**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 35/2006**

**BEFORE:** **THE HON. MR. JUSTICE PANTON, P.**
**THE HON. MR. JUSTICE MORRISON, J.A.**
**THE HON. MRS. JUSTICE N. McINTOSH, J.A. (Ag.)**

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| **BETWEEN** | **VERNON LYLE** | **APPELLANT** |
| **AND** | **ALLAN WAYNE LYLE** | **RESPONDENT** |

**Ransford Braham and Ms. Gisele Morgan instructed by Livingston, Alexander & Levy for the Appellant**

**Ravil Golding instructed by Lyn-Cook, Golding & Company for the respondent**

**April 20, 24 & October 2, 2009**

**PANTON, P.**

1. On April 24, 2009, we dismissed the appeal herein, affirmed the judgment of Sinclair-Haynes, J. (Ag.) delivered on May 10, 2005, and awarded costs of the appeal to the respondent to be agreed or taxed. We promised then to put our reasons in writing. This we now do.

2. The respondent filed a claim on September 22, 2004, against the appellant (his father) for $4.8 million with interest in the amount of $3.84 million, being sums he claimed the appellant acknowledged as due and owing to him (the respondent).

3. The particulars of claim indicate that in or about October, 1988, the respondent, while residing in the United States of America, transmitted the sum of one hundred thousand United States dollars (US$100,000.00) to the appellant for it to be applied towards the purchase of a house for the respondent. Although the appellant led the respondent to believe that a house had been purchased, that was not the case. When the respondent returned to Jamaica in October, 2003 and discovered that no house had been purchased, he demanded the return of his money. The particulars further indicate that by letter dated July 6, 2004, the appellant wrote to his attorney-at-law, copying same to the respondent, acknowledging the debt with interest.

4. A defence was filed out of time on November 12, 2004, denying the claim. In this defence, the appellant's wife, purporting to have a power of attorney, asserted that the appellant was of unsound mind at the time of the letter of July 6, 2004 and that the document is not the appellant's deed. Non est factum was the plea. Alternatively, the appellant contends that he was unduly influenced by the respondent who had taken him to his (the appellant's) attorney-at-law for the preparation of the letter.

5. The respondent filed an application for court orders, namely, the striking out of the defence and the entry of summary judgment in his favour. The learned judge noted that the defence had been filed outside the prescribed time, and that the appellant had not applied for extension of time to file same. She considered whether she would have been dealing justly, fairly and expeditiously with the matter were she to have allowed the appellant to file the defence. It was her view that there had been non-compliance with the rules through "sheer ignorance", but reminded herself that ignorance of the law was no excuse.

6. The learned judge then proceeded to consider whether there was a real prospect of the defence succeeding. In doing so, she considered the evidence of Mrs. Evadney Lyle, particularly that she was unable to disprove the respondent's case as to the remittance of the sums of money and the purpose for which they were sent. She concluded thus:

> "In the circumstances, even if I had been mindful to exercise my discretion to allow the defendant's defence to stand, Mrs. Lyle, through her own admission, could not prove her allegations."

In view of Mrs. Lyle's lack of knowledge of the facts so as to be able to dispute the claim and to sustain the defences of undue influence and non est factum, as well as what she saw as Mrs. Lyle's lack of standing to

defend the action, the learned judge felt obliged to enter judgment for the respondent. She ordered as follows:

> "1. Summary Judgment in favour of the Claimant on the Claim herein.
>
> 2. Defence of the Respondent/Defendant struck out.
>
> 3. That Judgment be entered for the Claimant in terms of the Claim Form filed herein."

**Grounds of Appeal**

7. The following grounds of appeal were filed:

> "a. The learned judge erred in law and/or misdirected herself when she granted summary judgment in circumstances where the Claimant failed to establish that the Defendant had no real prospect of successfully defending the claim having regard to:
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> i. That there was an issue on the defence as to whether the Defendant was mentally competent to provide the alleged letter of acknowledgment dated the 6th July 2004.
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> ii. The statement made by Evadne Lyle that the Defendant was of unsound mind prior to and at the date of the alleged letter of acknowledgement of 6th July 2004 and this statement was not tested in cross-examination at the summary judgment application and in the circumstances is an issue that should have been determined at trial.
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> iii. The issue as to whether Dr. McKenzie, being a general practitioner, was capable of providing an opinion of the mental condition

of the Defendant was a matter that ought not to have been determined on a summary judgment application.

b. The Claimant's claim was statute-barred and there was no proper acknowledgement of the said debt capable of reviving the claim.

c. The learned trial judge erred in law in granting summary judgment in circumstances where the debt and/or claim was discharged and extinguished by an accord and satisfaction and/or compromise.

d. The learned trial judge erred in law and/or misdirected herself in granting summary judgment were the issue of the Claimant procuring the alleged letter of acknowledgment of 6th July 2004 by undue influence or a catching and unconscientious bargain, which said issue could not have been determined at summary judgment application but at trial where the said issues could be properly investigated.

e. The learned judge in granting summary judgment failed to appreciate that the Defendant was a patient suffering from mental disorder as defined under the Mental Health Act, and as a consequence and pursuant to Part 23 of the Civil Procedure Rules a next friend ought to have been appointed to represent the Defendant prior to the Claimant proceeding with his application for summary judgment."

8. In written submissions, the appellant contended that the following were issues for determination at a trial:

I. The circumstances of the actual creation of the debt;

II. The mental capacity of the appellant with particular reference to the letter of July 6, 2004;

III. The knowledge of the respondent as regards the appellant's mental capacity;

IV. Whether there had been the relationship of trust and confidence between the parties, and there has been an abuse of the relationship;

V. Whether there had been accord and satisfaction thereby extinguishing the original debt.

9. From this summary of the issues, it is clear that the creation and continued existence of the debt, as well as the mental capacity of the appellant were the matters that the appellant wished us to focus on. It is also clear that these matters related to different periods of time.

**The creation of the debt**

10. The contention of the appellant was that the judge's first consideration ought to have been ensuring that the debt had in fact been created. According to the submission, the only acknowledgment of the debt was the letter of July 6, 2004, the validity of which was under challenge given the mental capacity of the appellant. The respondent however pointed to other correspondence between the parties and submitted that there has been clear acknowledgment of the debt.

11. On December 16, 2003, the appellant's attorney-at-law wrote to the respondent's attorneys-at-law thus:

> "It is our understanding that Mrs. Evadne Lyle, the wife of our client has agreed to settle the outstanding indebtedness to Mr. Allan Lyle. We now write to request that whatever arrangements that are being made by Mrs. Lyle in this matter insofar as they affect the assets or interest of Mr. Lyle must first be referred to us, as Mrs. Lyle has no authority to pledge the credit or assets of Mr. Lyle."

This letter did not deny the existence of a debt. On the contrary, it acknowledges the debt as outstanding, and expresses the preference for the arrangements for its settlement to be referred to the appellant's attorney-at-law, as the appellant's wife has no authority to pledge the appellant's credit or assets.

12. Notwithstanding this letter, the appellant's wife's attorneys-at-law wrote in the following terms to the respondent's attorneys-at-law on February 10, 2004:

> "Our client is the wife of Mr. Vernal Lyle, who is the father of your client. In or about 1996 your client while living in the United States of America sent funds totaling Eighty Thousand Dollars United States currency (US$80,000.00) to his father in Jamaica for safe keeping.
>
> Your client recently returned ...
>
> Your client has demanded the return of the above - stated funds from his father...this matter has created a very uncomfortable atmosphere within the home.

> Your client has indicated his willingness to accept this reimbursement in Jamaican currency ...
>
> Our client has taken steps to put these funds together and should be in a position to reimburse your client in full within five (5) days...
>
> We shall be happy to hear from you in respect of the foregoing as soon as possible so that this matter can proceed to an amicable conclusion."

This letter is not only further acknowledgment of the existence of the debt but it also indicates an intention and willingness to settle it. The appellant's wife in the said letter put forward as conditions for settlement:

> (a) the handing over of all keys to the premises by the respondent, upon reimbursement; and
>
> (b) the respondent's undertaking not to return to the premises unless invited.

It ill behoves the appellant's wife, now with a limited power of attorney, to be seeking to deny this acknowledgment of the debt, and requesting a trial in circumstances where she will not be able to contradict in any respect the existence of the debt. In the circumstances, there was no merit seen in this ground of appeal.

**The mental capacity of the appellant**

13. The tenor of the appellant's submission in this regard was that the respondent's claim was based on the letter of July 6, 2004, but the

appellant was not in a mental condition to give the instructions contained therein. According to the submission, the appellant's signature on the letter was a mere mark as the mind of the appellant did not go with the writing. Hence, the learned judge should have regarded the appellant's mental state as an issue for determination, and so summary judgment should not have been entered. The respondent has countered by saying that, taken to its logical conclusion, if the appellant is declared non compos mentis, he would be unable to give evidence at a trial to dispute the claim. The debt arose before July 6, 2004, and so that date could not be the date from which the Court would assess the merits of the claim.

14. In the documents placed before Sinclair-Haynes, J. (Ag.) was a certificate dated September 29, 2004, signed by Dr. Clive McKenzie, physician and surgeon, to the effect that the appellant:

(a) had been his patient since October 4, 2003;

(b) was suffering from hypertension, debilitating osteoarthritis, Alzheimer's disease, poor vision and amnesia;

(c) was at times disorientated in time, place and person; and

(d) was unable to make any sober decision at the time of the certificate.

15. It should be noted that the certificate does not eliminate the possibility of the appellant giving instructions to his attorney-at-law, and

signing the letter in question. Amnesia relates to the inability to recollect past events and, no doubt, there are degrees of such a condition. It does not mean that there is an inability to give instructions or to sign documents. The disorientation that he suffers is also "at times". In any event, the important point is that whatever medical challenges the appellant may have faced since he became a patient of Dr. McKenzie in October, 2003, they would have been of no relevance to the debt which he incurred several years before. The existence of this debt was obviously communicated by him to his wife who acknowledged same in discussions and correspondence with the respondent. It is this communication that would have enabled the wife, with her limited power of attorney, to make the detailed proposals she made to the respondent with a view to resolving the dispute.

16. The respondent returned to Jamaica in October, 2003. That was the very month in which the appellant came under the care of Dr. McKenzie. The revelation of the misuse of the respondent's funds was made upon the respondent's return. Since then, the appellant has been continually represented by an attorney-at-law. There is absolutely no evidence that the appellant was unable to give instructions to his attorneys-at-law in this matter at any stage. In the absence of such evidence, it has to be assumed that the instructions he gave were

properly given. Dr. McKenzie was careful not to say that the appellant was of unsound mind. This allegation that was put before Sinclair-Haynes, J. (Ag.) was sheer speculation. In the circumstances, the ground as to mental capacity was of no moment.

17. In our view, the failure of these grounds sufficiently disposed of the appeal. It was rather ingenious of the appellant to advance on appeal before us grounds in relation to accord and satisfaction as well as the claim being statute-barred. These were never made part of the defence that was filed on November 12, 2004; nor were they raised before the learned judge. In any event, the acknowledgment of the debt referred to earlier defeats the point as to the claim being statute-barred; and the absence of satisfaction means that there has been no consideration, even if indeed there was an accord.

18. In the light of the above, we concluded that the appeal was without merit and had to be dismissed, with costs to the respondent to be agreed or taxed.