary of the law on this point given by the High Court in the Chancery Division in Park Lane Ventures Ltd v Locke [2006] EWHC 1578 at paragraph 28:

*“In essence, to act on secondary evidence I must be satisfied that the document existed, that it has been lost or destroyed (ie the original document or ‘primary evidence’ is not available), and that a reasonable explanation for this has been given. For this purpose I must judge whether a sufficient search has been made, and do so according to the particular circumstances of the case.”*

## **The facts**

9. Back in 2002/2003 the Plaintiff and the Defendant were friends. The Defendant was Bermudian but the Plaintiff was not, and he did not have Bermudian status.
10. The Plaintiff was looking for a new home. The Defendant told the Plaintiff that if the Plaintiff found a Bermudian property that he liked, the Defendant would buy it and rent it to him. This was with a view to the Plaintiff buying the property if he obtained Bermudian status or a certificate of permanent residency.
11. The Plaintiff found a property at 1 Scarrington Hill, Paget (“the Property”) which was on the market for \$920,000. The Defendant bought the Property and leased it to the Plaintiff, who occupied the Property with his family as a tenant.
12. The Defendant does not dispute this. He accepts that he signed an agreement leasing the Property to the Plaintiff. The lease was dated 1<sup>st</sup> September 2003. Both parties produced a copy of the lease to the Court. He also accepts that he obtained a mortgage of \$750,000 from First Bermuda Group Ltd to help with the purchase of the Property.
13. However the Plaintiff contends that he, ie the Plaintiff, contributed a loan of \$200,000 towards the purchase price. He gave evidence that the Defendant signed the promissory note one evening when he, ie the Defendant, came round to the Plaintiff’s business premises. He said that the Defendant complained that the 7 per cent interest rate shown in the promissory note was too high and amended the note by hand so that the interest rate was 4 per cent.
14. The Plaintiff gave evidence that in 2009 he had asked the Defendant for repayment of the loan. This was because although the Plaintiff had by now qualified for permanent residence, the law had changed to prevent him from purchasing the Property from the Defendant as the Defendant was Bermudian. The Plaintiff stated that the Defendant had said that there was

no need to repay the loan as the law might change again in the future so that the Plaintiff could buy the Property.

15. The Plaintiff and the Defendant have since fallen out. The Defendant denies that there was ever any loan or promissory note. His evidence about the purchase of the Property and the surrounding circumstances was quite sparse. He stated that this was because his recollection of the events of 10 years ago is not clear.
16. The Plaintiff and the Defendant were not only friends but business partners. It is not disputed that, over the years, the Defendant has provided generous support to the Plaintiff's businesses.
17. The Plaintiff is the former director and shareholder of a group of companies known as Frescos group, which consisted of the companies behind the restaurants Frescos, Silk Thai Cuisine, 64 Bar and Grill, and the Opus Café and Grill. The Defendant was an investor in this Group.
18. The Group got into financial difficulties in around 2011, and the business and personal relationship between the Plaintiff and the Defendant began to deteriorate. Mrs Trott gave evidence alleging mismanagement and financial impropriety by the Plaintiff. The Plaintiff, the Defendant, and the companies in the Fresco Group became embroiled in various pieces of litigation. The Defendant and Mrs Trott became majority shareholders in two of the companies in the Fresco Group. This was in order to protect their investment.
19. In or about July 2011 the Defendant and Mrs Trott visited the Plaintiff at his office. It is common ground that Mrs Trott removed various files from the office in order to go through the accounts of the companies in which she and the Defendant were now shareholders. The Plaintiff alleges that one of those files contained the promissory note, which he says he kept in his office. Mrs Trott states that she has never seen the note and that it was not contained in any of the files which she removed. I note that files were moved previously,

although not by the Defendant or Mrs Trott, when the Plaintiff moved offices in 2007 and 2009.

20. Pursuant to his case that the note was removed from his office by Mrs Trott, the Plaintiff has served on the Defendant a notice to produce the promissory note and a summons for discovery of particular documents, including the promissory note. The Defendant has not produced the note as he maintains that it is not in his possession, custody or power and that he has no recollection of ever signing any such note.
21. The Plaintiff has also served a subpoena duces tecum on Mrs Trott to produce the promissory note. She gave evidence that she had looked through the files that were removed from the Plaintiff's offices on many occasions, both before and after she was supplied with a copy of the draft note by the Defendant's counsel, but that she had not found the note.
22. The Plaintiff relies on the evidence of two former employees, Rosemary Madeiros and John Williams.
23. Ms Madeiros was a former director, shareholder and accounts manager of the Frescos Group. She gave evidence that the Plaintiff mentioned the note to her, and that he showed her a copy in around 2007. This was the year in which the Plaintiff first moved offices. She stated:

*“The note was in a manila envelope with ‘Chris Trott’ written on it. I looked it over and can recall it was on green legal paper with gold binding at the top left hand corner. It consisted of 2 sheets of paper. One contained the heading of the document, whilst I recall that the other sheet was double-sided. This contained the note itself.*

*On the second sheet setting out the substance of the note, I recall seeing the figure of \$200,000 at the top and further down there was a reference to the interest payable. This attracted my attention as the figure of 7% had been struck through and replaced with 4%. 4% had been written along the left side of the page. Next to this were two sets of initials that appeared to be by Chris [ie the Defendant] and Claudio [ie the Plaintiff]. The document*

*extended over on to the second side and it was on this side that Chris had signed his name and dated the document. I cannot recall for certain whether it had a stamp or not.”*

24. Her evidence was that the Plaintiff then put the note in the office filing cabinet in a folder marked “Scarrington Hill”.
25. According to Ms Madeiros, Mrs Trott visited her in her office sometime in June 2011. This was shortly after Ms Madeiros had transferred her shares in two of the companies in the Frescos Group to the Defendant and Mrs Trott. Ms Madeiros said that she showed Mrs Trott a copy of the promissory note and that at Mrs Trott’s request she made her a copy.
26. Ms Madeiros stated that when the Defendant and Mrs Trott visited the Plaintiff’s office in July 2011 she was present by speakerphone. She said that a time came when, apart from her remote presence, only the Plaintiff and the Defendant were present in the room. They had evidently forgotten about her. She said that the Plaintiff asked when he was going to be paid back under the promissory note, to which the Defendant replied that he wasn’t going to pay the Plaintiff anything. The Plaintiff also gave evidence about the meeting, although he didn’t mention the promissory note being discussed.
27. In her witness statement, Ms Madeiros gave evidence that she was present at several previous conversations between the Plaintiff and the Defendant in which the promissory note was discussed. When cross-examined, she said at first that she was not present at any conversations between the Plaintiff and the Defendant about the promissory note prior to their conversation in July 2011. But when confronted with her witness statement, she confirmed that the account in the witness statement was correct.
28. John Williams was a close friend of the Plaintiff and the godparent of one of his children. From September 2009 until September 2011 he worked at 64 Bar and Grill, where in around March 2010 he was appointed general manager.

29. He gave evidence that the Plaintiff had showed him a copy of the promissory note. He also stated that he was present in the Plaintiff's office in July 2011 when Mrs Trott was removing files. He said that he saw her remove two files headed respectively "Chris Trott" and something like "House Details".
30. Ms Madeiros and Mr Williams were plausible witnesses. But as they had worked for the Plaintiff, and Mr Williams was a close personal friend of his, I shall treat their evidence with caution. As the Plaintiff has an interest to serve, I shall also treat his evidence with caution.
31. The Plaintiff also relies on the terms of the lease of the Property. Paragraph 5(2)(c) of the lease provides:
- “(i) That the tenant, in consideration for the sum of BD\$20,000 the receipt of which the landlord hereby acknowledges, shall hold first option to purchase the said premises at any time during the option period at the then market value less the aggregate rent then paid by the tenant to the landlord calculated from the date of commencement of this agreement and further less any monies paid or loaned to the landlord in connection with the said premises.*
- (ii) That the tenant acknowledges that the first option to purchase the premises may only be exercised subject to his obtaining Bermudian status or in the event that the tenant is a non-Bermudian at the time of his choosing to exercise the first option to purchase the said premises that the said premises be zoned for Non-Bermudian purchase and the relevant license fee be paid to the Bermuda Government.”*
32. This paragraph tends to confirm the reason for the purchase of the Property and is evidence that the Plaintiff paid \$20,000 to the Defendant, who said that he could not recall any such payment. However it is not evidence that the Plaintiff paid the Defendant \$200,000.
33. The Plaintiff further relies on documented withdrawals from his savings account with Capital G Bank Limited.



- (1) \$90,000 on 24<sup>th</sup> June 2003. He said in evidence that this was a contribution towards the deposit for the Property.
  - (2) \$2,500 on 18<sup>th</sup> August 2003. He said in evidence that this was to top up the legal fees for Kevin Bean, the attorney who was instructed with respect to the conveyance of the Property.
  - (3) \$52,000 on 26<sup>th</sup> August 2003. He said in evidence that this was to complete the deposit for the Property.
34. There is no documentary evidence as to the destination of these payments. They add up to \$144,500 not \$200,000. When giving oral evidence, the Plaintiff said that he also had a checking account with Bank of Butterfield, from which he withdrew the balance of the \$200,000. He said that he only withdrew money from his savings account when he had insufficient money in his checking account. However he did not produce any bank records from Bank of Butterfield.
35. In his witness statement the Plaintiff said that he told the Defendant that the source of the \$200,000 was money he had earned from the sale of his 40 per cent share in Ascots restaurant in 1999. He stated that he had placed this money in a personal bank account – presumably the one with Capital G Bank Limited – and that it had been left untouched since. In light of the witness statement, one might have expected to see a single withdrawal of \$200,000 from the savings account.
36. I find that the banking evidence is at best inconclusive.
37. If this were the extent of the Plaintiff's evidence then I would have dismissed his claim. However he called a further witness, Kevin Bean, the attorney who had carried out the conveyance of the Property.
38. Mr Bean was required to attend trial by a sub-poena issued by the Plaintiff. He had not made a witness statement as he had acted for the Defendant with respect to the conveyance and was concerned not to infringe legal professional privilege. However in the course of his evidence it became

clear that he had been instructed by the Plaintiff with respect to the promissory note. His evidence about the note could and should have been put into a witness statement prior to the trial. As it was not, neither party had any advance notice of what he was going to say.

39. Mr Bean stated that he was a barrister and attorney, and was called to the Bar in Bermuda in 1998. He was currently Chief Legal Officer for a local company, but in 2003 he was working for a local law firm, Lynda Milligan White & Associates, for whom he carried out conveyancing work.
40. He said that he recalled meeting with the Plaintiff. The meetings concerned the preparation of a lease, a promissory note, and incidental matters relating to the conveyance of the Property to the Defendant. He had retained unsigned drafts of the promissory note and the lease.
41. Mr Bean said that the Plaintiff had instructed him to draft the promissory note and had paid him to do so. He said that the note was for \$200,000 because it represented a loan in that amount from the Plaintiff to the Defendant. The Plaintiff made bank transfers to Mr Bean's firm of \$93,500 on behalf of the Defendant and an estimated \$40,000 on account of the stamp duty that was payable on the conveyance. The firm also received a bank transfer of \$20,000 from the Plaintiff for the Defendant as provided in the lease. Mr Bean stated that in drafting the lease he was careful to keep on the right side of the law with respect to fronting.
42. Mr Bean stated that he met with the Defendant on two occasions: initially, to discuss the conveyance, and at the time of the execution of the legal documents. He said that to his recollection the Defendant signed the promissory note in his presence. This was at the chambers of the law firm where Mr Bean worked. He said that he no longer had a signed copy of the promissory note. The signed copy was kept for safe keeping in chambers until he ceased to work there. Then the Plaintiff came to chambers and collected the file together with the note.

43. Mr Bean said that the meeting at which the Defendant signed the promissory note took place in the week of 25<sup>th</sup> August to 3<sup>rd</sup> September. The Defendant signed the lease and the promissory note at the same time, as all the legal documents were signed contemporaneously. Mr Bean couldn't recall whether the Plaintiff was also present at that meeting. He said that the promissory note would have been stamped, although he couldn't recall whether this took place before it was executed.
44. When cross-examined, Mr Bean accepted that he never received any funds from the Plaintiff on behalf of the Defendant in the full amount of \$200,000. He also accepted that prior to execution of the promissory note the Defendant may well have taken a draft of the note away from chambers without signing it. But Mr Bean stated that counsel's suggestion that the Defendant did not execute the promissory note in his presence was incorrect. He did not recollect witnessing the execution of the note but he was sure that it had been signed. This was first, because there would have been no protection for the Plaintiff without the note, and second, because of the rationale that was included in the lease.
45. I found Mr Bean a credible and convincing witness. I am satisfied that he was not lying and think it unlikely that he was mistaken. He has no interest to serve by giving evidence and, as an attorney, I would expect his evidence on a matter related to his practice to be reliable. It is true that his account of the execution of the promissory note differs from that of the Plaintiff. I think that his account is likely to be the more reliable, although it is possible that the rate of interest recorded in the note was varied by consent after the note was executed.
46. The Defendant had only a vague recollection of events surrounding the conveyance. I was able to derive little assistance from his evidence.
47. Mrs Trott was a plausible witness. But as she is married to the Defendant I approach her evidence with caution.

## **Findings**

48. In reliance on the evidence of Mr Bean, I am satisfied that the Defendant did execute a promissory note for \$200,000 in favour of the Plaintiff, and that he would not have done so unless the Plaintiff had loaned him that amount. I am also satisfied that the note was delivered to the Plaintiff but that it is no longer in his possession, either because it was lost, most likely in the upheaval of removing offices, or because it was in the files that were removed by Mrs Trott. I am therefore satisfied that there is a reasonable explanation for the absence of the note. Were it still in the Plaintiff's possession, I have no doubt that he would have produced it.
49. I therefore order that the loss of the note shall not be set up to defeat the Plaintiff's claim, provided that he gives a satisfactory indemnity to the Defendant in respect of the possible claims of any other person upon the note. I shall hear counsel as to the wording of the indemnity.
50. A promissory note must be presented within a reasonable time of its indorsement. What constitutes a reasonable time is to be construed in relation to the note's maturity date. As noted above, this promissory note matured on 1<sup>st</sup> September 2008. I am not satisfied that the Plaintiff presented the note for payment prior to the commencement of these proceedings. But the writ of summons contains a demand for payment. Taking into consideration the fact that the promissory note is for a large amount, I am satisfied that the demand has been made within a reasonable time of the note's indorsement.
51. I am also satisfied in light of Mr Bean's evidence that the requisite stamp duty has been paid on the promissory note.
52. I therefore find that pursuant to the promissory note the Defendant should pay to the Plaintiff the sum of \$200,000.
53. I have not heard argument as to interest and give counsel leave to address me on that topic. My provisional view is that interest should be payable on the sum of \$200,000 at the rate of 4 per cent per annum from 3<sup>rd</sup> September

2003 to the date of judgment, and at the statutory rate of 7 per cent per annum from the date of judgment until judgment is satisfied.

54. 3<sup>rd</sup> September 2003 is the date from which interest starts to run as according to Mr Bean this was the most recent date on which the promissory note could have been executed.
55. 4 per cent is the appropriate rate of interest because on the Plaintiff's evidence that is the rate that was contained in the note. It would be unfair to permit him to resile from his own account.
56. I shall hear the parties as to costs, although my strong provisional view is that costs should follow the event.

Dated this    day of April, 2013 \_\_\_\_\_

Hellman J