[2014] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 37/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**GARTH DYCHE**	**APPELLANT**
AND	**JULIET RICHARDS**	**1st RESPONDENT**
AND	**MICHAEL BANBURY**	**2nd RESPONDENT**

Emile Leiba and Miss Sabrina Cross instructed by DunnCox for the appellant

Stuart Stimpson and Miss Martina Edwards instructed by Shelards for the respondents

25 and 26 February and 6 June 2014

PHILLIPS JA

[1] This appeal arises out of the decision of Evan Brown J made on 22 April 2013 whereby, after a preliminary objection raised by the 1st respondent before the commencement of the trial in relation to the admissibility of a document entitled "promissory note", the learned judge ruled as follows:-

> "The Promissory Note dated May 30, 2005 not being adequately stamped, has no evidentiary effect and cannot be relied on as a Promissory Note."

[2] The trial was adjourned to 23, 24 and 25 June 2014 and permission to appeal was granted to the appellant herein.

[3] Although the notice and grounds of appeal lists the 2nd defendant as 2nd respondent on the appeal, the notice was not addressed to him, so I presume that he had not been served; he did not appear in the appeal nor was he represented. I do not consider that he was a party to the appeal.

The proceedings in the court below

[4] The claim was brought by the 1st respondent in the court below against the appellant and the 2nd respondent (as 1st and 2nd defendants respectively) in their capacity as executors of the Last Will and Testament of Raymond Arthur Brooks ('the deceased'), who died on 23 November 2005. It is common ground between the parties that the 1st respondent is the common law wife of the deceased and also one of the beneficiaries under his will. Her pleadings set out several allegations of misconduct and breaches of duty carried out by the appellant and 2nd respondent in their capacity as executors and seek consequential relief.

[5] For the purposes of this appeal, her particulars of claim contains the following allegations at paras 36, 37, 38 and 41 respectively;

> "36. On the 30th September 2009, the Claimant through her Attorneys-at-law received a letter from Rattray Patterson Rattray, Attorneys-at-law for the 1st and 2nd Defendants, executors of the Will of the deceased, with a copy of a promissory note dated the 30th May 2005, allegedly signed by the deceased, stating that the deceased promised to pay

the 1st Defendant Thirty Thousand United States Dollars (US$30,000.00). Attached hereto and marked with the letters "**JR-7**" is a copy of the said promissory note dated 30th May 2005.

37. On the 07th April 2010, the Claimant obtained a report from a handwriting expert, Deputy Superintendent of Police, William Smiley, which confirms that the said Promissory Note mentioned and referred to at Paragraph 36 above was not signed by the deceased.

38. The 1st Defendant therefore falsely and fraudulently represented to the Claimant and her Attorneys-at-law that the deceased had signed a Promissory note dated the 30th May 2005, stating that the deceased had promised to pay him Thirty Thousand United States Dollars (US$30,000.00).

…

41. Further, by reason of the 1st Defendant's fraud and deceit and the facts herein alleged, the Claimant has been damaged in the sum of Thirty Thousand United States Dollars (US$30,000.00) which according to the 1st Defendant's Attorney-at-law, is equivalent to the sum of Two Million One Hundred and Fifty Eight Thousand Two Hundred Jamaican Dollars (J$2,158,200.00)."

Some of the consequential orders sought include:

"…(10) An order declaring that the Promissory note dated the 30th May 2005, purported to be signed by the Testator in favour of the 1st Defendant, allegedly stating that the Testator had promised to pay the 1st Defendant Thirty Thousand United States Dollars (US$30,000.00) is fraudulent.

(11) An order declaring that the Testator has no unpaid debt owing to the 1st Defendant in the sum of Thirty Thousand United States Dollars (US$30,000.00) or any other sum.

…

> (13) An order that in due course of administration, the 1st and 2nd Defendants are not allowed to pay the sum of Thirty Thousand United States Dollars (US$30,000.00) to the 1st Defendant from the Estate."

[6] There are several other allegations made in the claim in respect of certain devises made by the deceased to the 1st respondent, but which had not been transferred to her, due, she claimed, to the "gross negligence, corruption, misfeasance, malfeasance, nonfeasance, gross misconduct, maladministration and fraud" of the executors of the estate. She therefore claimed, in addition to the orders mentioned at para [5], orders for the transfer of assets to her, for an accounting of funds, for inquiries and directions to be made and taken, with dispatch, and for other orders.

[7] The appellant filed his defence on 12 July 2010. He set out the difficulties that his attorneys had experienced in obtaining the grant of probate which included, he claimed, some recalcitrance on the part of the 1st respondent in providing documents in her possession including, for instance, certificate of title for lands at 19 Bonanza Drive. He accepted that he had taken the total sum of $3,209,505.28 from the deceased's four accounts, in equal amounts, as payment on the promissory note being reimbursement for monies advanced to the deceased. He then pleaded, for the purposes of this appeal (in para 29), the circumstances relating to the execution of the promissory note. It states:

> "29. The 1st Defendant now states the relevant facts surrounding the execution of the aforesaid Promissory Note by the deceased. The 1st Defendant states that on or around

> the 4th of March 2005 he saw the deceased in Florida. The deceased asked the 1st Defendant to lend him US$30,000.00 to help pay for a surgery he needed. The deceased had asked for this money on previous occasions. The 1st Defendant withdrew the money and gave it to the deceased while indicating that he would require the deceased to sign a Promissory Note for the amount when both men returned to Jamaica. The Promissory Note was duly prepared, signed by the deceased and witnessed. The Promissory Note matured on the 24th February 2006."

[8] The appellant denied specifically that he had fraudulently represented that the deceased had signed the promissory note, but stated to the contrary, that it had been duly signed, was a "valid document and proof of a debt which was justly and truly owed by the deceased to the 1st Defendant" (para 34). The appellant also pleaded that at all times he had acted as best as he could to ensure the efficient administration of the deceased's estate, and denied any negligence, mismanagement, corruption, misfeasance, fraud or any other wrongdoing.

[9] After previous adjourned trial dates, the matter came on for trial before Brown J on 22 April 2013. Prior to that, on 16 April 2013, the 1st respondent filed a notice of preliminary objection making the following objection:

> "That the Promissory Note dated the 30th May 2005, purportedly signed by the deceased, Raymond Brooks in favour of the 1st Defendant, is unstamped or insufficiently stamped and therefore not receivable in evidence or available for any purpose whatsoever under sections 35 and 36 of the Stamp Duty Act 1937."

[10] Attached to the notice of preliminary objection were the following documents (pages 308 – 314 of the record of appeal):

(i) promissory note dated 30 May 2005 signed by Raymond Brooks;

(ii) letter dated 10 September 2012 from Tax Administration Jamaica to SHELARDS, attorneys-at-law, for the 1st respondent, giving details relating to the stamping of the promissory note;

(iii) stamp duty receipt no 691384 issued to Rattray Patterson Rattray;

(iv) notice of assessment from Tax Administration Jamaica dated 10 September 2012, in relation to the payment of the fees for the stamping of the promissory note.

[11] It is common ground between the parties that this preliminary objection was raised before the commencement of the trial. In fact on 19 April 2013 the appellant served the 1st respondent with a list of documents containing 39 new documents, which had only been filed on the day before. The learned judge was therefore asked to hear the preliminary objection and deal with the trial thereafter as he saw fit. As indicated, in para [2] herein the judge having given his decision on the preliminary objection adjourned the trial. It is the learned judge's decision in relation to the preliminary objection which now gives rise to this appeal.

The appeal

[12] On 30 April 2013, the appellant filed the notice and grounds of appeal. The following are the grounds of appeal:

> "(i) The learned judged erred in law and/or wrongly exercised his discretion by finding that the document entitled 'Promissory Note' and dated May 30, 2005 was not adequately stamped as there was no evidence before the learned judge to support such a finding.
>
> (ii) The learned judge erred in law and/or wrongly exercised his discretion by finding that the document entitled 'Promissory Note' has no evidentiary effect.
>
> (iii) The learned Judge erred in law and/or wrongly exercised his discretion by taking into consideration the documents attached to the Notice of Preliminary Objection filed April 16, 2013 which had not been admitted into evidence before the Court nor were they exhibited to an Affidavit.
>
> (iv) The learned judge erred in law and/or wrongly exercised his discretion by finding that the said document entitled 'Promissory Note' was in breach of Sections 35 and 36 of the Stamp Duty Act.
>
> (v) The learned Judge erred in law and/or wrongly exercised his discretion by failing to appreciate that the said document entitled 'Promissory Note' was evidence of an underlying loan agreement between the Appellant and the Deceased Raymond Brooks and was therefore not being enforced or relied upon for the purposes of Section 36 of the Stamp Duty Act or otherwise.
>
> (vi) The learned Judge erred in law and/or wrongly exercised his discretion by treating the objection raised on behalf of the Claimant as a preliminary objection, as its determination was not conclusive of the matter before the Court."

The preliminary point on appeal

[13] On 18 February 2014 prior to the hearing of the appeal the 1st respondent filed a "Notice of Preliminary Point" which raised two points, namely:

> "1. This Honourable Court is without jurisdiction to hear this appeal and
>
> 2. This appeal is premature as it is neither a procedural nor a final appeal."

1st respondent's submissions

[14] The gravamen of the submissions of counsel for the 1st respondent was that the decision of Brown J was not an order or judgment as contemplated by section 10 of the Judicature (Appellate Jurisdiction) Act, from which an appeal would lie. Counsel submitted that the order of Brown J was a mere ruling on the admissibility of evidence and therefore not appealable. Counsel submitted that had the learned trial judge refused permission to appeal, the trial would have continued, so the issue itself had not been determined, just merely narrowly defined. Had the order been made at a case management conference, or at a pre-trial review, the 1st respondent's approach to the appeal, he said, would have been different. The authorities of ***Moncris Investments Ltd, Allan Deans, Reynu Deans v Lans Efford Francis, Carol Marie Francis and the Registrar of Titles*** SCCA No 50/1992, delivered 23 June 1992 and ***Wilmot Perkins v Noel B Irving*** SCCA No 80/1997, delivered 31 July 1997 were relied on in making the point that whereas an order or judgment of the Supreme Court is appealable, a mere ruling is not.

[15] Counsel further submitted that Brown J's decision, having taken place during the course of the trial, was neither procedural (as defined by rule 1.1(8) of the Court of Appeal Rules, 2002) nor a final appeal, as it had not decided any of the substantive issues in the claim, in particular, the issue of whether there was a debt owed by the deceased's estate to the appellant, which still remains an issue to be determined at the trial. Additionally, counsel argued that it was the appellant's contention that the promissory note was simply evidence that a loan agreement existed between the appellant and the deceased, but since that matter is yet to be determined, the appeal could only be heard by the court if judgment had been granted against the appellant. As a consequence, counsel submitted, the filing of the appeal was premature.

[16] In summary, the 1st respondent contended that this court had no jurisdiction to hear the appeal.

Appellant's submissions

[17] Counsel for the appellant took the opposite view in relation to the 1st respondent's submission that Brown J's decision did not give rise to a procedural appeal. Counsel submitted that Brown J's decision did in fact give rise to a procedural appeal as the decision was made before the trial commenced, arising from a preliminary point which was raised by the 1st respondent's counsel relating to the admissibility of the document which is the subject matter of this appeal. Counsel submitted that a trial takes place when one or more of the parties presents evidence upon which a court makes a decision which should determine the proceedings. Counsel sought support

from the learned author of Words and Phrases Legally defined, 3rd edition in making the point that the trial had not commenced at the time of Brown J's decision.

[18] Counsel contended that had Brown J made his decision during the course of the trial, his order would not have been appealable as it would fall in the category of a decision made during the course of a trial. It was contended on behalf of the appellant that in making the decision that he did, Brown J acted in a similar manner to a judge at a pre-trial review making a ruling with regard to the admissibility of evidence.

[19] Counsel sought to distinguish the cases relied on by the 1st respondent and submitted that the very same authorities supported the appellant's position that Brown J's decision on the admissibility of evidence before the commencement of the trial gave rise to an appealable order and that the preliminary objection raised by the 1st Respondent led to a "trial within a trial", the decision arising thereon being an appealable order.

Analysis and discussion on the preliminary point

[20] It is common ground between the parties that whereas an order or judgment of the Supreme Court is appealable, a mere ruling is not (see ***Moncris***). It is the 1st respondent's contention, however, that Brown J's decision was a ruling, while the appellant contends that the decision was in the form of an order which is appealable. It appears therefore that the sole issue for determination in relation to this preliminary point is whether Brown J's decision was a ruling or an order.

[21] The authorities relied on by both the 1st respondent and the appellant demonstrate that in deciding whether a decision is appealable, the court has looked at the stage the proceedings had reached at the time the decision was made (see ***Wilmot Perkins)***; and whether the decision was based on an issue in the trial of which an order is made for its determination (see ***Moncris***).

[22] In ***Wilmot Perkins***, before the commencement of the trial, the appellant's counsel asked the trial judge to recuse himself on the ground that there was a real danger of bias. The learned judge refused and one of the issues before the Court of Appeal was whether the judge's refusal to withdraw from the case was an order and therefore appealable. Forte JA (as he then was) stated at page 6 of the judgment:

> "In the instant case, **it was before the commencement of the trial**, that counsel moved the court to allow for another judge to try the case, as the appellant contended that a real danger of bias was likely. This was not an application made during the process of the trial as to a matter affecting evidence which required a ruling as to admissibility or other matters of that sort…" [Emphasis supplied]

[23] Downer JA had this to say at page 27:

> "It is important to grasp that both the application for an adjournment and for Ellis J to disqualify himself were taken before Mr. Goffe, Q.C. opened his case on behalf of Mr. Irving…"

[24] In the final analysis, it was decided by the court that the decision was an appealable order.

[25] In the ***Moncris*** *case,* the issue was whether a decision made by the trial judge, during the course of the trial as to the admissibility of evidence, was a ruling or an order. Carey JA at page 3 of the judgment made the point that:

> "A ruling on the admissibility of evidence, plainly does not come within [the] definition [of judgment or order]. It would make for a great loss of time and money if, on every occasion a judge made a ruling on the admissibility of evidence, which some party thought was incorrect, that by itself enabled him or her to apply to this Court by way of appeal. One can understand quite easily, the situation where the question of the admissibility of the evidence is made an issue in the case to be determined. As for example, a trial within a trial, in which an order for such a determination is made. Plainly there would, in those circumstances, be an appealable order…"

[26] Based on the documents before this court, it is clear that the decision of Brown J on the notice of preliminary objection was made before the commencement of the trial. Based on the authorities, such a decision as regards the admissibility of evidence which is made before the commencement of a trial is not a ruling, but an order of the court which is appealable. As to when a trial is commenced, the learned authors of Words and Phrases Legally Defined, 3rd edition, state that:

> "...this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non-jury trial, enter[s] upon the hearing and examination of the facts for the purpose of determining the questions in controversy in the litigation…"

[27] In the final analysis, after we heard the submissions of counsel we ruled that Brown J's decision was an appealable order and we dismissed the preliminary objection and proceeded with the hearing of the appeal. We promised to give our reasons in respect of the preliminary point when the judgment and reasons on the substantive appeal were delivered. The above reasons are a fulfillment of that promise.

[28] At the hearing of the appeal, counsel for both parties made submissions under each of the grounds enumerated in para [12] above. These submissions were at times repetitive due to the fact that some of the grounds are connected. Accordingly, I have grouped the grounds in order to avoid such repetition in the judgment:

GROUNDS 3(i) and 3(iii)

The learned judged erred in law and/or wrongly exercised his discretion by finding that the document entitled "Promissory Note" and dated May 30, 2005 was not adequately stamped as there was no evidence before the learned judge to support such a finding.

The learned Judge erred in law and/or wrongly exercised his discretion by taking into consideration the documents attached to the Notice of Preliminary Objection filed April 16, 2013 which had not been admitted into evidence before the Court nor were they exhibited to an Affidavit.

Appellant's submissions

[29] Under these grounds counsel for the appellant argued that in arriving at his decision, the learned judge placed reliance on documents that were attached to the 1st respondent's notice of preliminary objection. Those documents, it was argued, were not in evidence before the court as the trial had not yet commenced and neither were they exhibited to an affidavit. In so far as that was so, counsel contended that the learned judge was not entitled to rely on the documents and in so doing fell into error.

[30] As regards the finding by the learned judge that the promissory note was not adequately stamped, counsel for the appellant argued that there was no indication on any of the documents attached to the notice of preliminary objection that the amount for which the promissory note was stamped was inadequate. It was argued that in order for there to have been a finding that the document had been inadequately stamped, the 1st respondent would have had to lead evidence as to the amount which represented the proper stamp duty payable on the document. Counsel argued that it is based on such evidence that it would then be an issue of fact and law for the trial judge to determine the amount for which the document should have been stamped. However, no such evidence was led in the court below. In fact, counsel conceded that that point had not been raised in the court below, but maintained that the court had a duty to act in accordance with the law in respect of any matter before it. The learned judge had erred, he submitted, as once the document had been stamped the court could not look behind the stamped document in respect of the adequacy of the stamping.

1st respondent's submissions

[31] Counsel for the 1st respondent contended that the learned judge did not say that his decision was based on his reliance on the documents annexed to the notice of preliminary objection, but even if he did so rely, it was in his power to do so. Counsel noted that the documents annexed to the notice of preliminary objection were obtained pursuant to an order of the court below made by Straw J on 8 August 2012.

[32] Counsel argued that when considering preliminary issues or points of law, the court has the power to order that evidence of any particular fact be given in any manner, such as simply the production of documents or entries in books or copies of them, or even specified newspapers. Reliance for this proposition was placed on Atkin's Encyclopedia of Court Forms in Civil Proceedings, 2nd edition, vol 23, page 167.

[33] The written submissions filed on behalf of the 1st respondent highlighted two concessions allegedly made by the appellant before Brown J: (i) that the promissory note dated 30 May 2005 was not stamped as a promissory note in accordance with the law; and (ii) that the promissory note cannot be stamped as a promissory note and cannot be relied on as a promissory note in view of the fact that it was stamped in breach of the Stamp Duty Act. It was argued that there was therefore no dispute before Brown J that the promissory note was stamped in breach of the Stamp Duty Act.

[34] It was submitted that, in any event, the outcome of the preliminary issue could have been determined solely by considering the promissory note in question, as the original promissory note carried all the information required by the Stamp Duty Act, 1957 and the Stamp Duty Rules, 1959, those being: an impressed stamp along with the stamping details including the instrument number, the amount paid for the stamp duty and the date of the stamp.

[35] Counsel submitted that there was no need to lead evidence as to how much stamp duty was payable on the promissory note as there was no issue or question before the court below relating to the amount of stamp duty which was payable on the

promissory note. It was contended that the preliminary point before Brown J concerned whether the promissory note was stamped in breach of section 35 of the Stamp Duty Act, 1937 and therefore not admissible in evidence by virtue of section 36 of the Act.

Discussion and analysis

[36] One of the appellant's complaints is that in arriving at his decision, the learned judge relied on documents that were attached to the 1st respondent's notice. Strictly speaking, there is no evidence that Brown J did in fact rely on these documents, as he did not provide any reasons for his decision. It was common ground between the parties for example, that the promissory note had thereon an impressed stamp along with the stamping details including the instrument number, the amount paid for the stamp duty and the date of the stamp. It therefore appears that the learned judge was able to arrive at his decision by solely considering the promissory note in question. This argument is therefore without merit.

[37] As regards the challenge to the learned judge's decision that the promissory note was not adequately stamped, it is common ground that there was no challenge in the court below as to the amount that the promissory note ought to have been stamped for. The learned judge's decision therefore ought not to be interpreted as addressing whether the promissory note should have been stamped for a greater or lesser sum. It was also common ground between the parties that the promissory note, though executed on 30 May 2005, was not stamped until some four years later on 21 September 2009. There therefore seems to be no dispute, and as I understand it, the

appellant does not take issue with the fact that the promissory note was stamped in breach of section 35 of the Stamp Duty Act which provides that:

> "The Commissioner shall not stamp any inland or foreign bill of exchange, or promissory note, or foreign bill of lading, after the lapse of seven days from the execution thereof, or any coastwise receipt, or inland bill of lading after the execution thereof."

Section 36 of the Stamp Duty Act states:

> "No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof."

Pursuant to section 36 therefore, it would seem, prima facie, that such a document, stamped in excess of the seven days stipulated in section 35 of the Act, would not have been stamped according to law, and could not be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof. The issue, however as will be seen as argued under grounds 3 (ii), (iv) and (v), related to the proper interpretation to be accorded the words "admitted in evidence", "in any court or proceeding" and "for the enforcement thereof".

[38] That being the case, in my view, the learned judge was entitled to find that the promissory note had not been "adequately" stamped, meaning in conformity with the provisions of the Act. No doubt it would have been preferable had the learned judge said that the document had not been stamped in accordance with section 35 of the Stamp Duty Act, as such language would not have led to the interpretation that the learned judge was speaking to the inadequacy of the duty payable on the document. It

appears that the submissions before the learned judge related to the date on which the promissory note had been stamped, and not the amount of duty payable, which is why the appellant had accepted that the promissory note in those circumstances could not be relied on as a promissory note. Accordingly, in my opinion, the language used by the learned judge should simply be taken to mean that the document was not properly stamped in accordance with the Act.

[39] It is worth emphasizing that the promissory note was not stamped in accordance with section 35 of the Stamp Duty Act and was therefore not admissible in any court proceeding as a valid promissory note to enforce it, pursuant to section 36 of the Stamp Duty Act.

[40] The appellant's challenge to the learned judge's decision on grounds 3(i) and 3(iii) is therefore without merit.

GROUNDS 3(ii), 3(iv) and 3(v)

The learned judge erred in law and/or wrongly exercised his discretion by finding that the document entitled "Promissory Note" has no evidentiary effect.

The learned judge erred in law and/or wrongly exercised his discretion by finding that the said document entitled "Promissory Note" was in breach of Sections 35 and 36 of the Stamp Duty Act.

The learned Judge erred in law and/or wrongly exercised his discretion by failing to appreciate that the said document entitled "Promissory Note" was evidence of an underlying loan agreement between the Appellant and the deceased Raymond Brooks and was therefore not being enforced or relied upon for the purposes of Section 36 of the Stamp Duty Act or otherwise.

Appellant's submissions

[41] Counsel for the appellant submitted that the appellant was not seeking to enforce the promissory note. No counterclaim had been filed. Counsel maintained that section 36 of the Stamp Duty Act must be given its natural and ordinary meaning, namely that the promissory note cannot be enforced in a court or proceeding. It is the 1st respondent, he argued, who had filed suit and was seeking to enforce the matter through the courts. The appellant's contention was that the basis on which reliance was being placed on the promissory note was to corroborate the existence of a loan agreement between the appellant and the deceased wherein the sums in question were disbursed by the appellant to the deceased and recovered by the appellant subsequent to the deceased's death, by withdrawal of sums from the deceased's accounts, as a just debt of the deceased's estate.

[42] It was submitted that as the appellant was not seeking to enforce the promissory note in the proceedings in the court below, section 36 of the Stamp Duty Act was not relevant. It was further submitted that by virtue of that section, the promissory note could only be precluded from being admitted into evidence if the matter before the court concerned the enforcement of the subject document, which the proceedings in the court below were not. Counsel stated that the document had been stamped by the Taxpayer Audit and Assessment Department as an agreement without seal. It had, he said, been assessed and stamped for $10.00 and a further $10.00 penalty for late stamping pursuant to the Stamp Duty Act and Regulations. Counsel relied on **Evans v Prothero** 1DE GM & G 572, for the principle that a document may not be admissible

for a certain purpose but may be admissible for another purpose. So whilst he accepted that the subject document was entitled a "promissory note" and may not be relied on for that purpose, it could be relied on to corroborate the underlying debt, arising from the loan agreement.

[43] Counsel submitted that based on the appellant's pleaded case, he had not brought a claim upon the promissory note, nor as indicated was he seeking to enforce its terms. Rather, it was submitted that the document was corroborative of his case and ought to have been accepted into evidence as a document which would assist the appellant in establishing his defence as pleaded.

1st Respondent's submissions

[44] In response, counsel for the 1st respondent highlighted that throughout the appellant's defence and witness statement, the appellant had maintained that the document in question was a promissory note. Counsel submitted that it was the appellant's case that he had withdrawn the monies from the deceased's accounts, which counsel submitted was a "self-help" method of attempting to enforce the promissory note. Counsel argued that there was nothing in the appellant's pleaded defence which indicated that a loan agreement or any agreement existed between the appellant and the deceased. It was therefore contended that the argument now being advanced before this court, as to the promissory note being relied on to corroborate the existence of a loan agreement with the deceased, was inconsistent with the appellant's pleaded case.

[45] Counsel contended further, that the fact that the appellant alleged in his defence that he is entitled to repayment of the sums stated in the promissory note, meant that he was seeking to enforce the promissory note. However, counsel made it clear that the fact that the appellant had withdrawn the monies in question pursuant to the promissory note did not mean that he was entitled to those monies, as he would have to remit them should the court find that the sums were unlawfully withdrawn.

[46] Counsel for the 1st respondent relied on the case of **M'Taggart v MacEachern's Judicial Factor** (1949) SC 503 in making the point that the document in question had all the features of a promissory note viz:

(i) Its contents consisted substantially of a promise to pay - containing a promise to pay meant that, that was the substance of the document, the whole of its contents; it does not mean that containing a promise to pay, formed one of a number of stipulations.

(ii) The sum of money payable is a definite sum of money and not just "any sum of money".

(iii) The writing does not purport to do substantially anything more than make such a promise of payment.

(iv) The writing is completely unilateral in the sense that it does not require the grantee or any third person to do anything so as to bring it into operation or make it effective.

(v) The document is definite as to the date when the payment promised is to be made.

(vi) The document is definite as to the person to whom the payment is to be made.

[47] These requirements, counsel submitted, conformed with the definition of promissory notes contained in section 83 of the Bills of Exchange Act.

[48] Counsel for the 1st respondent also relied on **Evans v Prothero** and on **Mortgage Insurance Corporation Limited v Commissioners of Inland Revenue** (1888) 21 QBD 352 in making the point that the promissory note in question could not be classified as an agreement as it did not contain any of the requisites to constitute an agreement. Counsel also argued that there was no authority provided, and perhaps there was none that could be provided, to permit the Taxpayer Audit and Assessment Department to determine and reclassify a document presented for assessment as something other than what it was entitled. The document was headed "Promissory Note" and was not a document executed under seal, nor was it a deed. It was as described, namely a "promissory note", which was how the appellant had also always referred to it, and counsel reiterated, it was inadequately stamped and, inadmissible in the proceedings. The learned judge, he said, had been correct in his ruling to that effect. Counsel drew the court's attention to section 50 of the Stamp Duty Act, but submitted that it was inapplicable to the instant case and could not avail the appellant,

as it was for the court to determine the true nature and effect of the promissory note, which the trial judge had done correctly.

Analysis and discussion

[49] The essential question arising from these grounds is: can the promissory note, notwithstanding not being in compliance with section 35 of the Stamp Duty Act, and therefore inadmissible if being enforced in court proceedings pursuant to section 36 of the Act, be relied on as evidence to corroborate the existence of a loan agreement between the appellant and the deceased?

[50] The 1st respondent has argued that this is a new argument that was not raised on the appellant's pleaded case. Based on this contention, it is necessary to peruse the pleaded case of the appellant and the 1st respondent to determine if the 1st respondent's objection has merit. If it was not the appellant's pleaded case that he was using the promissory note to corroborate the existence of a loan agreement and, not attempting to enforce it pursuant to section 36 of the Stamp Duty Act, then such an argument would not be permitted.

[51] With respect to the promissory note, the relevant portions of the 1st respondent's particulars of claim, namely paras 36, 37, 38 and 41, have been set out in para [5] herein. The relevant paras of the defence have also been referred to herein in paras [7] and [8].

[52] On any review of the relevant portions of the appellant's defence as set out above, it is my view that it cannot be said that it was not the appellant's pleaded case

that the promissory note was being relied on to corroborate the existence of a loan agreement. Based on the defence, the appellant's pleaded case has always been that he loaned US$30,000.00 to the deceased and that the promissory note "is proof of a debt which was justly and truly owed by the deceased" to him. This was not a new argument contrary to what the 1st respondent contends. That being the case, the essential question, is can a promissory note which has not been stamped in accordance with and is therefore not in compliance with section 35 of the Stamp Duty Act, be admissible in evidence and be relied on to corroborate the existence of a loan between the parties? The 1st respondent has placed heavy reliance on the fact that it cannot be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof.

[53] Section 50 of the Stamp Duty Act, however, appears to contemplate that even where a promissory note is not duly stamped within the time set out by section 35, the necessary duties and fines can be paid thereon at which time the document becomes valid and available as evidence. According to the section:

> "50. Every person who issues, endorses, transfers, negotiates, presents for payment, or pays any bill of exchange, or promissory note liable to duty, and not being duly stamped, shall incur a fine or penalty not exceeding one hundred dollars and the person who takes or receives from any other person such bill or note, either in payment, or as security, or by purchase, or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever, **except that the same may be used for the purposes of evidence on payment of the stamp duty payable thereon, together with a penalty**

> **equal to the stamp duty payable thereon**, which penalty shall be in lieu of the penalty imposed by section 32". [Emphasis supplied]

[54] The wording of section 50 indicates that it does not amplify nor repeal section 36. It therefore still remains that a document thus described in that section could not be admitted in evidence in order to recover on or enforce it. What, in my opinion, section 50 does, however, allow, is that on payment of the required stamp duty and a fine and/or penalty, the document may be used for the purposes of evidence. By virtue of this section, a person in the appellant's position is able to say, "This document is corroborative of an agreement I had with the deceased. I now seek to tender it." It is my view that in so far as the learned judge failed to appreciate this, he fell into error.

[55] It appears that the learned judge took the approach of Lord McIntosh in the **M'Taggart** case, which is relied on by the 1st respondent. That case was, however, decided within the context of section 14(4) of the UK Stamp Act, 1891 which provided:

> "Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, **shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever**, unless it is duly stamped in accordance with the law in force at the time when it was first executed." [Emphasis supplied]

[56] The Stamp Duty Act, is different, however, in so far as section 50, as indicated above, provides for the document to be used as evidence upon the duties and relevant fines and penalties having been paid.

[57] The 1st respondent has argued that the promissory note in question cannot be classified as an agreement as it does not contain any of the requisites to constitute an agreement, and has relied on the cases of **Evans v Prothero** and **Mortgage Insurance Corporation Limited v Commissioners of Inland Revenue**. The appellant's case, however, is not that the promissory note is a contract thereby requiring the formalities of a contract. The appellant's case is that the document is corroborative of his agreement with the deceased. The document is capable of providing corroborative evidence of his contention that he loaned money to the deceased and that the amount that was owed represents the monies that he deducted from the deceased's accounts, which are reflected on the promissory note. That is an entirely different matter from saying that the document comprises the agreement between the parties.

[58] It is my view that the learned judge erred in so far as he failed to recognize that the Stamp Duty Act, contemplates that a promissory note can be used in court for purposes other than its enforcement. In ruling that the promissory note has no evidentiary effect the learned judge effectively prohibited the appellant from utilizing the document in accordance with the provisions of the Stamp Duty Act, in support of an important aspect of his defence and, in so doing fell into error. It will, however, be a matter for the appellant to prove that the duties and any applicable fines and penalties have been paid before the promissory note would be admissible pursuant to section 50 of the Act.

GROUND 3(vi)

The learned Judge erred in law and/or wrongly exercised his discretion by treating the objection raised on behalf of the Claimant as a preliminary objection, as its determination was not conclusive of the matter before the Court.

Appellant's submissions

[59] Counsel for the appellant submitted that the learned judge ought properly to have determined the objection raised during the course of the trial rather than as a preliminary issue. It was argued that the appropriate point at which the objection should have been taken was when the appellant sought to put the subject document in evidence. Counsel submitted that in treating the matter as a preliminary objection the learned judge did not have the benefit of other evidence adduced on the appellant's behalf, which would have established that the subject document was simply corroborative of the appellant's case. Additionally, the learned judge did not have the benefit of other documents being tendered into evidence in the case generally, which could have assisted him in his determination of the issue.

1st respondent's submissions

[60] Counsel for the 1st respondent submitted that the learned judge was asked to decide a question on a point of law and that the court has the power at any stage of the proceedings to determine whether an issue should be decided as a preliminary issue. He referred to Atkin's Encyclopedia of Court Forms in Civil Proceedings, 2nd edition, vol 23, page 162.

[61] Counsel submitted further that a question relating to whether specified documents are admissible at trial is one of the many issues that the court will determine as a preliminary issue. For this submission he relied on **Bearmans Ltd v Metropolitan Police District Receiver** [1961] 1 All ER 384.

[62] Counsel submitted that the determination of a point of law does not have to be conclusive of the case as a whole for the point of law to be considered by the court. Counsel stated that it is sufficient if the determination of the preliminary issue will at least dispose of one aspect of the case or will cut down the costs and time involved in connection with the trial itself. Counsel referred to and relied on **Steele v Steele** (2001) the Times, 5 June 2001 for that proposition.

Analysis and discussion

[63] No authority has been cited by the appellant in support of the submission that the learned judge erred in treating the objection raised as a preliminary objection. Likewise, no authority has been cited in support of the argument that in order to embark on such a process the objection has to be determinative of the matter.

[64] It will be recalled that in response to the 1st respondent's argument that the decision of Brown J was not appealable, it was argued on behalf of the appellant that what Brown J conducted was a 'trial within a trial' and that in so far as that is so his decision was appealable. Reliance was placed on the case of **Moncris** for that position. In **Moncris,** Carey JA who delivered the judgment of the court suggested that questions as to the admissibility of evidence are commonplace often creating trials

within trials. Such decisions, the learned judge opined, are appealable. Following upon that reasoning, it cannot be seriously argued that a trial judge's decision to embark on a 'trial within a trial' as to the admissibility of a document is open to challenge. Nor could a determination of the said issue at a case management conference or at a pre-trial review not be considered an order or decision and therefore appealable. In addition such a process can properly be conducted at any stage in the proceedings. In fact in **Wilmot Perkins** which counsel for the appellant sought to distinguish in making the point that Brown J's decision was appealable, a point of law was raised prior to the opening of the claimant's case. That is exactly the position in the instant case.

[65] This ground is therefore without merit.

Conclusion

[66] For the reasons set out herein, it is my view that the promissory note is admissible for evidentiary purposes once there has been compliance with section 50 of the Stamp Duty Act.

[67] For the avoidance of doubt the promissory note cannot be admitted in evidence as a promissory note, nor for purposes of its enforcement. The provisions of sections 35 and 36 of the Stamp Duty Act have not been complied with and so the promissory note cannot be utilized in that way. It must also be made clear that this court has not made any decision that there was in fact a loan. That is a matter for the trial court. However, once section 50 of the Stamp Duty Act has been complied with, the appellant should be able to endeavour to adduce in evidence the promissory note in support of

his contention that a loan existed. At that point the 1st respondent will be able to challenge the document, especially in light of her contention in the particulars of claim that the document is fraudulent.

[68] In the light of all of the above I would allow the appeal with costs in the appeal and in the court below, to the appellant, to be paid by the 1st respondent.

McINTOSH JA

[69] Having had the opportunity to read in draft the judgment of my sister Phillips JA, I agree with her reasoning and conclusion and have nothing useful to add.

LAWRENCE-BESWICK JA (Ag)

[70] I have read in draft the judgment of Phillips JA and agree with her reasoning and conclusion. I have nothing to add.

PHILLIPS JA

ORDER

Appeal allowed. Costs in the appeal and in the court below to the appellant to be paid by the 1st respondent, such costs to be taxed if not agreed.