[2016] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 31/2014

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**MARVALYN TAYLOR-WRIGHT**	**APPELLANT**
AND	**SAGICOR BANK JAMAICA LIMITED (formerly known as RBC Royal Bank (Jamaica) Limited, formerly known as RBTT Bank Jamaica Limited)**	**RESPONDENT**

Ransford Braham QC and Anwar Wright instructed by Taylor-Wright & Co for the appellant

Mrs Sandra Minott-Phillips QC and Miss René Gayle instructed by Myers, Fletcher & Gordon for the respondent

11, 12 March 2015 and 1 July 2016

DUKHARAN JA

[1] I have read, in draft, the judgment of my sister Phillips JA and I agree with her reasoning and conclusion. I have nothing further to add.

PHILLIPS JA

[2] This appeal sought to challenge an order made by Sykes J on 14 April 2014, awarding summary judgment on a claim filed by the respondent against the appellant for money it claimed that she owed on a loan. This claim was based on a promissory

note which the appellant contended was forged. The appellant had applied to set aside that judgment on the basis that, *inter alia*, the learned judge failed to consider the fact that she had no liability to the respondent on a forged promissory note and the learned judge erred in considering documents that were not pleaded in the respondent's particulars of claim.

Factual background

[3] The appellant is an attorney-at-law and customer of the respondent. The respondent is a company duly incorporated in Jamaica and operates as a bank. It was formerly known as "RBC Royal Bank (Jamaica) Limited", prior to that as "RBTT Bank Jamaica Limited", before its name was changed on 26 June 2014 to "Sagicor Bank Jamaica Limited".

[4] On 27 July 2007, the appellant borrowed the sum of $21,760,000.00 from the respondent with interest. In pursuance of this arrangement, it was the respondent's contention that the appellant signed a promissory note dated 27 July 2007 (the 27 July promissory note). The appellant denied this, but admitted that she signed a promissory note on 20 July 2007 (the 20 July promissory note); she signed an offer letter; and provided residential property situated at Lot 4 Wireless Station Road, Stony Hill in the parish of Saint Andrew and commercial property situated at Duke Street in the parish of Kingston as security for the money advanced to her with the respondent being a 2nd mortgagee. The respondent alleged that the appellant made fairly regular payments towards the loan between July 2007 and June 2008, but subsequent payments were sporadic with the last payment being made on 31 December 2009.

The claim

[5] On 8 March 2011, the respondent filed a claim against the appellant for money owed on the loan with interest in the sum of $31,662,395.26 and money owed on credit cards with interest, fees, costs and expenses to the date of payment. The appellant subsequently paid the sums owed on the credit cards, but a dispute remained as to the money the respondent alleged was owed on the loan. The respondent also filed a particulars of claim on 8 March 2011. Paragraphs 3, 4, 5, 6 and 7 of the particulars of claim provide that:

> "3. By Promissory Note dated July 27, 2007 the [appellant], for valued [sic] received unconditionally promised to pay the [respondent] upon demand the sum of $21,760,000.00 together with interest thereon at a variable rate of .25% below the [respondent's] Prime Rate of interest as declared by the [respondent] from time to time payable monthly, both before and after demand or payment and judgment, with interest calculated on a daily basis based on a 360-day year and accruing from the date hereof until payment (hereinafter referred to as 'the demand loan'). A copy of the Promissory Note is attached as 'A'.
>
> 4. The Promissory Note further provided as follows:
>
> (i) Interest shall vary automatically on the day that the Prime Rate is varied by the [respondent] and without the requirement for individual notice by the [respondent] to the [appellant].
>
> (ii) The [respondent's] prime rate of interest at the date the Promissory note was made was 19.75% per annum.
>
> 5. The [appellant] made fairly regular payments towards the loan in the period July 2007 to June 2008. Subsequent payments were sporadic with the last

being made to the account on December 31, 2009 as shown below.

Demand Loan No. MG0821335217

	Principal	Interest
Principal balance as at July 21, 2007	21,760,000.00	
Interest accrued from 28/07/2007 to 31/12/2009		10,212,536.80
Less payments to principal 29/09/2007 to 31/12/2009	1,423,121.04	
Less payments to interest 31/07/2007 to 30/11/2008		3,998,207.71
Balances outstanding as at 31/12/2009	20,336,878.96	6,214,329.09

6. The [appellant] has failed and/or refused to further service the loan and the amount outstanding as at March 7, 2011, inclusive of interest, is detailed as follows:-

Demand Loan No. MG0821335217

Principal	20,336,878.96
Outstanding interest b/fwd from 31/12/2009	6,214,329.09
Interest from 01/01/2010 to 07/03/2011	4,747,813.86
Total amount due and on 07/03/2011	$31,299,021.93

7. Interest continues to accrue on the principal balance of $20,336,878.96 from the 8th day of March 2011 at the per diem rate of $11,015.81 being 19.50% per annum."

[6] The 27 July promissory note being relied on by the respondent is stated in its entirety as follows:

"Mandeville – 0045830000076

Individual

PROMISSORY NOTE

(Time or Demand)

TO: RBTT BANK JAMAICA LIMITED

DATE: _____July 27, 2007_____

AMOUNT: $21,760,000.00

On DEMAND AFTER DATE for value received the undersigned unconditionally PROMISES to PAY to **RBTT BANK JAMAICA LIMITED** or order (hereinafter, including any holder hereof, called 'the Holder') at **17 Dominica Drive, Kingston 5** or such other place as the Holder may designate the sum of **TWENTY ONE MILLION, SEVEN HUNDRED AND SIXTY THOUSAND** ---------- **Dollars ($21,760,000.0)** [sic] together with interest thereon at a variable rate per annum of POINT TWO FIVE --------- percentage (.25%) points BELOW [signature] the Holder's Prime Rate of interest as declared by the Holder from time to time, payable monthly, both before and after demand of payment and judgement [sic], with interest calculated on a daily basis based on a **360** - day year accruing from the date hereof until payment.

Unpaid interest shall be compounded at monthly rests [sic] at the same rate applicable in respect of principal at the relevant time.

The rate of interest hereunder shall vary automatically on the day that the Prime Rate is varied by the Holder and without the requirement of individual notice by the Holder to any party hereto.

The Holder's Prime Rate as at the date hereof is understood to be **NINETEEN POINT SEVEN FIVE** ----- percent (**19.75**%) per annum.

The undersigned hereby waives presentment, demand, protest and notice of any kind in the enforcement of this Note.

The term "undersigned" means the persons executing this Note and where there are more than one each of them shall be jointly and severally liable to the Holder.

This Note shall be governed by and construed in accordance with the Laws of Jamaica.

Signature: ____[signed]__ _____

Name: MARVALYN TAYLOR-WRIGHT
Address: LOT 4, WIRELESS STATION ROAD
STONY HILL, ST. ANDREW

Witness: __[signed]____ _____
ROOSEVELT GILLETT-CHAMBERS"

[7] The appellant replied to this claim by filing a defence on 29 April 2011, which was amended on 3 April 2012, and further amended on 18 May 2012. Paragraphs 2, 3, 4, 5, 6 and 15 of the further amended defence states that:

"2. The [appellant] categorically denies paragraphs 3 to 7 of the Particulars of Claim and say that she did not sign issue nor deliver to the [respondent] the instrument purporting to be a promissory note, which is referred to, relied on in and attached to the Particulars of Claim.

3. The [appellant] says further that the said instrument is fraudulent and/or a forgery and accordingly she is not liable on the said instrument as alleged or at all.

PARTICULARS OF FRAUD AND/OR FORGERY

(i) Making and inserting a representation of the [appellant's] signature after the word "below" in the body of the instrument at line 7 thereof, so as to cause it to appear to be that of the [appellant's].

(ii) Making and affixing a representation of the [appellant's] signature at the end/foot of the instrument so as to cause it to appear to be her signature.

(iii) Falsely representing that the [appellant] made her signature on the document in the presence of Mr. Roosevelt Gillett Chambers who was the attesting witness.

(iv) Falsely representing that the promissory note relied on in the Particulars of Claim is the [appellant's] document and that same was issued to the [respondent] by her.

4. The [appellant] will say that at all material times the alleged witness to the promissory note, Mr. Roosevelt Gillett Chambers was the manager of the [respondent's] Duke Street branch and while she has spoken to him on the phone and communicated to him in writing concerning an unrelated personal matter, she has never met him nor seen him in her life.

5. The [appellant] will say that in July of 2007 she borrowed the sum of $21,760,000.00 from the [respondent] and made payments thereon. If, which is not admitted, the sum claimed is owed by her, the [appellant] says that she has provided to the [respondent] collateral to secure the said loan in the form of prime real estate valued at approximately six times the sum claimed.

6. The [appellant] will say further that the [respondent] thereafter formalized second mortgages bearing numbers 1490190 and 1490187 and registered same on the said prime real estate: being land contained in Duplicate Certificates of Title registered at Volume 1159 and Folio 221 and Volume 1100 Folio 227 of the Register Book of Titles respectively and the transaction between the parties created in law a mortgage debt only.

...

15. The [appellant] will seek to rely in support of her defence, inter alia on copies of the duplicate Certificates of Title registered at Volume 1100 Folio 277 and Volume 1159 Folio 221 of the Register Book of Titles and mortgages no. 1490187 and 1490190

> endorsed thereon respectively, the genuine promissory note signed by her in the presence of Mr. Wilton South, agent of the [respondent] and the [respondent's] letter of commitment dated July 17, 2007."

[8] In the respondent's reply to the appellant's defence, filed 2 June 2011 and sworn to by Tyrone Nam, Manager of Retail Collections in the respondent, while Mr Nam denied that the 27 July promissory note was forged or fraudulent, he nonetheless stated that Mr Chambers could not remember whether the appellant had affixed her signature to the 27 July promissory note in his presence. Mr Nam also contended that Mr Chambers could not remember whether the appellant spoke to him on a phone, communicated to him in writing or whether he ever met the appellant before as alleged in paragraph 4 of the appellant's amended defence. Mr Nam admitted that the appellant signed instruments of mortgage for the properties at Stony Hill and Duke Street and exhibited these instruments to the respondent's reply. However, he maintained that the said note was signed by the appellant and delivered to the respondent bank.

The application for summary judgment

[9] On 8 May 2012, the respondent filed a notice of application for summary judgment on its claim with respect to the loan in the sum of $31,650,395.26. This application was made on the basis that the appellant had no real prospect of successfully defending the claim since: (i) she admitted in paragraph 15 of her amended defence that a genuine promissory note had been executed in the respondent's favour in the sum of $21,760,000.00 plus interest; (ii) she admitted in paragraph 5 of her amended defence that she borrowed the said sum and does not

deny owing the money; and (iii) the fact that the respondent elected to recover the money owed to it by the appellant using the 27 July promissory note and not the mortgage was immaterial.

[10] The affidavit of Richard Pryce, Manager of Retail Collections in the respondent bank, was filed on 8 May 2012 in support of the said application. He deponed that the appellant was in default on her loan and the last payment on the loan was in December 2009. He noted that First Global Bank, the 1st mortgagee of the Duke Street property, exercised its power of sale with respect to that said property, but the sum obtained was insufficient to yield any surplus payable to the respondent (the 2nd mortgagee). He noted that the appellant admitted to borrowing the sum of $21,760,000.00 from the respondent with interest and she admitted to signing a promissory note and so she had no real prospect of successfully defending the respondent's claim. He also exhibited, *inter alia*, a copy of the commitment letter dated 17 July 2007; the 20 and 27 July promissory notes; and copies of land titles for the Stony Hill and Duke Street properties.

[11] The appellant swore to an affidavit filed on 25 January 2013, in response to the respondent's application for summary judgment, wherein she acknowledged that she borrowed the sum of $21,760,000.00 plus interest from the respondent but denied owing the sum claimed in what she deemed the "forged promissory note". She deponed that she signed a promissory note on 20 July 2007 (the 20 July promissory note) that was witnessed by Mr Wilton South of the Mandeville branch of the respondent's bank. However, she claimed that she owed no liability to the respondent under the 20 July promissory note since it was incomplete as it did not contain any agreed interest rate;

she had received the loan on 27 July 2007 which meant that the said note dated 20 July 2007 was not signed contemporaneously with the disbursement of the loan; and she never signed, issued or delivered to the respondent the promissory note being relied on by the respondent. The appellant exhibited a copy of the document that she claimed to be the 20 July promissory note which she accepted was genuine and claimed to have signed. The 20 July promissory note in its entirety is as follows:

> "On DEMAND AFTER DATE for value received the undersigned unconditionally PROMISES to PAY to **RBTT BANK JAMAICA LIMITED** or order (hereinafter, including any holder hereof, called 'the Holder') at 17 Dominica Drive, Kingston 5 or such other place as the Holder may designate the sum of **TWENTY ONE MILLION, SEVEN HUNDRED AND SIXTY THOUSAND ---------- Dollars ($21,760,000.0)0** [sic] together with interest thereon at a variable rate per annum of **POINT TWO FIVE** --------- percentage (.25%) points BELOW [signature] the Holder's Prime Rate of interest as declared by the Holder from time to time, payable monthly, both before and after demand of payment and judgement [sic], with interest calculated on a daily basis based on a 360 - day year accruing from the date hereof until payment.
>
> Unpaid interest shall be compounded at monthly rests [sic] at the same rate applicable in respect of principal at the relevant time.
>
> The rate of interest hereunder shall vary automatically on the day that the Prime Rate is varied by the Holder and without the requirement of individual notice by the Holder to any party hereto.
>
> The Holder's Prime Rate as at the date hereof is understood to be **NINETEEN POINT SEVEN FIVE** ----- percent **(19.75%)** per annum.
>
> The undersigned hereby waives presentment, demand, protest and notice of any kind in the enforcement of this Note.

> The term "undersigned" means the persons executing this Note and where there are more than one each of them shall be jointly and severally liable to the Holder.
>
> This Note shall be governed by and construed in accordance with the Laws of Jamaica.
>
> Signature: ____[signed]__ _____
> Name: MARVALYN TAYLOR-WRIGHT
> Address: LOT 4, WIRELESS STATION ROAD
> STONY HILL, ST. ANDREW
>
> Witness:_____[signed]___ _____
> WILTON SOUTH"

[12] With regard to Mr Chambers witnessing and signing the 27 July promissory note, the appellant repeated her contention that she has never met him in person and further that she had a history of hostility with Mr Chambers and would not have conducted business with him. She denied ever visiting the Duke Street branch of the respondent's bank where Mr Chambers had been the manager and she also denied conducting any part of her loan transaction there. The appellant further deponed that she had served the respondent with a notice to admit the authenticity of the 27 July promissory note, and on 13 April 2012, the respondent's attorneys-at-law responded to her, by letter to say that they were unable to locate the original of the said note.

[13] The appellant further deponed that she had made a formal complaint about what she perceived was the respondent's fraud, to the Organized Crime Investigation Division of the Jamaica Constabulary Force, and sought the assistance of Ms Andrea Thomas, a Forensic Document Examiner. The said Forensic Document Examiner, in a report dated 19 July 2012, found that the author of the signature of the 27 July promissory note was not the same as those in other documents that the appellant claimed to have signed

and submitted to the examiner for comparison. Consequently, the appellant deponed that she had no personal liability to the respondent under the fraudulent 27 July promissory note. She further stated that the 20 July promissory note was incomplete and had never been stamped, recorded or relied on by the respondent as a part of the loan transaction.

[14] The appellant admitted that she had signed mortgages on her Stony Hill and Duke Street properties and assigned peril and life insurance to the respondent to secure the said loan. She admitted that she had signed the commitment letter dated 17 July 2007 but said that the said letter makes no mention of a promissory note. She further deponed that the 20 July promissory note was incomplete and was not issued contemporaneously with disbursement of the funds. As a consequence, she stated that she had no personal liability under the mortgages or the letter of commitment. Moreover, the respondent had no interest in the Duke Street property since it had been sold by the 1st mortgagee and the funds received from the sale were used to settle the debt owed to the 1st mortgagee. She deponed that the respondent's application for summary judgment ought to fail because its entire claim was based on a forged promissory note.

[15] The respondent filed a supplemental affidavit of Richard Pryce on 19 February 2013 in response to the appellant's affidavit of 25 January 2013. He deponed that it was the respondent's usual practice to insert the date of disbursement of funds in an undated promissory note given for value received and he had no reason to believe that

the respondent had departed from this practice. He also exhibited an updated status of the appellant's loan which then stood at $39,988,511.88.

Sykes J's judgment

[16] The learned judge found that $21,760,000.00 was loaned to the appellant by the respondent and there had been no serious challenge to the allegations stated in paragraphs 5, 6 and 7 of the respondent's particulars of claim or that the appellant made fairly regular payments towards the loan between July 2007 and June 2008 but subsequent payments were sporadic and that she was liable to pay interest. He also found that the last payment was made on 31 December 2009 and that interest had continued to accrue since then.

[17] The learned judge also examined the letter of commitment dated 17 July 2007, which, in his view, captured the essential terms and conditions of the loan between the appellant and the respondent and had been executed by all the relevant parties.

[18] Additionally, the learned judge found that on his understanding of the particulars of claim, while there was reference to the 27 July promissory note in paragraphs 3 and 4 of the particulars of claim, paragraphs 5 and 6 set out the money that was borrowed, the interest and how much was paid. So, for the learned judge, even without paragraphs 3 and 4, paragraphs 5 and 6 of the particulars of claim "would still indicate how much money was borrowed, what was the interest and how much money had been repaid, that is, whether in terms of principal or interest or both".

[19] The learned judge refrained from making any pronouncement as to whether or not the promissory note was forged because in his view, that was not his function. Nonetheless, he found that regardless of whether the 27 July promissory note was forged, that promissory note was not an essential part of the respondent's claim since the respondent could still establish its claim without the promissory note because there was no real denial of the loan by the appellant and there was no assertion that the money was repaid and so the only problem was one of arithmetic. He also contended that the appellant did not deny that she had been servicing the loan regularly up to a period of time, then made intermittent payments and then stopped making payments. Consequently, the learned judge found that the respondent was entitled to summary judgment having regard to the principles set out in **Swain v Hillman and another** [2001] 1 All ER 91 and **ED & F Man Liquid Products Ltd v Patel and another** [2003] All ER (D) 75 (Apr).

[20] The learned judge therefore entered judgment for the respondent in the sum of $39,988,511.88 and interest thereon of $11,015.81 per diem from 18 February 2013 to the date of payment.

The appeal

[21] On 22 April 2014, the appellant filed an appeal which sought to set aside Sykes J's decision with costs to the appellant to be taxed, if not agreed on the following grounds:

> "i. The learned trial judge erred in law by holding that the promissory note dated July 27, 2007 expressly relied on and exhibited by the [respondent] in

paragraphs 3 and 4 of the Particulars of Claim was not an essential part of the bank's claim, that the [respondent] could properly rely only on paragraphs 5 and 6 to advance its claim and by thereafter granting summary judgment to the said [respondent].

ii. The learned trial judge had no judicial competence to amend the Particulars of Claim by importing into it, the bank's letter of commitment dated July 17, 2007 and treating it as a document upon which the [appellant] should be fixed with liability to repay the demand loan by way of an order for summary judgment.

iii. The learned trial judge's finding that the [appellant] had raised no serious challenge to paragraphs 5 and 6 of the Particulars of Claim was aberrant as no reasonable judge could have so found having regard to the Defence and the evidence contained in the Affidavits filed in opposition to the application for summary judgment.

iv. The Order of the learned trial judge granting summary judgment to the [respondent] was an erroneous exercise of discretion in that it was based on a clear misunderstanding of the law or legal principles governing:

(a) bills of exchange and promissory notes
(b) the effect of illegality on contracts and the application of *ex turpi causa non oritur actio* rule.
(c) the duty of the Court when faced with the unchallenged evidence that the [respondent] had brought proceedings on a forged and illegal promissory note.

v. The learned trial judge incorrectly applied the principles set out in **Swain v Hillman [2001] 1 All ER 91** and **ED and F Products Ltd v Patel [2003] EWCA Civ 472** to the circumstances of the case when he found that the [respondent] was entitled to summary judgment on those principles.

vi. The learned trial judge erred in law in awarding summary judgment in the sum of $39,988,511.88 with interest at $11,015.81 from February 18, 2013 to the date of payment when the [respondent] did not seek summary judgment in those terms. Further the learned trial judge had no authority to order post judgment interest contrary to section 2(a) of the Judicature (Supreme Court) Rate of Interest on Judgment Debts) Order, 2006 in particular or any interest whatsoever."

The appellant's submissions

[22] In support of grounds (i) and (ii), Mr Braham QC, for the appellant, argued that pursuant to rule 8.9(1), (2), (3) and 8.9A of the Civil Procedure Rules, 2002 (CPR), the respondent had a duty to set out its claim in its particulars of claim; was prohibited from relying on any allegation or any factual argument not contained within its particulars of claim; and must annex or identify documents it wishes to rely on to prove its case. He also referred to **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775, **Blay v Pollard and Morris** [1930] 1 KB 628, **Boissevain v Weil** [1950] AC 327, **Belmont Finance Corporation Ltd v Williams Furniture Ltd and Others** [1979] All ER 118 to support his contention that pleadings should identify the issue in dispute between the parties and where a party to any matter is desirous of raising additional issues, an amendment must be sought. Mr Braham submitted that, in the instant case, the respondent had not raised any other cause of action based on there being an agreement for a loan in writing, and based on that agreement, money had been advanced or that there was security documentation for a mortgage. As a consequence, he submitted that since the respondent's claim was based on the 27 July promissory note (which was particularly pleaded in paragraphs 3 and 4 of the

respondent's particulars of claim), the learned judge ought to have only considered the application for summary judgment in respect of the claim made on the 27 July promissory note and was wrong to identify other legal platforms upon which the respondent could have proved its claim against the appellant.

[23] In reliance on section 89 of the Bills of Exchange Act (the Act) and **Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH** [1977] 1 WLR 713, counsel argued that a bill of exchange represents an independent cause of action and so a party is entitled to sue on a bill of exchange without reference to the underlying cause of action. Thus, he contended, where a bill of exchange has been dishonoured and a claimant sues on the bill itself, then the law does not recognize defences unrelated to the bill itself (the cheque rule). In the instant case, he submitted, the respondent chose to file a claim on the 27 July promissory note, thereby restricting the defences available to the appellant. Mr Braham therefore argued, that the learned judge erred in considering other legal platforms upon which the respondent could have endeavoured to prove its claim since he facilitated a change to the claim itself, and in so doing gave the appellant no opportunity to avail herself of other defences that would have been open to her.

[24] On ground (iii), Mr Braham argued that the essence of the appellant's defence is that the 27 July promissory note upon which the respondent had based its claim was not signed by her, is illegal and void, and so the respondent can derive no benefit from it. He contended that pursuant to section 23 of the Act, in order to be liable as the issuer of the promissory note, the issuer must have signed it and under section 24 of

the Act, where a signature is forged and made without authority, there is no right to enforce payment of the bill. Mr Braham also relied on the learned authors of Byles, On Bills of Exchange, 25th edition, where it was stated that any material alteration to a bill of exchange without authority is a forgery. He submitted further that pursuant to section 30 of the Act, once fraud or illegality is admitted or proved, the burden shifts to the holder to prove good faith. In reliance on **Anwar Wright v The Attorney General of Jamaica** Claim No 2009 HCV 2875, delivered 26 November 2010, Mr Braham submitted that the respondent's reply to the appellant's defence was defective since the respondent failed to give a positive response to the appellant's defence. Consequently, Mr Braham contended that judgment should not have been entered summarily in the instant case since the appellant had clear challenges to the claim, the veracity of which could not be determined without a trial.

[25] To support ground (iv), Mr Braham submitted that the learned judge gave no consideration to the principle of illegality of contracts and the application of *ex turpi causa non oritur actio* rule. He cited **Simpson v Bloss** (1816) 129 ER 99 to show that a judge should consider whether the respondent required aid from the illegal transaction to prove its case. Mr Braham also contended that the learned judge misunderstood the law on bills of exchange and so failed to make reference to the legal nature and effect of a bill of exchange stated in sections 23 and 24 of the Act. He further submitted that, in the instant case, the commitment letter and the instruments of mortgage are tainted by the illegal promissory note and in reliance on **In *re* Cork and Youghal Railway Company** (1869) LR 4 Ch App 748, **Fisher v Bridges** (1854)

118 ER 1283, **Mahonia Limited v JP Morgan Chase Bank and another** [2003] EWHC 1927 (Comm) and **Les Laboratoires Servier and another v Apotex Inc and others** [2011] EWHC 730 (Pat), Mr Braham contended that if the instrument upon which the claim was brought is illegal, then it cannot be enforced in equity, even if money was paid out on it and once the instrument held for security is tainted with illegality, the security and any document connected to it are unenforceable. Mr Braham therefore argued that since the possibility exists that the 27 July 2007 promissory is unenforceable, then the appellant would not be obligated to repay the respondent. He submitted that this live possibility of the appellant's strong prospects of success on the claim meant that there appears to be serious issues which required investigation and also meant that summary judgment ought not to have been granted in the instant case.

[26] Mr Braham's submissions in support of ground (v) were that the learned judge incorrectly applied the principles in **Swain v Hillman** and **ED & F Man Liquid Products Ltd v Patel**. He contended that based on **Swain v Hillman**, issues which require investigation ought to be tried. Moreover, **ED & F Man Liquid Products Ltd v Patel** is distinguishable from the instant case and the principles contained therein are inapplicable, since in that case, no issues of illegality, forgery or criminality were raised. He also submitted, in reliance on a number of cases such as **Les Laboratoires Servier and another v Apotex** and **Arrow Nominees Inc and another v Blackledge and others** [2000] 2 BCLC 167, that the learned judge fell into error in focusing on the fact that money was borrowed and not repaid, rather than whether the transaction was tainted with illegality. Mr Braham submitted further that the appellant was denied the

right to a fair trial since she was not given the opportunity to challenge the forged promissory note. As a result, Mr Braham argued that the issues raised by the appellant as to the forgery or illegality of the 27 July promissory note, should be determined in a trial and not on summary judgment.

[27] Ground (vi) was a challenge to the sum awarded by the learned judge. Queen's Counsel argued that the respondent's claim was for $31,662,395.26 and US$15,465.22 (in relation to a US credit card debt) with interest. However, Mr Braham contended that there was no issue joined that the debt of US$15,465.22 was no longer in issue and had been repaid by the appellant. He further argued that there was no amendment to show that the sum of $31,650,395.26, comprised of a sum of $351,373.33 representing a debt due on a Jamaican credit card, had also been paid by the appellant. Mr Braham also submitted that the sum for which summary judgment was ordered was derived from the supplemental affidavit of Richard Pryce filed 19 February 2013, wherein he displayed a balance that was never a part of the claim and no amendment had been sought for the claim form to reflect the sum of $39,988,511.88 with interest. He also argued that interest was not computed pursuant to rule 8.7(3) of the CPR and so it is unknown how the interest had been calculated. The sum of $39,988,511.88, Mr Braham submitted, included a claim for fees of $824,202.01 which had never been claimed. The learned judge therefore failed to properly determine what amount, if any, was owed by the appellant and so the order for summary judgment had been improperly made.

[28] In all the circumstances, Mr Braham argued that the instant case was not suited for summary judgment and urged this court to set the judgment aside so that the matter could proceed to a trial.

The respondent's submissions

[29] Mrs Minott-Phillips QC, for the respondent, submitted that it was proper for the learned judge to rely on documents other than the pleadings made by the parties when deciding whether to grant summary judgment. In her view, "the fact that a party is entitled to sue on a bill of exchange without reference to other existing contractual arrangements, does not mean that the court must ignore evidence of those arrangements if such material is before it". She posited that the appellant herself referred to the commitment letter; the mortgage instrument; and what she (the appellant) perceived to be the genuine promissory note, as a part of her pleaded case and cannot now resile from that position. Mrs Minott-Phillips posited that **Blay v Pollard and Morris** is distinguishable from the instant case, since the issue the judge decided in that case was raised by the learned judge himself, without amending the pleadings; while in the instant case, the issues raised by the learned judge were all pleaded. Mrs Minott-Phillips further argued that the learned judge was correct to find that the respondent could have established its claim without the promissory note because evidence of the debt was borne out by the following:

(i) the appellant admitted to borrowing $21,760,000.00 from the respondent with interest and made payments on account of her loan;

(ii) the appellant produced a commitment letter which sets out certain terms and conditions of a demand loan;

(iii) the appellant signed instruments of mortgage in pursuance of the said loan which she exhibited in her affidavit;

(iv) the 20 July promissory note that the appellant claimed to be genuine was identical in terms to the 27 July promissory note that she claimed is fraudulent; and

(v) the commitment letter, the promissory note and the mortgage instruments were all done with a view to complete a loan transaction.

[30] Mrs Minott-Phillips for the respondent argued that the respondent's claim was not to validate the 27 July promissory note, but rather that the appellant owed a debt to the bank and the 27 July promissory note was evidence of that debt. She argued that the demand loan gave rise to the debt that was specifically referenced in the claim form and the particulars of claim gave rise to a cause of action on the promissory note and breach of contract. Mrs Minott-Phillips also contended that while some of the appellant's defences may have been futile in the circumstances of a valid promissory note, she was not in any way restricted in her defences. Summary judgment can be issued once the court is satisfied that the respondent has no real prospect of successfully defending the claim. Proof of the debt could have been discerned in various ways and so the claim was ripe for summary judgment.

[31] Mrs Minott-Phillips posited that the 20 July promissory note that the appellant claimed to have signed and claimed to be genuine, is identical in terms to the 27 July promissory note that she claimed is fraudulent. Section 30 of the Act stipulates that every party who signs a bill is prima facie deemed to be a party for value. Consequently, the appellant had "neutralized her own allegation of forgery and rendered it immaterial" and "she has eliminated any scope for a contention by her that any copy of a promissory note she admittedly authorized is not authentic". Mrs Minott-Phillips submitted that by virtue of sections 83 and 91 of the Act, there is no requirement for someone to witness the signing of the promissory note. Additionally, Mrs Minott-Phillips contended that the 20 July promissory note is evidence of the debt since the appellant admitted to signing it and receiving value subsequently. She distinguished **Boissevain v Weil** from the instant case in that it dealt with a loan that was specifically prohibited by statute, while the loan in the instant case was not illegal.

[32] Summary judgment, counsel argued, was sought based on the appellant's admissions in paragraphs 5 and 15 of her amended defence. The respondent admitted the authenticity of the promissory note signed by the appellant by not responding to the notice to admit authenticity and so counsel contended that both parties agree that the 20 July promissory note is genuine. Mrs Minott-Phillips further argued that there was also no finding by any court that the 27 July promissory note is a forgery and the evidence of the expert has not yet been accepted as evidence by the court. However, even if the note is a forgery, Mrs Minott-Phillips relied on **Yango Pastoral Company Pty Limited and others v First Chicago Australia Limited and others** (1978) 139

CLR 410, where the High Court of Australia held that the illegality of a mortgage did not render it void and would not prevent the court from giving effect to the transaction and allowing the bank to recover. Mrs Minott-Phillips also cited **Mistry Amar Singh v Serwano Wofunira Kulubya** [1964] AC 142 where the Judicial Committee of the Privy Council allowed a plaintiff to obtain an order of possession of land and eviction of the defendant, despite the fact that the lease was illegally entered into, since he did not have to rely on the lease to claim possession of the land. Mrs Minott-Phillips also noted that public policy should permeate any decision on the question of illegality, since the appellant would be able to borrow money from the respondent, who is in the business of lending money, and she would be relieved from her obligation to repay the sum borrowed by making an unsubstantiated claim of forgery amounting to illegality.

[33] With regard to the appellant's challenge to the sum awarded for summary judgment, Mrs Minott-Phillips submitted that after the respondent was notified of the date of the hearing for the application for summary judgment and after the settlement by the appellant of a part of the debt, the respondent had filed a supplemental affidavit to update the amount of the debt owed in advance of the hearing. This affidavit was sworn to by Richard Pryce and filed on 19 February 2013, claiming that the sum owed to the respondent was $39,988,511.88 with interest at $11,015.81 per day and that the appellant had paid her credit card debts. Mrs Minott-Phillips argued that the appellant took no issue with the principal or interest being claimed by the respondent in the supplemental affidavit in the court below or in her amended defence. Mrs Minott-Phillips also argued that the appellant's challenge as to interest is without merit since the

payment of interest can be evidenced in the various documents relied on by the appellant. Furthermore, section 3(b) and (c) of the Law Reform (Miscellaneous Provisions) Act provides that "interest on a debt or damages to the date of judgment does not apply in relation to any debt upon which interest is payable as of right (whether by virtue of agreement or otherwise); or affect the damages recoverable for the dishonour of a bill of exchange".

[34] In the instant case, the appellant agreed to pay interest on the principal loan amount of $21,760,000.00 at a rate of 19.5% (variable with market conditions) per annum. In the commitment letter dated 17 July 2007, the respondent contended that the appellant agreed to pay "expenses and other charges, whether legal or otherwise... on a full indemnity basis". This breakdown of the interest, Mrs Minott-Phillips submitted, is set out in the claim form and the particulars of claim. She reiterated that the appellant had not challenged the sum claimed by the bank, so the learned judge, having found that the debt was due, was correct to accept the respondent's calculation of the debt, interest and fees payable.

[35] In the circumstances, Mrs Minott-Phillips submitted that the appellant has no real prospect of successfully defending the respondent's claim and urged this court not to disturb the learned judge's findings.

Discussion and analysis

Summary judgment

[36] Part 15 of the CPR sets out the procedure by which the court may decide a claim or particular issue without a trial. Rule 15.2 of the CPR provides that:

> "The court may give summary judgment on the claim or on a particular issue if it considers that-
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
> (b) the defendant has no real prospect of successfully defending the claim or the issue.
> (Rule 26.3 gives the court power to strike out the whole or part of statement of case if it discloses no reasonable ground for bringing or defending the claim.)"

[37] Rule 15.3 of the CPR states the type of matters which are excluded from summary judgment and rule 15.4 of the CPR sets out the procedure that is to be utilised when applying for summary judgment. Rule 15.5 speaks to the evidence that is to be utilised in support of a summary judgment application as follows:

> "(1) The applicant must-
> (a) file affidavit evidence in support with the application; and
> (b) serve copies on each party against whom summary judgment is sought, not less than 14 days before the date fixed for hearing the application.
>
> (2) A respondent who wishes to rely on evidence must-
> (a) file affidavit evidence; and
> (b) serve copies on the applicant and any other respondent to the application, not less than 7 days before the summary judgment hearing."

[38] Rule 15.6 of the CPR sets out the powers of the court on an application for summary judgment, and confirms that the court has a discretion whether to grant summary judgment. It provides that:

> "(1) On hearing an application for summary judgment the court may-
> (a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;
> (b) strike out or dismiss the claim in whole or in part;
> (c) dismiss the application;
> (d) make a conditional order; or
> (e) make such other order as may seem fit.
>
> (2) Where summary judgment is given on a claim, the court may stay execution of that judgment until after the trial of any ancillary claim made by the defendant against whom summary judgment is given.
> ('Ancillary claim' is defined in rule 18.1.)
>
> (3) Where the proceedings are not brought to an end the court must also treat the hearing as a case management conference."

[39] The principles which ought to guide a court in determining whether there is a "real prospect of succeeding on the claim or issue" are those enunciated by Lord Woolf MR in **Swain v Hillman**. Lord Woolf MR, in defining the terms "no real prospect of succeeding on the claim", stated at page 92 of the judgment that:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success… they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[40] In making a pronouncement as to the value of summary judgments, Lord Woolf MR at page 94 stated:

> "It [summary judgment] saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."

[41] Notwithstanding its value, Lord Woolf cautioned at page 95 (referring to part 24 of the English Civil Procedure Rules which is similar to part 15 of the CPR) that:

> "…. Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial…… the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way to be disposed of summarily."

[42] In **ED & F Man Liquid Products Ltd v Patel**, the court adopted the principles expounded by Lord Woolf MR in **Swain v Hillman**. In that case, the claimant brought an action against the defendants for payment of two shipments of alcohol, as partners trading in industrial alcohol under the name of 'Quickstop Group'. Judgment was obtained against the defendants in default of acknowledgement of service and so each defendant applied to set aside on the basis that he had a real prospect of successfully defending the claim. The first instance judge held that the second defendant had a real prospect of success on the basis of his assertion that he was not a partner in, but merely employed by the Quickstop Group. However, in respect of the first defendant, the judge dealt with the matter upon the merits, and held that, in the light of a series of unqualified admissions of the claimant's debt over a prolonged period prior to

judgment, there was no real prospect of a successful defence. The first defendant appealed against that decision on the ground, *inter alia*, that the court ought to have considered whether he had an "arguable case", rather than whether he had a "real prospect of successfully defending the claim or issue" pursuant to the English Civil Procedure Rules. This appeal was dismissed on the basis that, *inter alia*, on either test the defendant had no real prospect of success in light of admissions he had made prior to judgment. Potter LJ stated at paragraph 10:

> "...where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial:... However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable:..."

[43] The principles stated in **Swain v Hillman** and **ED & F Man Liquid Products Ltd v Patel**, have been cited with approval in a number of cases before this court such as **National Commercial Bank Jamaica Ltd and another v Toushane Green** [2014] JMCA Civ 19, **Tikal Limited and others v Amalgamated (Distributors) Limited** [2015] JMCA App 11 and **Island Car Rentals Ltd (Montego Bay) v Headley Lindo** [2015] JMCA App 2. From a reading of these cases, it is evident that to succeed on an application for summary judgment, the prospects of success must be 'realistic' as opposed to 'fanciful' and in making an order on this assessment, regard must be had to the overriding objective, and the interests of justice. However, if there

are serious issues which require investigation, these ought to be determined in a trial and not on a summary judgment application.

Setting aside the order of Sykes J

[44] Any order granting summary judgment is an exercise of discretion by a judge at first instance. This court will not lightly interfere with the exercise of such a discretion and must not interfere with it on the basis that this court would have exercised its discretion differently. In making a determination as to whether or not to interfere with a judge's exercise of discretion, regard must be had to principles stated by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and Others** [1982] 1 All ER 1042, at 1046 where he said:

> "It [the Court of Appeal] may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

[45] This principle has been endorsed and applied by this court in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, where my learned brother Morrison JA (as he then was) on behalf of the court at paragraph [19]-[20] stated:

> "[19] It is common ground that the proposed appeal in this case will be an appeal from Anderson J's exercise of the discretion given to him by rule 13.3(1) of the CPR to set aside a default judgment in the circumstances set out in the rule. It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
>
> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'
>
> [20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[46] From these cases, it is evident, that if it can be shown that the learned judge misconceived or misapplied the law or misconceived the facts or there was a change in circumstances of the case, sufficient to show that the learned judge, in exercise of his discretion, was "palpably wrong" then his judgment ought to be set aside. In the case at bar, this court must decide whether this is a proper exercise of the learned judge's

discretion to grant summary judgment on the respondent's claim and whether the exercise of his discretion was "palpably wrong" and the judgment ought to be set aside.

Issues

[47] In my view, based on the grounds of appeal advanced and the arguments in support of and in opposition to this appeal, there are three issues which require this court's determination:

1. Whether issues raised as to the validity of the 27 July promissory note require investigation at trial (grounds (iii) and (iv)).
2. Did the learned judge err in considering documents that were not relied upon by the respondent in its pleadings? (grounds (i) and (ii))
3. Did the learned judge err in his assessment of the prospects of success of the respondent's claim? (grounds (v) and (vi))

Issue 1: The validity of the 27 July promissory note

[48] Promissory notes are governed by the Bills of Exchange Act. Section 83 of the Act defines a promissory note as:

> "...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."

[49] Section 89 of the Act states that subject to certain exceptions, the provisions of the Act relating to bills of exchange are applicable to promissory notes, with the necessary modification as follows:

> "(1) Subject to the provisions in this Part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.
>
> (2) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.
>
> (3) The following provisions as to bills do not apply to notes, namely, provisions relating to-
>
> (a) presentment for acceptance;
>
> (b) acceptance;
>
> (c) acceptance supra protest;
>
> (d) bills in a set.
>
> (4) Where a foreign note is dishonoured, protest thereof is unnecessary."

[50] For a promissory note to be valid it must accord with certain features stipulated in the Act. The most relevant features to this appeal are those that relate to the signature of the maker of the note and the effect that forgery may have on the validity of that note.

[51] Section 83(1) of Act stipulates that a promissory note "must be signed by [its] maker". By virtue of section 23 of the Act, it is only where a person has signed a promissory note that he becomes liable upon it. Section 23 provides that:

> "No person is liable as drawer, indorser or acceptor, of a bill who has not signed it as such:
>
> Provided that where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name.
>
> The signature of the name of a firm is equivalent to the signature, by the person so signing, of the names of all persons liable as partners in that firm."

[52] Under section 30 of the Act, there is a presumption that where a party's signature appears on a promissory note, that party is prima facie deemed to have become a party thereto for value. However, in order to rely on that presumption, the holder of that promissory note must prove that the note itself is valid and was validly negotiated. Section 30 states as follows:

> "Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

[53] The appellant had contended that her signature was forged. Forgery is defined in section 3(1) of the Forgery Act as "the making of a false document in order that it may be used as genuine...with intent to defraud or deceive". Section 3(2) and (3) of the Forgery Act provides that:

> (2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by, or on behalf or on account of a person who did not make it nor authorize its making; or if, though made by, or on behalf or on account of, the person by whom or by whose

> authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false-
>
> (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein, or
>
> (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; or
>
> (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it:
>
> Provided that a document may be a false document notwithstanding that it is not false in such manner as is in this subsection set out.
>
> (3) For the purposes of this Act-
>
> ...
>
> (b) forgery of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law;..."

[54] The provisions of the Forgery Act are important in light of section 24 of the Act which provides that a promissory note may be defeated by a forged signature, or an unauthorised signature. However, the Act itself recognises an exception where there is ratification of the forged unauthorised signature. The provisions of section 24 are as follows:

> "Subject to the provisions of this Act, where a signature on a bill is forged, or placed thereon without the

> authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
>
> Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery."

[55] A signature placed on a bill without the authority of the person it purports to be is a forgery and by virtue of section 24, there is no right to enforce payment under a promissory note where the signature contained thereon is forged. If it is found that the signature was indeed forged, the bill is rendered invalid and there is no obligation to pay under it unless the party against whom the instrument is to be enforced is precluded from setting up the forgery, or want of authority or has ratified the unauthorised signature. This position was stated by the English Court of Appeal in **Kreditbank Cassel GmbH v Schenkers, Ltd, and others** [1927] All ER Rep 421, at 430 where Atkin LJ opined that "under section 24 of the Bills of Exchange Act, 1882, (in England) the holder is not entitled to enforce payment of these forged bills unless the principal is precluded from setting up the forgery or the want of authority". The learned authors of Halsbury's Laws of England, 2015, volume 49, paragraph 209 have said that:

> "Where a signature on a bill or note is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the instrument or to give a discharge for it or to enforce payment of it against

> any party thereto can be acquired through or under that signature unless the party against whom it is sought to retain or enforce payment of the instrument is precluded from setting up the forgery or want of authority, but this does not affect the ratification of an unauthorised signature not amounting to forgery."

[56] The appellant, at paragraphs 33-34 of her affidavit, filed 25 January 2013, deponed that forgery of the 27 July promissory note is evident from:

(i) the false representation of her signature at two places on the note so as to cause it to appear to be hers;

(ii) the false representation that she signed the document in Mr Chamber's presence;

(iii) the fact that there are three notes: one signed by her but not Mr South; one signed by herself and Mr South that she alleged was signed on 20 July 2007; and one that the respondent alleged that she signed in Mr Chamber's presence on 27 July 2007;

(iv) her unchallenged evidence that she had a history of hostility with Mr Chambers and had never conducted any portion of the loan transaction at the respondent's Duke Street branch;

(v) the fact that the respondent has admitted to not being in possession of the genuine note; and

(vi) the finding of Andrea Thomas that her signature on the document was forged.

[57] The respondent on the other hand, in its reply to defence filed 2 June 2011, denied that the 27 July promissory note was forged. It further stated that it could not admit or deny falsely representing that the appellant's signature on the 27 July promissory note was made in Mr Chamber's presence, because Mr Chambers could not recall whether those allegations were true. However, it is arguable as to whether the appellant's alleged unauthorised signature was ratified by payments on the sums advanced to the appellant by the respondent.

[58] These varying accounts as to whether the signature on the 27 July promissory note was that of the appellant, raised issues which may impact the respondent's prospects of success on the claim, since the appellant could not be held liable on a promissory note that may contain her forged signature. The respondent had contended that since the appellant admitted to signing the 20 July promissory note, and that note was identical in terms to the 27 July promissory note it was pointless for the appellant to deny signing the 27 July promissory note. However, there is no assertion by either party that the money was disbursed on the 20 July promissory note. As indicated, the issue of want of authority or ratification of the note would be a matter that required investigation. In all the circumstances, it is my view that there are indeed triable issues as to whether the appellant's signature on the 27 July promissory note was forged and she therefore had no obligation to pay under it and/or whether she was precluded from setting up the forgery or want of authority, or had ratified the alleged unauthorised signature. The learned judge therefore erred when he found that it was not his function to make such an assessment.

Issue 2: The learned judge's reliance on documents not pleaded

[59] Rule 2.4 of the CPR defines a statement of case as:

> "(a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and
>
> (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court;"

[60] Rule 8.9 of the CPR states:

> "(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.
>
> (2) Such statement must be as short as practicable.
>
> (3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.
>
> (4) Where the claim seeks recovery of any property, the claimant's estimate of the value of that property must be stated.
>
> (5) The particulars of claim must include a certificate of truth in accordance with rule 3.12."

[61] Rule 8.9A states:

> "The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."

However, this court in **Ricco Gartmann and Peter Hargitay** SCCA No 116/2005, delivered 15 March 2007, has said that the facts or allegations on which a claimant wished to rely could be stated in either the statement (particulars) of claim or the reply.

[62] The import and application of these rules have been emphasised by Lord Woolf MR in **McPhilemy Times Newspapers Ltd and others**, at pages 792-793, where he said:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."

[63] His dictum has been cited with approval by the House of Lords in **Three Rivers District Council v Bank of England (No 3)** [2001] UKHL 16 and was also endorsed by the Judicial Committee of the Privy Council in **Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Seebalack** [2010] UKPC 15. However, the Board cautioned against long statements of case since detailed witness statements or lists of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant which must be as short as the nature of the claim reasonably allows.

[64] **McPhilemy Times Newspapers Ltd and others** has been cited with approval in a number of cases before this court such as **Akbar Limited v Citibank NA** [2014]

JMCA Civ 43 where, at paragraph 64, I opined that a defendant must not be taken by surprise and is entitled to know the claim being made against him and while there is no longer a need for extensive pleadings:

> "..., they are still required to mark out the parameters of the case of each party and to indentify the issues in dispute, but the witness statements and other documents will detail and make obvious the nature of the case that the other party has to meet."

[65] My learned brother Morrison JA (as he then was) also approved Lord Woolf MR's dictum in **McPhilemy Times Newspapers Ltd and Others** in **Capital & Credit Merchant Bank Limited v The Real Estate Board** [2013] JMCA Civ 29 and at paragraph [142] he said:

> "In my view, firstly, the pleader is required to set out a short statement of the material facts relied on in support of the remedy sought, sufficient to reveal the legal basis for the claim, but not the legal consequence which may flow from those facts. Secondly, once the claim form itself is generally in compliance with the rules, full details of the claim may be supplied by the affidavit or affidavits filed in support of it (together with any accompanying documents upon which the claimant relies), provided that the documentation, taken all together, is sufficient to enable the defendant to appreciate the nature of the case against him, and the court to identify the issues to be decided."

[66] The effect of the CPR and the principles gleaned from the cases are that: (i) any claimant must include, in the claim form, particulars of claim or reply, statements of all the facts on which he/she intends to rely; (ii) a claimant must annex or identify documents in the claim form, particulars of claim or reply which is considered necessary for the case; and (iii) a claimant is precluded from relying on any allegation or factual argument which is not set out in the particulars of claim or reply, but which could have

been set out there, unless the court grants such permission and the allegations or factual arguments contained therein should not be lengthy.

[67] In my view, from an examination of the particulars of claim, it is evident from paragraphs 3, 4, 5, 6 and 7, that the respondent based its claim on the 27 July promissory note. The appellant in her amended defence exhibited a copy of the 20 July promissory note, the letter of commitment and copies of the mortgage instruments. The respondent, in its reply joined issue with admissions made by the appellant in her defence and exhibited the instruments of mortgage that had been used as security for the money advanced to the appellant. However, it did not exhibit the 20 July promissory note or the letter of commitment nor did it amend its pleadings to identify any cause of action separate and apart from the 27 July promissory note. The respondent asserted that credit had been extended to her on the terms and conditions of the letter of commitment and that that letter did not mention any promissory note. The appellant's counsel contended that this letter was subject to other terms and conditions being fulfilled and there was no evidence as to whether that had been done. The learned judge, in reliance on the letter of commitment, which had not been pleaded by the respondent, said:

> "There is also... the... letter of commitment, which from my examination of it sets out what I would consider to be the essential terms of the loan. The, document was executed by all the relevant parties... And as I understand it, this document captures, the essential terms and conditions of the loan between... made by the [respondent] to the [appellant]. So in that regard, I am not persuaded by Mr Braham that, reference to, the promissory note, is essential to the bank's claim for payment."

It therefore seems to me, that since the respondent did not identify the letter of commitment or rely on its contents in its particulars of claim or its reply, and no amendment to the claim form or particulars of claim was sought or granted enabling the respondent to rely upon the same, the learned judge should, in his findings, not have placed reliance on the letter of commitment or any document other than the 27 July promissory note relied on in the particulars of claim or the instruments of mortgage referred to in the reply.

[68] The learned judge also stated that while there was reference to the 27 July promissory note in paragraphs 3 and 4 of the particulars of claim, a claim for money had and received could still be established on paragraphs 5 and 6, since those paragraphs set out the fact that money had been borrowed, the interest, and the amount of money repaid. In my view, this approach was not open to him on the pleadings, and this finding is palpably wrong for the following reasons.

[69] Section 88 of the Act states that upon the issue of a promissory note, the maker is liable on the note and further, by making the note, the maker engages that he will pay it according to its tenor and is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. The learned authors of Bullen & Leake & Jacob's Precedents of Pleadings, 14th edition, volume 1, paragraph 6-12 stated that:

> "A defence to an action on a bill of exchange must either deny one or more of the constituent elements of the claim, or set up a positive defence either arising out of the operation of the Act, or the general law. The extent to which it is open to a defendant to raise general contractual

> defences depends upon the status of the claimant; such matters will be no answer to an action brought by the holder in due course. Where therefore such a defence is to be raised, it is necessary not merely to set out those circumstances, but also to negative the status of the claimant (who is otherwise presumed to be a holder in due course)."

[70] In **Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH**, the plaintiffs sued the defendants in an English Court upon six bills of exchange drawn by the plaintiffs and accepted by the defendant. The defendant sought a stay of proceedings so that the claim could be referred to arbitration in Germany. The Court of Appeal reversed the judgment in the court below which in effect granted the respondent's application for a stay. The appeal to the House of Lords was granted on the basis that it was wrong for the Court of Appeal to do so. Lord Wilberforce at page 721 said:

> "When one person buys goods from another, it is often, one would think generally, important for the seller to be sure of his price: he may (as indeed the appellants here) have bought the goods from someone else whom he has to pay. He may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred instalments of cash. Unless they are to be treated as unconditionally payable instruments (as in the Act, section 3, says "an unconditional order in writing"), which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason that English law (and German law appears to be no different) does not allow cross-claims, or defences, except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made. I fear that the Court of Appeal's decision, if it had been allowed to stand, would have made a very substantial inroad upon the commercial principle on which bills of exchange have always rested. In my opinion, this is a straightforward case of an action on bills, to which no admissible defence has been put forward."

[71] When these principles are read together, it is evident that when one files a claim based on a promissory note, the defences available to any defendant are restricted to fraud, invalidity or failure of consideration. The respondent's claim appears to me to be based on the 27 July promissory note and the appellant had raised fraud as a defence. The learned judge failed to consider her defence; found that the terms and conditions of the loan were those stated in a letter of commitment; and also found that the claim for money had and received could still be established in paragraphs 5 and 6 of the particulars of claim, without reference to the 27 July promissory note. Mr Braham, suggested that the learned judge in so doing, dissected the respondent's statement of case in a manner that artificially created a legal platform unrelated to the 27 July 2007 promissory note. Mr Braham further submitted that this dissection created other claims to which the appellant had no obligation to respond and was therefore never given the opportunity to respond thereto. This is precisely the situation that the courts had warned against in **McPhilemy Times Newspapers Ltd and Others** and the cases that followed it as discussed earlier in this judgment. I entirely agree with Mr Braham's description of what the learned judge did and what the law frowns upon. It is therefore my view, that the learned judge was palpably wrong in the exercise of his discretion in that regard.

Issue 3: The learned judge's assessment of whether the respondent had a real prospect of success on the claim.

[72] As indicated earlier, the learned judge examined the appellant's prospects of success by having regard to the fact that, in his view, the respondent could still prove its case without reliance on the promissory note because: (i) there had been no serious

challenge made to paragraphs 5, 6 and 7 of the particulars of claim; (ii) the letter of commitment captured the essential terms and conditions of the loan made by the respondent to the appellant; (iii) there was no denial of the loan; (iv) there was no assertion that it was repaid; and (v) there was no denial that the appellant was servicing the loan regularly and then intermittently before she stopped altogether. In light of all these circumstances and in reliance on the principles stated in **Swain v Hillman** and **ED & F Man Liquid Products Ltd v Patel**, the learned judge found that the appellant's claim had no real prospect of success and the case was suited for summary judgment.

[73] Mrs Minott-Phillips, posited that the respondents claim for money owed had a real prospect of success and was evidenced by: (i) the appellant's admission to borrowing $21,760,000.00 with interest; (ii) the 27 July promissory note; (iii) the 20 July promissory note which is identical in content to the 27 July promissory note and which the appellant admitted to signing; (iv) the appellant's acknowledged receipt of value for the promissory note; (v) the loan contract set out in the commitment letter; and (vi) the personal covenants for repayment of loan in the instruments of mortgage executed by the appellant.

[74] Mrs Minott-Phillips further contended that even if the 27 July promissory note was tainted with fraud, there are instances where courts were inclined to allow parties to recover under illegal contracts. She cited **Yango Pastoral Company Pty Ltd and Others v First Chicago Australia** where the High Court of Australia found that despite the fact that a bank was carrying out banking business without authority, the

mortgage or guarantees given to it to secure a loan made by it in the course of business were enforceable. Queen's Counsel also relied on **Mistry Amar Singh v Serwano Wofunira Kulubya**, where the Judicial Committee of the Privy Council held that although the lease was illegal, the plaintiff was still entitled to possession since his right to possession was not based on the illegal agreement and the plaintiff could have presented his claim without it. Whether these principles are applicable to the case at bar must be examined in light of the appellant's defences to the claim.

[75] With regard to the appellant's admission to borrowing money from the respondent with interest, as stated previously, a bill of exchange is a cause of action itself and so restricted the range of defences available to the appellant. As a consequence, despite this admission and the lack of any denial of making payments on the loan, the principle still stands that, if it were to be found that the 27 July promissory note was forged, the appellant would not be liable under it unless it can be shown that the appellant was precluded from setting up the forgery or want of authority or has ratified the alleged unauthorized signature. Accordingly, without an amendment to the respondent's pleadings to rely on other causes of action, the issue as to the forgery of the 27 July promissory note may have a serious impact on the prospects of success of the respondent's claim.

[76] The appellant contended that since the claim was based on the 27 July promissory note and no amendment was sought to the particulars of claim which enabled the respondent to rely on the 20 July promissory note, the commitment letter and the instruments of mortgage, reliance could not be placed on them to assess the

respondent's prospects of success on the claim. However, the appellant had contended that, even where an amendment was sought and obtained, she still had valid defences to the claim since no single document encompassed the terms and conditions of the loan, and the covenant to pay was contained in the forged promissory note only and in any event it was her contention that the letter of commitment and the mortgage instruments were all tainted by the fraudulent promissory note.

[77] Mr Braham submitted that the defence of *ex turpi causa non oritur actio* would also have been available to the appellant and cited the case **Simpson v Bloss** which states that where a claim is so mixed with the illegal transaction, and could not be established without going into proof of that transaction, that claim could not be enforced in law. The appellant also contended that she had a valid defence to the 20 July promissory note since it was incomplete and the money had not been issued to her under it. Mr Braham also argued that there is uncertainty as to the amount that the appellant actually owed on the loan since the sum claimed included interest and fees which she had not agreed to pay. These are all defences to the claim recognised in law, and which may impact the respondent's prospects of success on the claim.

[78] Without hearing all the evidence and on the pleadings as existed, it is evident that the learned judge's approach in granting an order for summary judgment and his assessment of the respondent's prospects of success was palpably wrong.

Conclusion

[79] The issues surrounding whether the appellant signed the 27 July promissory note and whether it was forged or was ratified require investigation and cannot be a basis for summary judgment. The learned judge placed reliance on documents outside the respondent's particulars of claim and reply without regard to the applicable law on bills of exchange and without an amendment to the particulars of claim. In those circumstances, the learned judge was wrong in the exercise of his discretion to grant summary judgment and so it ought to be set aside with costs to the appellant. The issues which arise on the disputed facts in this case must be subject to a trial. I would therefore order that the matter be remitted to the Supreme Court to be heard by a different judge. A case management conference should be fixed at the earliest possible convenient date.

SINCLAIR-HAYNES JA (AG)

[80] I too have read the draft judgment of my sister Phillips JA and agree. Her reasoning and conclusion accord with my own views.

DUKHARAN JA

ORDER

1. Appeal allowed.
2. The judgment of Sykes J made on 14 April 2014 is set aside.
3. The matter is remitted to the Supreme Court to be heard by a different judge.

4. A date is to be fixed for case management conference at the earliest possible date.

5. Costs to the appellant to be taxed if not agreed.