

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. NO. 2461 OF 1997

B E T W E E N:

THE SPORTS WIRE INCORPORATED PLAINTIFF

AND

VINDA RAMSINGH DEFENDANT

BEFORE THE HON. MR. JUSTICE STOLLMAYER

Appearances:

Ms. J. Jones for the Plaintiff

Mr. R. Montano for the Defendant

JUDGMENT

The Plaintiff in this action sues as the payee of a promissory note dated 18th January 1995 made by the Defendant in the sum of US\$113,489.00 and for interest thereon at the rate of 10.5% per annum from 1st February 1995. The Defendant defends this action on the sole basis that the promissory note in question (to which I will refer as “the Note”) is not a valid promissory note because it is not a promissory note within the meaning of Section 83 of the Bills of Exchange Act, Ch. 82:31.

When the trial came on for hearing on October 26th 1999 the Defendant, with the consent of the Plaintiff, amended its defence so that paragraph 2 of same read “the Defendant will contend at the trial of this action that the Statement of Claim shows no or no reasonable cause of action in that the alleged promissory note sued upon is invalid in that it is not a promissory note within the meaning of Section 83 of the Bills of Exchange Act, Ch. 82:31” and further amended the Defence and Counterclaim by deleting paragraphs 3 to 6 thereof, inclusive. On inquiry from the Court, Ms. Jones for the Plaintiff indicated that she saw no necessity to amend the Plaintiff’s Reply and Defence to Counterclaim, there being nothing to reply to or defend, and the trial proceeded on the basis of the Defendant having abandoned all the other defences as originally set out in his Defence filed on 14th October 1998. The parties also agreed that the action would be tried on the basis of no viva voce evidence being led, that the Note would be admitted into evidence by consent (as it was, and marked ‘A’) and that the advocates would address on the law only. If the Court determined the Note to be valid, then only formal evidence would be led by the Plaintiff in relation to the matters at paragraph 4 of the Statement of Claim that is, as to the payments made, if any at all, on account of the Defendant’s indebtedness under the Note.

The Note reads as follows:

“PROMISSORY NOTE

Port-of-Spain,
January 18, 1995

\$113,489.00

1. For value received. Vinda RamSingh, 85 A Cipriani Boulevard, Port of Spain, Trinidad and Tobago, until December 31, 1994. d/b/a CENTRAL RACING SERVICE, Port of Spain, San Juan, San Fernando, Tunapuna, Arima, and California, and his successors and assignees, promise to pay in U.S. dollars THE SPORTS WIRE, INC., a U.S. corporation with offices at 318 Delaware Avenue, Delmar, New York 12054-1991, U.S.A., or order the principal sum of One Hundred Thirteen Thousand Four Hundred Eighty Nine U.S. Dollars [\$113,489.00] with interest on the unpaid principal amount owing from time to time at the rate of ten and a half percent per annum [10.5%], commencing on February 1, 1995, and continuing on the unpaid principal until paid.

2. This Note is payable in daily installments of Two Hundred Fifty U.S. Dollars [\$250,00], due on every day of every week except Sundays, commencing on February 1, 1995 until this Note is fully paid. The daily payments shall be deposited by payor in a U.S. Dollar account, maintained by the holder of this note in a bank in Trinidad & Tobago.

3. All payments shall be applied first to accrued interest, and thereafter to principal. Any delinquent installment of interest shall bear interest at the same rate as principal bears interest. Notwithstanding anything to the contrary contained in this Note, in no event shall interest payable hereunder exceed the maximum amount of interest permissible under applicable U.S. and Trinidad & Tobago law.

4. This Note may be paid in whole or in part at any time or from time to time, without penalty or additional fees.

5. If any payment of principal or interest is not paid when due and continues unpaid for a period of ten days after its scheduled due date, then at the option of the holder of this note, the entire unpaid balance of this Note and interest accrued thereon shall, at the option of the holder of this Note, become immediately due and payable.

6. Likewise if payment for current or future services, delivered by THE SPORTS WIRE, INC. or any of its associated or affiliated companies to Vinda RamSingh or firms operated by him, his successors or assignees, are deemed to be past due by THE SPORTS WIRE, INC., the entire unpaid balance of this Note and interest accrued thereon shall, at the option of the holder of this Note, become immediately due and payable.

7. Payor hereby waives presentment, demand, protest or notice of any kind, and agrees to reimburse the holder of this Note for all

reasonable attorney's fees and court costs incurred by holder in enforcing and collecting this Note.

8. *This note shall be construed in accordance with and governed by the laws of Trinidad & Tobago and by the State of New York, U.S.A.*

9. *The undersigned Payor warrants and represents that he is duly authorized and empowered to execute and deliver this Note.*

10. *This Note supersedes a Promissory Note signed by Payor on October 28, 1994."*

The provisions of the Bills of Exchange Act which are material are Sections 83, 9 and

11. Section 83 of the Act reads as follows:

Section 83(1) 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 to bearer.

Section 83(2)

Section 83(3)

Section 84(4)

Section 9 reads of the Act reads as follows:

9.1. *The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid –*

(a) with interest;

(b) by stated installments;

(c) by stated instalments, with a provision that upon default in payment of any instalment the whole shall become due;

(d)

Section 9(2)

Section 9(3)

Section 11 of the Act reads as follows:

Section 11. A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable –

(a) at a fixed period after date or sight;

(b) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.”

The issues to be determined in this case can be summarised as follows:

1. Whether the Note is unconditional;
2. whether the Note contains more than merely a promise to pay;
3. whether the Note is payable at a fixed or determinable future time;
4. whether the note is made payable to a specified person, or his order, or to bearer.

If any of these issues are determined by an answer in the negative then the Note will be invalid.

There was a further issue raised by Mr. Montano on behalf of the Plaintiff which was that the provisions of paragraph 8 of the Note, which provides for the Note to be construed in accordance with and governed by the laws of Trinidad and Tobago and by the laws of the State of New York, throw up a conflict of laws issue which makes the

Note invalid on the ground of uncertainty. No evidence was led as to the laws of the State of New York in relation to any matter raised at the trial, and no submissions were made by either advocate as to what those laws might be, or what their effect might be. The parties obviously elected to have this matter determined in accordance with the laws of this jurisdiction and I have therefore done so. I do not think, as Ms. Jones submitted, that Section 72 of the Bills of Exchange Act resolves the question of which law should apply but suffice it to say the Note is on the face of it made in this country and payable in this country. For these reasons I have therefore determined the issues before me in accordance with the laws of this jurisdiction.

I turn to the various issues as summarised above.

The Defendant submits that the Note is not an unconditional promise in writing because there is a conditionality arising out of the provisions of paragraphs 4, 5 and 6 of the Note. These provisions, it has been submitted, import an uncertainty as to the time for payment. Further, and with particular reference to paragraph 6 of the Note, it was submitted that payment for “current or future services,” as well as the amount of US\$113,489.00, is a second obligation and, indeed, a conditionality. In support of this submission Mr. Montano referred me to *Halsbury’s Laws of England, 4th Ed., Vol. 4, paragraph 324 and 325* as well as the decision of The English Court of Appeal in *Williamson v. Rider (1962) 2 All E.R. 268*. He also submitted that a document

containing a promise to pay money as part of a contract containing other stipulations will not be a promissory note.

The unconditional promise made by the maker of a promissory note relates not to the certainty of the date when payment must be made. Rather, it relates to a pre-condition which must be satisfied before liability on the Note arises. *Chalmers on Bills of Exchange, 13th Ed.* is of assistance in this regard. At page 14 the elements of certainty and conditional instruments are both dealt with.

“It is of the essence of a bill that it should be payable at all events. Therefore its requisites must appear on its face with reasonable certainty.”

“The reason is that it would greatly perplex the commercial transactions of mankind if paper securities of this kind were issued out into the world encumbered with conditions, and if the persons to whom they were offered in negotiation were obliged to inquire when those uncertain events be reduced to a certainty. And hence the general rule is that a bill of exchange always implies a personal general credit not limited or applicable to particular circumstances and events which cannot be known to the holder in the general course of its negotiation.”

“A bill drawn payable in the common form, “as per advice” is not conditional; but a bill payable so many days after the arrival of a certain ship is conditional, and invalid, for the ship may never arrive and the expression of an executory consideration of the face of a note may perhaps make it conditional.”

Paragraph 6 of the Note does not, in my view, create a condition precedent to liability arising.

There is no precondition to be fulfilled so as to make payment of the Note fall due. The maker

of the promissory note in the instant case does not condition his promise to pay, his liability, on the happening of any event.

Paragraph 5 of the Note, which makes it payable at the option of the holder in certain circumstances, is likewise not a condition of liability. This provision goes to the time when payment is to be made and is a provision for bringing forward that time.

Similarly, paragraph 4 of the Note goes to the time for making payment..

The Note is not in my view conditional.

Turning to the submission that the Note is not payable to the order of a specified person or to bearer, it has been submitted that paragraph 2 of the Note provides for the instalments to be paid into a bank account maintained by the holder of the Note at a bank in Trinidad and Tobago. It is clear to me that on a proper reading and interpretation of this provision the Note is payable to the Plaintiff or to its order. There is in my view a specified person to whom it is payable, or his order. The provision for paying the instalments into a bank account is merely to provide the methodology by which payments to the holder are to be made.

The decision in *Wirth v. Weigel Leygonie & Co. Ltd.*, (1939) 3 All E.R. 712 to which I was referred is to be distinguished if for no reason other than it dealt with a document which

could not in my view be said to resemble a promissory note and, further, and perhaps more important, provided for the payment of an uncertain sum of money.

I turn now to perhaps the most difficult issue to determine: that of whether the Note is payable at a fixed or determinable future time.

It is clear that bills of exchange payable on a contingency are not negotiable, because it does not appear on the face of them whether they will ever be paid. See Chalmers at page 32. See also *Byles on Bills of Exchange, 26th Ed. at page 19*, where it is said that it is not material that the time when the event may happen is uncertain, provided that it must happen at some time or another.

A note payable on the death of a person or the maker is a good note. A note will not be void as payable on a contingency if it is certainly payable and the uncertainty is only as to the persons who may have a right to enforce it under particular circumstances. See *Byles at page 20 and Richards v. Richards (1831) 2 B. & Ad. 447*.

Paragraphs 4, 5 and 6 of the Note are attacked on the basis that they introduce uncertainty as to the date of payment of the Note. There is a contingency created by the provisions of each such paragraph, submits Mr. Montano on behalf of the Defendant, and cites the decisions in *Williamson v. Rider* and *Claydon & Anor v. Bradley & Anor. (1987) 1 All E.R. Report*

522 in support of this. He further submitted that this Court is bound by the decision in *Williamson v. Rider*.

Ms. Jones for the Plaintiff, however, submits in essence that the requirements of the Act have been met and, particularly, that there is no uncertainty as to the time for payment of the basis that there is no option allowing the maker to pay the Note prior to 1st February 1995, that being the date on which the first instalment fell due. All that need be said with respect to this submission is that the Note fell due for full repayment perhaps some two years after it was made (that being a very rough preliminary estimate of the time it would take to pay \$113,489.00 with interest at 10.5% by daily instalments of \$250.00 each six out of the seven days in each week) so that the maker had ample time and opportunity to bring forward that date.

By the provisions of paragraph 4 of the Note the maker may have the option to pay it off in advance, but that does not in my view remove the element of certainty of payment nor does it import into the Note a contingency upon which payment is predicated. It clearly, however, gives to the maker an option to make payments before they are due and he may either pay off the Note partially or wholly.

Paragraph 5 of the Note provides that if the maker defaults in making any payment when due and that default continues for ten days thereafter, then the entire balance of the Note then due and any accrued interest thereon, becomes due and payable immediately. This provision does not of itself introduce any element of contingency into the Note and is indeed a provision to be

found in many lending agreements and promissory notes. Further, it is a provision specifically dealt with in Section 9 of the Act. Clearly, a provision of this nature will not make a promissory note invalid on account of uncertainty.

What presents a difficulty in the instant case, however, is that this default clause, and the bringing forward of the date for full payment of the Note, does not come about unless the holder of the Note so elects.

In my view the certainty of date for payment of the Note remains. It is payable by instalments. Each of paragraphs 4 and 5, however, gives to the maker and holder of the Note respectively, an option to bring forward the date for full repayment. To my mind this option does not alter the original basic obligation to pay, nor to pay off the Note at a particular determinable future time, and if the option is not exercised by the maker of the Note then he must continue paying the instalments until payment in full. Conversely, if the holder of the Note does not exercise his option, then he must wait until the date for payment of the Note in its entirety has passed before he can call for payment or bring an action to enforce payment.

It has been submitted that the decision in *Williamson v. Rider* is binding on me. If it is, then my views as set out above are of no consequence as a matter of law but I do not for the purposes of the instant case come to any conclusion as to whether the provisions of paragraphs 4 and 5 of the Note create uncertainty as to the date of its payment, nor as to whether that decision, and the decision in *Claydon v. Bradley*, are binding on me or merely persuasive.

Indeed, I make no such findings, although my further view is that they are merely persuasive and not binding. In my view the instant case can be decided having regard to the provisions of paragraph 6 of the Note.

The provisions of paragraph 6 of the Note introduce not just an option by which either the maker or the holder can bring about payment in full prior to the original date for so doing. It also provides that the payee (not necessarily the holder) of the Note may deem the maker of the Note, or any firms operated by him, his successors or assignees, to be indebted and overdue in payment of such indebtedness to the payee, or any of its associated or affiliated companies in respect of any current or future services. If the payee so deems then the holder of the Note has the option to call for immediate repayment of the balance then due under the Note at that time as well as any interest thereon, whether or not there has been any default by the maker of the Note with respect to any payments due thereunder when due.

In other words, the maker of the Note can be called upon to pay the entire balance due on the Note even if he is not in default of any of the payments he is required to make by the terms of the Note. Further, this call for full repayment can be made in relation to business dealings which may not necessarily involve the maker or the holder of the Note; the requirement for repayment in full can arise as a consequence of an act or omission which, for all we know, has nothing to do with either the maker, or the payee, or the holder.

This paragraph imports into the Note an element of uncertainty which must affect its validity. There are third parties who may become involved but, more important is that the date for full repayment can be brought forward even if the maker is not in default of his obligations under the Note. Such a provision cannot, in my view, be properly be regarded as leaving the Note within the meaning of Section 83 of the Act and providing for its payment at either a fixed or determinable future time. This provision introduces a contingency which strikes at the root of the certainty of the date of payment and the Note must therefore be invalid. And I so hold.

Ms. Jones submitted that if I should come to this conclusion then I could, and should, exercise my discretion and sever paragraph 6 from the remainder of the Note.

The doctrine of severance is called into play where the terms of a contract are illegal, or against public policy, or where the whole contract is prohibited by statute. See *Chitty on Contracts, 26th Ed. Vol. 1 at paragraph 1281*. On occasion there are parts of a contract which are unenforceable for any one or more of these reasons, and a Court can then be asked to consider severing these objectionable parts of the contract from the whole, but in the instant case there are two difficulties in doing this. The first is that no authority has been put before me to support the submission that there can be severance in the case of a provision of a promissory note and I have not myself been able to find any such authority in the time available to me. Second, in the instant case there is no illegality, no element of being contrary to public policy, or prohibition by statute insofar as the provisions of paragraph 6 of the Note are concerned. Nothing has been put before me to suggest that the provisions of this paragraph of the Note are

unenforceable by one party as against another. Consequently, even I were to accept Ms. Jones submission that the doctrine of severance is applicable to promissory notes, which I do not, the relief she

seeks must be refused.

The Plaintiff's action is therefore dismissed with costs.

DATED the 28th day of January, 2000

C.V.H. STOLLMEYER
JUDGE

ADDENDUM

After my Judgment was delivered on 27th October 1999, Ms. Jones applied for leave, pursuant to the provisions of Order 20 of the Rules of the Supreme Court, to amend the prayer to the Statement of Claim to include the alternative relief of “payment of the sum of US\$113,489.00 being monies due from the Defendant to the Plaintiff for services supplied by the Plaintiff to the Defendant at the Defendant’s request.”

She submitted that an application to amend can be made even after judgment, and that an amendment can be permitted even if the appropriate limitation period has expired once no new facts are pleaded. She further submitted that from the pleadings before me there were sufficient facts both to support such a plea and to allow the Plaintiff to lead the evidence pursuant to the amendment. She proposed that the Statement of Claim refers to the Note as admitted into evidence and that paragraph 1 of the Note indicates value having been received by the Defendant, and that this would permit evidence to be led sufficient to support the amendment.

In answer to an inquiry from the Court as to whether it was not usual to permit amendments at this stage of the proceedings only if there was sufficient evidence before the Court to support

such an amendment, she agreed that this is indeed the position but that what had been determined was only a preliminary point, after which evidence was to be led.

Mr. Montano opposed this application submitting that it was not a preliminary point which had been determined but that the full trial had in fact been completed; that the Plaintiff had from the very inception of the proceedings based its claim solely on the Note and made no attempt to amend its Statement of Claim; and that the Defendant had always defended based upon the validity, or invalidity, of the Note.

The Writ in these proceedings was filed on 7th October 1997. On 12th October 1998 the parties entered a consent order for early trial. The Defence and Counterclaim were filed, and the Reply and Defence to Counterclaim was filed on 23rd October 1998. The Pleadings give no indication as to the possible existence of any alternative claim available on the part of the Plaintiff. When the matter came on for trial on October 26th 1999 it was on the basis of the Defendant amending his Defence, which was the subject of a consent order, and the trial proceeding on a single point of law, i.e. the validity of the promissory note and whether it fell within the meaning of Section 83 of the Bills of Exchange Act.

No mention was made by either advocate as to any preliminary point being determined. Further, it was agreed that no viva voce evidence would be taken and that the Note would be the only evidence for consideration by the Court. The Note was admitted into evidence by consent.

In response to a specific inquiry from the Court at the time Ms. Jones indicated that she did not see the necessity to amend the Plaintiff's Reply and Defence to Counterclaim, despite the fact that the amended Defence was substantially different to that originally put forward and there being no counterclaim. The Court specifically inquired of her whether paragraphs 2 to 5 of the Reply and Defence to Counterclaim should not be deleted but she said that she did not think it necessary to do so.

I did not consider that there was anything before me which would properly move me to exercise my discretion and grant the Plaintiff's application for leave to amend.

In the circumstances I refused leave to the Plaintiff to amend as applied for.