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ND COURT OF THE CAYMAN ISLANDS
[ON

CAUSE NO. G 124 OF 2018

EZMIE SMITH

PLAINTIFF

AND

(1) DHARA A. LEVERS
(2) DHARA A. LEVERS, EXECUTOR OF THE ESTATE OF PRIYADARSHINI ANANDA JUMARI LEVERS

DEFENDANTS

IN CHAMBERS

Appearances:	**Mrs. Stacy Thompson for the Plaintiff** **Mr Kerrie Cox of HSM for the Defendants**
Before:	**The Hon Alistair Walters (Actg.)**
Hearing:	**20 and 21 June 2022**
Draft circulated:	**28 December 2022**
Judgment Delivered:	**17 January 2023**

References in pleadings and affidavits to without prejudice communications liable to be struck out. Whether words to the effect that payment to be made on or before a specific date invalidate a promissory note for the purposes of ss 11 and 83 (1) Bills of Exchange Act (2021 Revision). Application of Limitation Act (1996 Revision) to loan where agreement to extend deadline for repayment.

JUDGMENT

1. Although the hearing was on 20 and 21 June 2022, after the evidence had been given, I adjourned the hearing and directed that the parties attend mediation in an effort to resolve the issues between them in an amicable way. The parties did attend mediation, but it was unsuccessful and closing submissions were then filed in mid-November.

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2. This matter relates to a claim for repayment of loans made by the Plaintiff to the late Mrs Priyadarshini Levers ("Mrs Levers"). Mrs Levers had sat as a judge of the Grand Court but was found to be guilty of misbehaviour and removed from office[1]. This followed the appointment by the then Governor of a tribunal of inquiry pursuant to subsections (2) and (4) of s.49J of the Cayman Islands (Constitution) Order 1972. The tribunal reported on 12 August 2009 expressing the view that Mrs Levers had been guilty of misbehaviour that justified her removal from office and advised the Governor to request that the question of removal be referred to the Judicial Committee of the Privy Council. In 2010, the Judicial Committee upheld the findings of the tribunal. The Plaintiff is a retired civil servant and former senior member of the administrative staff of the Grand Court. Mrs Levers died on 24 December 2014, having been diagnosed with cancer in 2013.

Summary of facts and positions of the parties

3. Acting in person, the Plaintiff issued proceedings by way of Originating Summons dated 28 June 2018 with Particulars of Claim dated 4 April 2019. The Particulars of Claim set out the Plaintiff's claim as follows:

3.1 The Plaintiff and Mrs Levers were friends and the Plaintiff says that she trusted Mrs Levers.

3.2 As a result of losing her job as a Grand Court Judge, Mrs Levers requested that the Plaintiff lend her money to help cover her day to day living expenses, the mortgage payments on her house at 79 Shorelink Terrace (the "House") and her legal fees related to the misconduct proceedings.

3.3 The first loan of CI$170,000 was made on 21 August 2009 (the "First Loan"). Mrs Levers offered the Plaintiff a promissory note (the "Promissory Note") as security for the repayment of the First Loan. Mrs Levers prepared the wording of the Promissory Note and the First Defendant, her daughter, typed it out for signature. The Promissory Note was signed at the House by Mrs Levers with the First Defendant signing as guarantor. The Promissory Note provided that the First Loan would attract interest of 3% and would be repaid on or before two years from the date of its execution. In exchange, the Plaintiff provided Mrs Levers with a bank draft for the amount of the First Loan.

[1] See *In the Matter of Madam Justice Levers, Judicial Committee of the Privy Council* [2010 (2) CILR 18].

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3.4 At the request of Mrs Levers, between 28 August 2009 and 28 July 2014, the Plaintiff subsequently lent her the additional sums (the "Additional Loans"):

3.4.1 CI$397,650

3.4.2 CI$25,000

3.4.3 CI$55,400

3.4.4 CI$239,592

3.4.5 CI$3,000

3.4.6 CI$1,375

3.5 Mrs Levers told the Plaintiff that she would repay the sum due under the Promissory Note from payments that she was to receive from the Public Service Pension Board ("PSPB") and that the Additional Loans would be repaid from an inheritance that Mrs Levers told the Plaintiff that she would receive from her brother in Sri Lanka and from the proceeds of sale of the House. Mrs Levers also allegedly told the Plaintiff that she had a fixed deposit at Butterfield Bank which could be used to repay part of what was owed. The Plaintiff claims that she relied on these assurances some of which she says were made in the presence of the First Defendant.

3.6 The Plaintiff claims that she subsequently found out that Mrs Levers received CI$143,695.97 from the PSPB on 13 September 2010 and CI$143,695.97 on 1 February 2011 but no repayments were made of the sum due under the Promissory Note or in relation to the Additional Loans.

3.7 The Plaintiff states that after the death of Mrs Levers the amounts due to her remained outstanding. She says that she then discovered that the House was never registered in the name of Mrs Levers and that her bank accounts were in joint names with the First Defendant with a right of survivorship and were not part of her estate.

3.8 After Mrs Levers' death the Plaintiff and her attorney exchanged correspondence with the First Defendant and her brother, Mr Christopher Levers ("Mr Levers") about the amounts owed and repayment of them[2].

[2] There is a dispute as to whether that correspondence and those meetings were conducted on a "without prejudice" basis and I will return to them below.

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3.9 The Plaintiff alleges that she has been the victim of fraudulent misrepresentation and deceit on the part of Mrs Levers (in her evidence, this allegation is extended to the First Defendant and to Mr Levers) and that, as a result, the First Defendant and Mrs Levers' estate are jointly and severally liable for repayment of the amount due under the Promissory Note. She further alleges that the First Defendant as executor of Mrs Levers' estate has a fiduciary duty to settle the debts owed to her.

3.10 The Plaintiff claims damages for breach of contract and repayment of the First and Additional Loans.

4. The Promissory Note reads as follows:

> *"I, Madame Justice Priya Levers of 79 Shorelink Terrace promise to pay Mrs. Ezmie Smith of West Bay Grand Cayman the sum of one hundred and seventy thousand one hundred dollars (CI$170,100) being the sum received with interest of 3% per annum on or before two years from the date of this promissory note.*
>
> *The sum is guaranteed by the undersigned.*
>
> *Priya Levers*
>
> *D. Levers*
>
> *Dated the 21 day of August 2009"*

5. All of the loans made by the Plaintiff to Mrs Levers were from savings that the Plaintiff held with her late husband and from income that the Plaintiff was receiving from rental properties. It appears that the Plaintiff is executor of her late husband's estate. As a result, the First Defendant has raised an issue about the capacity in which the Plaintiff brings this action.

6. By way of her Defence dated 26 April 2019, the First Defendant's case is as follows:

6.1 The Particulars of Claim are insufficiently particularized, especially in relation to the allegations of fraud and liable to be struck out as an abuse of process.

6.2 The Plaintiff has some legal qualifications and is a sophisticated professional and fully capable of understanding and appreciating the legal and practical consequences of any documents that she signed.

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6.3 The Plaintiff was appointed co-executor of Mrs Levers' estate along with the First Defendant and, in those roles, the Plaintiff and First Defendant swore an Affidavit dated 18 May 2015 as part of the probate process stating that the estimated net value of Mrs Levers' personal estate was CI$50,000.

6.4 The First Defendant admits that Mrs Levers signed the Promissory Note and that she signed as guarantor. However, the First Defendant does not accept that the Promissory Note is in fact a promissory note. Indeed, she alleges further that the fact that time for payment of the First Loan was extended without her knowledge discharges her as a guarantor of that debt.

6.5 The First Defendant claims that she was unaware of the Additional Loans and was unaware of any statements made by Mrs Levers to the Plaintiff in relation to how the First Loan and Additional Loans were to be repaid. The First Defendant states that despite being a joint account holder on Mrs Levers' bank accounts she did not monitor the activity in the accounts.

6.6 The First Defendant also raises a limitation issue in relation to the claim under the Promissory Note.

7. The Plaintiff is quite adamant that Mrs Levers promised that she would be repaid the amounts of the First Loan and the Additional Loans. The Plaintiff states that Mrs Levers told her that she had advised her children to ensure that the Plaintiff was repaid what she was owed.

8. However, as explained by the First Defendant in her Affidavit dated 18 March 2019, the House was originally purchased on 3 January 2003 and was registered in the names of the late Charles Quin and Carla Reid as trustees of the "Nadaraja Trust" (the "Trust"). On 17 October 2013, prior to Mrs Levers' death, title to the House was transferred by the trustees of the Nadaraja Trust into the joint names of the First Defendant, Mr Levers and their sister, Leanne Levers in equal shares as was required by the terms of the Trust upon the youngest of the children attaining a certain age. At that time, it appears that there was a pre-existing mortgage registered against the title to the House. Subsequently, in January 2014 the First Defendant and Mr Levers appear to have borrowed CI$178,000 against their shares in the House and a further US$136,000 in 2018[3] increasing the amount of the charges registered against the title to the House. The First Defendant goes on to

[3] Page 187 of Exhibit "DAL-1" to the Affidavit of the First Defendant dated 18 March 2019.

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explain that an offer of US$835,000 had been received from a third party to purchase the House with a closing date of April 2019. At that point, apparently the borrowings against the House were approximately US$748,000 with some additional House related debts also outstanding.

9. There has been much back and forth between the parties over disclosure of bank accounts and what happened to Mrs Levers' assets. As at the date of this hearing, it does not appear that on her death, Mrs Levers' estate held any assets of any material value. Indeed, exhibited[4] to an affidavit of the First Defendant dated 18 February 2021 is a document headed "Instructions" which was from Mrs Levers to her children dealing with steps to be taken after her death. It refers to properties in Sri Lanka and Jamaica[5] as well as in the Cayman Islands. There also appears to have been some cash in Mrs Levers' Cayman Islands bank accounts held jointly with the First Defendant. As Mrs Levers says in her Instructions: *"What I am leaving for you now is nothing really except the car. The houses are already in your name.*" There is no mention in the document of the debt owed to the Plaintiff.

First Defendant's Summons

10. The present hearing dealt with a Summons dated 12 February 2021 issued on behalf of the First Defendant seeking the following orders:

    1. That certain paragraphs of the Plaintiff's affidavits and pleadings be struck out.

    2. That the following issues be determined as preliminary issues:

        (a) Whether the Promissory Note is valid as a promissory note;

        (b) Whether the Plaintiff's claims under the Promissory Note and/or the loans which are the subject of the Promissory Note are time barred; and

        (c) Whether the Plaintiff has filed the action in the wrong capacity.

    3. If any of the issues in 2(a), (b) or (c) are answered in the affirmative, this action be struck out, in whole or in part as relevant.

[4] Page 59 of Exhibit "DAL-2".
[5] Which also appears to have been maintained in part using monies lent by the Plaintiff to Mrs Levers (see paragraph 13 of the Plaintiff's Response to the First Defendant's Request for Further and Better Particulars dated 14 May 2019).[6] Also supported by the affidavits of Captain Bryan Ebanks dated 30 January 2019, Kerry Whittaker dated 30 January 2019 and Lorna Allen dated 12 March 2019.

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4. In the event that the entirely of the action is not struck out, the proceedings be sealed or, in the alternative, anonymised pending further order of the Court.

Evidence given at the hearing

11. Both the Plaintiff and First Defendant gave evidence at the hearing. Much of that reflected the contents of their various affidavits. What I found to be clear from that evidence is as follows:

11.1 the Plaintiff and Mrs Levers were close friends and the Plaintiff trusted Mrs Levers[6];

11.2 Mrs Levers did ask the Plaintiff to lend her money and the First Loans and the Additional Loans were made to Mrs Levers;

11.3 the First Defendant was aware of the First Loan and signed the Promissory Note as guarantor; and,

11.4 based on the Plaintiff's evidence, Mrs Levers did provide to the Plaintiff with assurances that she would be repaid from various sources. In reliance on those assurances, the Plaintiff believed that she would be repaid and, on that basis, was willing to continue to advance funds to Mrs Levers.

12. Having said that, the issues for determination now are relatively narrow.

Should certain paragraphs of the Plaintiff's affidavits and pleadings be struck out?

13. It appears that after the death of Mrs Levers there was communication and correspondence between the Plaintiff and First Defendant and, to a limited extent, between the Plaintiff and Mr Levers. There were also a number of meetings between the Plaintiff, First Defendant and the Plaintiff's lawyer, Ms Karin Thompson and a meeting between the Plaintiff, First Defendant and Mr Levers. All were related to the Plaintiff's demands for repayment of the amounts owed to her. The Plaintiff has referred to the details of that communication and those meetings in her Particulars of Claim, affidavits[7] and evidence given at this hearing and has effectively treated it as all being open. Some of the correspondence is not marked as being without prejudice but the First Defendant says in her affidavit dated 18 February 2021 and repeated in her evidence at this hearing that the meetings

[6] Also supported by the affidavits of Captain Bryan Ebanks dated 30 January 2019, Kerry Whittaker dated 30 January 2019 and Lorna Allen dated 12 March 2019.
[7] Particulars of Claim paragraphs 22, 23 and 25, Plaintiff's Affidavit dated 9 November 2018 paragraphs 17, 18, 19 and 23 and the Plaintiff's Affidavit dated 5 April 2019 paragraphs 18, 23 and 42.

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attended by the Plaintiff's attorney proceeded explicitly on the basis that they were to be "*off the record*". Similarly, a meeting in March 2017 between the Plaintiff, First Defendant and Mr Levers is said to have been expressed to be on a "*without prejudice*" basis. The First Defendant says that although the correspondence may not have been marked as such, in some cases it did relate to efforts to resolve a dispute between the parties and in some cases it did refer to what had been discussed at the various off the record meetings. On that basis, she says, it is to be treated as being without prejudice. Indeed, in her affidavit dated 12 January 2021 in support of an application to join Mr Levers to these proceedings the Plaintiff herself refers to the "negotiations" between the parties.

14. The Plaintiff has sought to argue that during those meetings the First Defendant committed herself to a certain position. The First Defendant denies that she did so. Having heard the evidence of the parties and reviewed the correspondence in question, I am not satisfied that here is evidence that any final, binding agreement was reached during those meetings or in the correspondence in question between the Plaintiff and the First Defendant or between the Plaintiff and Mr Levers that might be enforceable in its own right and would therefore result in any without prejudice privilege being lifted.

15. Whilst on one hand apparently accepting that settlement discussions did take place it is denied by the Plaintiff that the meetings with Ms Thompson present were without prejudice, despite what the First Defendant says about them having been expressed to have been off the record. It is further argued on behalf of the Plaintiff in her closing submissions that there was no genuine attempt by the First Defendant or Mr Levers to reach any settlement. On that basis it is argued that the without prejudice privilege does not apply to those communications.

16. The "*without prejudice*" rule governs the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather that litigate them to a finish (*Cutts v Head*[8]). The rule applies to exclude all negotiations genuinely aimed at a settlement, whether oral or in writing, from being given in evidence.

17. In *Sang Kook Suh v Mace (UK) Ltd*[9] the English Court of Appeal dealt with the question of when are discussions to be covered with without prejudice privilege.

[8][1984] Ch. 290 and Rules of the Supreme Court ("RSC") 24/5/45.
[9] 2016 WL 2370 (2016).

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> *"19. The classic statement of the law was contained in Lord Griffith's speech (with whom the rest of the Committee agreed) in Rush & Tomkins v GLC [1989] 1 AC 1280 at pages 1299-1300 as follows:-*
>
> > *"The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish ... The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rules not dependent on the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission".* (emphasis added).

18. The Plaintiff relies on the case of *Unilever PLC v The Proctor & Gamble Company*[10] and cites the first instance decision which was subsequently upheld on appeal[11]. The headnote of the Court of Appeal's decision succinctly sets out the approach to exceptions to the application of without prejudice privilege:

> *"(1) There were a number of well recognised occasions where the without prejudice rule did not prevent the admission into evidence of what one or both of the parties said or wrote. These included:*
>
> *(i) where the issue was whether the without prejudice communications had resulted in a concluded compromise agreement;*
>
> *(ii) where it was admissible to show that an agreement apparently concluded between the parties during negotiations should be set aside on the ground of misrepresentation, fraud or undue influence;*
>
> *(iii) where a statement might be admissible as giving rise to an estoppel;*
>
> *(iv) where the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety;*
>
> *(v) where the evidence was admissible in order to explain delay or apparent acquiescence;*
>
> *(vi) where, in an action for negligence, the evidence was admissible to show that the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations brought by him against a third party;*

[10] [1999] F.S.R. 849.
[11] [2000] F.S.R. 344.

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> *(vii) where the evidence was admissible as being an offer made without prejudice save as to costs.*
>
> *(2) The modern authorities made it clear that the without prejudice rule was founded partly in public policy and partly in the agreement of the parties. The protection of admissions against interest was the most important practical effect of the rule. However, to dissect out identifiable admissions and to withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties."*

19. I have already indicated that I am not satisfied that any concluded compromise agreement was reached thereby creating an exception to the without prejudice rule. The Plaintiff also appears to argue that the First Defendant and Mr Levers did not approach any settlement discussions genuinely and suggests that their real, deceptive, intention was to give the Plaintiff the impression that they really did wish to settle the dispute about the sums owed to her. This, it is said, was intended to cause the Plaintiff to delay taking any legal action and thereby cause her to fail to issue proceedings within what the First Defendant says is the requisite limitation period leaving a claim under the Promissory Note time barred.

20. The Plaintiff suggests that the Court should examine the relevant correspondence and dealings and make a determination of whether there was impropriety and dishonesty on the part of the First Defendant ***-Redacted-*** in their dealings with her which might invoke one of the exceptions to the without prejudice rule.

21. I have considered the arguments put forward by the Plaintiff in relation to the suggestion that the First Defendant and Mr Levers were not engaged in a genuine attempt to settle. I also note that in March 2017 the Plaintiff was in correspondence with her attorney, Ms Thompson about the outstanding debt due[12]. That correspondence seems to have been forwarded to the First Defendant and makes it clear that neither the Plaintiff nor Ms Thompson were of the view that the First Defendant and Mr Levers would settle matters voluntarily and that it was likely that proceedings would have to be issued. The fact that a settlement was not reached is not in itself evidence of a lack of genuine intent. There is no evidence from Mr Levers but based on the affidavits filed by the First Defendant and her oral evidence at the present hearing, I do not believe that, on the balance of probabilities, I can make any findings of lack of genuine intent, impropriety or dishonesty.

[12] Exhibit DAL-2 page 50.

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Accordingly, unless full particulars of such allegations can be provided, those parts of the Statement of Claim and the Plaintiff's affidavits which make reference to any fraud, deceit or misrepresentation on the part of the First Defendant ***-Redacted-*** are struck out.

22. I am of the view that various of the meetings between the Plaintiff, First Defendant and Ms Thompson and the meeting between the Plaintiff, First Defendant and Mr Levers did relate to efforts to settle the dispute between the parties and whether expressed to be off the record or whether or not expressed to be on a without prejudice basis, should be treated as without prejudice, as should any correspondence relating to those discussions. I do not think that any exceptions to that approach are applicable in this case.

23. On that basis, references to those meetings and what was discussed at them should be struck out of the Plaintiff's pleadings and affidavits.

Is the Promissory Note valid as a promissory note and, if so, is the First Defendant discharged as guarantor by the extension of time for payment?

24. The wording of the Promissory Note is set out above. A promissory note is a negotiable instrument governed by the Bills of Exchange Act (2021 Revision). S. 83 (1)[13] provides as follows:

> *"A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to order the order of a specified person, or to bearer."*

25. Section 11 of the Bills of Exchange Act provides:

> *"(1) A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable-*
>
> *(a) At a fixed period after date or sight; or*
>
> *(b) On or at a fixed period after the occurrence of a specified event which is certain to happen, through the time of happening may be uncertain.*
>
> *(2) An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect."*

[13] Which duplicates s 83 (1) of the Bills of Exchange Act 1882 which governs the formalities and enforcement of promissory notes in England and Wales.

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26. The position of the First Defendant is that the Promissory Note is not a promissory note pursuant to the Bills of Exchange Act because expressing the payment date as being on or before two years from its date creates an uncertainty or contingency in the time of payment. Reference is made to the case of *Williamson v Rider*[14] in which the English Court of Appeal held by a majority that:

> *"A document in which the person signing it agreed unconditionally to pay a sum certain in money to another "on or before Dec. 31, 1956" is not a promissory note within the meaning of the Bills of Exchange Act, 1882 s.83(1) because the option to pay at an earlier date creates an uncertainty or contingency in the time of payment contrary to the provisions of s.11."*

27. Although the decision was by a majority, Danckwerts, L.J who delivered the first judgment described the issue as "one of difficulty" and, in agreeing with him, Willmer, L.J. noted that there was no direct authority on the point that had been brought to the court's attention. Ormerod, L.J. dissented and said:

> *"The view taken by Danckwerts, L.J.'s judgement was, I think, that he was attracted by the submission made by counsel for the plaintiffs that the words "on or before Dec. 31, 1956", meant that the fixed date for payment was Dec. 31, 1956, and the words "on or before" meant nothing more than the promisor had an option to pay on some earlier date, if he so wished, but there was no compulsion on him. He cited the words (and I do not propose to repeat them) of Evershed J. in Dagger v Shepherd when he dealt with a phrase which is the phrasing controversy in this case. It is true, as Danckwerts, L.J. has said, that Dagger v Shepherd is a case dealing with very different subject-matter. It was an appeal arising out of a notice to quit. None the less, the words were the same. The words of Evershed, J. purport to do nothing more than to state the views of the court as to the meaning of this particular phrase; and, for my part, I do not hesitate to adopt that meaning and hold the view that the term "on or before" means that there is a fixed date for payment (i.e. Dec. 31, 1956, in this case), that the promisor binds himself to pay on that date, and if he fails can be sued under his promissory note, but if he chooses to pay-and it is purely a matter for him-at an earlier date than Dec. 31, 1956, then the holder of the bill is under an obligation to accept that payment."*[15]

The Lord Justice went on to conclude as follows:

> *"Having regard to all these matters… I have come to the view that, in spite of the words "on or before", there is no uncertainty about the date of payment under this promissory note which would render this document other than which it purports*

[14] [1962] All E.R 268.
[15] Page 276, D-H.

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> *to be. I have come to the conclusion, therefore, that that this is a promissory note within the meaning of s.83(1) of the Bills of Exchange Act, 1882…"*[16]

28. Counsel for the Plaintiff has referred to the decision of the Supreme Court of Canada in the case of *John Burrows Limited v. Subsurface Surveys Limited et al*[17] which had to consider whether a particular instrument was a promissory note. The instrument in question included the following words:

> *"FOR VALUE RECEIVED Subsurface Surveys Ltd. promises to pay to John Burrows Ltd. or order at the Royal Bank of Canada the sum of forty-two Thousand Dollars ($42,000.00) in nine (9) years and ten (10) months from April 1st, 1963, together with interest at the rate of six per cent (6%) per annum from April 1st, 1963, payable monthly on the first day of May, 1963, and on the first day of each and every month thereafter until payment, provided that the maker may pay on account of principal from time to time the whole or any portion thereof upon giving thirty (30) days' notice of intention prior to such payment.*
>
> *In default of payment of any interest payment or instalment for a period of ten (10) days after the same became due the whole amount payable under this note is to become immediately due."*

29. Following the dissenting judgment of Ormerod, L.J. in *Williamson,* the Supreme Court decided as follows[18]:

> *"It was contended on behalf of the respondent that because the instrument in question contained the provision that:*
>
> > *…the maker may pay on account of principal from time to time the whole or any portion thereof upon giving thirty (30) days' notice of intention prior to such payment.*
>
> *It was therefore not a promissory note within the definition contained in s.176(1) of the Bills of Exchange Act which reads as follows:*
>
> > *(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.*
>
> *In acceding to this contention in the opinion which he delivered in the Appeal Division, Mr. Justice Ritchie, with whom Limerick J.A. agreed in the result, relied in great measure on the case of Williamson et al. v. Rider, where the majority of the Court of*

[16] Page 278, E-F.
[17] 68 DLR (2d) 354.
[18] Page 613.

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Appeal in England held that a written promise to pay a sum certain "on or before" a given date was not a promissory note within the meaning of s. 83(1) of the Bills of Exchange Act, 1882 (which is identical with s.176(1) of our own Act), because the words created an uncertainty as to the date of payment and introduced a contingency.

The opinion of the majority was most fully expressed in the judgment of Danckwerts L.J., who thought the case to be governed by the decision of Blackburn J. in Crouch v. Credit Foncier of England, in which it was held that debentures issued under a company's seal, repayable at a certain time but subject to a condition which permitted redemption by drawings by lot, "could not be promissory notes".

Danckwerts L.J. treated this case as decisive notwithstanding the authority of the judgment of the Court of Appeal in Dagger v. Shepherd, in which a notice by a landlord to quit "on or before" a fixed date was held to be an effective notice and in which Evershed J. had said:

> *'The use of the phrase "on or before" some fixed date is today by no means uncommon, particularly in covenants or demands for payment of money, and in such a context it cannot, in our judgment, be open to serious doubt that it means, and would be understood to mean that the covenantor or debtor is under obligation to pay the debt on (but not earlier than) the date fixed but has the option of discharging it at any earlier time selected by him.'*

We are not bound by the decision of the majority in the Williamson case and I prefer the reasoning in the dissenting judgment delivered by Ormerod L.J., in which he pointed out that the Crouch case was distinguishable on the ground that the payment there was dependent upon a very real contingency, namely a lottery, whereas in the Williamson case, as in the present case, there was no such contingency. Mr. Justice Ormerod cited with approval the judgment of Evershed J. in Dagger v. Shepherd, supra, and concluded by saying:

> *'…I have come to the view that, in spite of the words "on or before", there is no uncertainty about the date of payment under this promissory note which would render this document other than that which it purports to be. I have come to the conclusion, therefore, that this is a promissory note within the meaning of s. 83(1) of the Bills of Exchange Act, 1882…'*

The instrument here in question is an unconditional promise in writing made by the respondent to pay the appellant or order the sum of $42,000 at a fixed and determinable future time, namely, nine years and ten months from April 1, 1963. This was a promise of the kind defined in s. 176(1) and the fact that the maker was accorded the privilege of making payments on account of principal from time to time did not alter the nature of his unconditional promise to pay at the time fixed by the instrument, but merely gave him an option to make earlier payment.

I am accordingly of opinion that the instrument in question was a promissory note, and there can be no doubt that the respondents were in default in their interest payments for more than ten days after the same became due."

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30. It is interesting to note that Stroud's Judicial Dictionary of Words and Phrases contains[19] a definition of "on or before" and says that: *"On or before", in a promissory note, created a prepayment option and did not make the note uncertain* (*Burrows, John v Subsurface Surveys* (1968) 68 D.L.R. (2d) 354).

31. Neither of the *Williamson* or *Burrows* decisions are binding on this Court. However, having considered the matter I am of the view that the approaches of Ormerod, L.J. in *Williamson* and the Supreme Court of Canada in *Burrows* do present a preferred approach to the question of the validity of a promissory note that includes the words "on or before" within the payment provisions. There is certainty that the payment must be made by the specified date but the payee has the right to make repayment earlier if they wish or able to do so. This seems to me to be a perfectly sensible commercial arrangement and such wording should not in my view invalidate a promissory note. On that basis, I am of the view that the Promissory Note was a valid promissory note.

32. The next question therefore is whether the First Defendant is liable as guarantor under the Promissory Note for the amount of the First Loan. The First Defendant argues that the extension of time to pay what was due under the Promissory Note was agreed between Mrs Levers and the Plaintiff. There was consideration in the form of continued interest that the Plaintiff would earn on the outstanding sum and, as such, there was a binding agreement between them for time to be extended (see *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*[20]).

33. The First Defendant says that she was not aware of or agreed to the extension of time under the Promissory Note. On that basis it is argued on her behalf that, as guarantor, she is discharged from her obligation.

34. As was said in *Polak v Everett*[21]:

> *"It has been established for a very long time, beginning with Rees v Berrington to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing and even positively benefiting him,*

[19] 10th edn.
[20] [1979] Q. B. 705.
[21] (1986) 1 Q.B.D. 669 (Court of Appeal, E&W).

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> *nevertheless, by the principles of equity, it is established that this discharges the surety altogether."*

35. In the more recent case of *Associated British Ports v Ferryways NV*[22], the English Court of Appeal said:

> *"61. Every commercial lawyer knows or ought to know that a guarantee is rendered unenforceable by the giving of time to pay to the debtor or by a non-trifling variation of the underlying contract, and that to guard against these consequences a term permitting them ought to be included in a guarantee."*

36. The evidence of the First Defendant has been clear; namely that she was not aware and did not consent to the extension of the time to pay under the Promissory Note. In the absence of any evidence to the contrary, I see no option but to find that because of the extension of time given to Mrs Levers under the terms of the Promissory Note which was clearly prejudicial to the First Defendant, the First Defendant was discharged from her obligation as guarantor under the terms of the Promissory Note. Accordingly, the personal claims against the First Defendant as guarantor under the Promissory note stand dismissed.

37. But matters do not rest there in relation to the Promissory Note. The fact that the payment date was extended, it seems indefinitely, based on an oral agreement between the Plaintiff and Mrs Levers, in my view means that payment was no longer at a fixed or determinable future time as required by s.11 and s.83 (1) of the Bills of Exchange Act. On that basis, it seems to me that when the agreement to extend time was made, the Promissory Note ceased to be a promissory note. This does not of course mean that the debt ceased to be due from Mrs Levers to the Plaintiff.

Are the Plaintiff's claims under the Promissory Note and/or the loans which are the subject of the Promissory Note time barred?

38. Based on what I have said above, the Promissory Note ceases to have much significance in relation to the Plaintiff's claim[23]. However, as mentioned above, that does not mean that the amount of the

[22] [2008] EWHC 1265 (Comm).

[23] The parties have focused their arguments on whether a claim under the Promissory Note itself is time barred. The Plaintiff has sought to rely on s. 34 which makes provision for limitations periods in cases where there has been an acknowledgement or part payment of a debt. This trespasses once again on what I have found is without prejudice

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First Loan ceased to be a debt due from Mrs Levers to the Plaintiff. The amount of the First Loan and the Additional Loans remained outstanding as at the date of Mrs Levers' death. The Plaintiff expected, based on the assurances from Mrs Levers that she would be repaid what she was owed. As I have explained, that expectation was clearly misplaced because, despite what she told the Plaintiff, Mrs Levers' had essentially stripped her estate of all material assets.

39. With the agreement by the Plaintiff to give Mrs Levers time to repay the sums due to her, it is not entirely clear when Mrs Levers could be said to have been in breach of contract and therefore the limitation period/s in this case started to run. Sections 7 and 8 of the Limitation Act state:

> *"7. An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.*
>
> *8. (1) Subject to subsection (3), section 7 shall not bar the right of action on a contract of loan to which this section applies.*
>
> *(2) This section applies to any contract of loan which does not —*
>
> *(a) provide for repayment of the debt on or before a fixed or determinable date; and (b) effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter, except where, in connection with taking the loan, the debtor enters into any collateral obligation to pay the amount of the debt or any part of it (as, for example, by delivering a promissory note, which expression in this subsection, has the same meaning as in section 83 of the Bills of Exchange Law (Revised), as security for the debt) on terms which would exclude the application of this section to the contract of loan if they applied directly to repayment of the debt.*
>
> *(3) Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one or more of them) section 7 shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made."*

39. Based on ss.7 and 8 it may be that limitation did not start to run until the date of Mrs Levers' death or demands for payment were made by the Plaintiff after that date. In either case, proceedings were

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material and, regardless of that, s.35 requires that an acknowledgment of a debt must be in writing and signed by the person making it. Neither of those conditions has been satisfied in this case.

The Plaintiff also seeks to rely on s.37 of the Limitation Act that provides for limitation periods in cases of fraud, concealment and mistake. In light of the provisions of s.8 of the Limitation Act, I am not sure that there is any reason to invoke s.37 and besides that, there is no clearly pleaded and particularized case that supports a claim of fraud, concealment or mistake on the part of Mrs Levers, or against the First Defendant or Mr Levers.

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commenced in 2018, within 6 years of Mrs Levers' death and I do not see any basis upon which it could be said that the claims for repayment of the First and Additional Loans were time barred.

Capacity in which the Plaintiff brings these proceedings

40. This issue has not been addressed in any detail by the parties. It does appear that the Plaintiff is an executor of the estate of her late husband from which it seems some monies were lent to Mrs Levers. It also appears that some monies were lent by the Plaintiff personally. Overall, therefore I do think that the Plaintiff is entitled to bring these proceedings although the precise basis upon which she is doing so has not been set out fully.

Allegations of fraud and future of these proceedings

41. Subject to paragraph 21 of this judgment, there are various allegations made by the Plaintiff in relation fraud on the part of Mrs Levers, the First Defendant, ***-Redacted-***. The First Defendant has referred to the case of *Three Rivers District Council v Governor & Company of the Bank of England*[24] which made it clear that when making an allegation of fraud or misconduct, the more serious the allegation, the greater is the need for particulars to be given to explain the basis for the allegation[25].

42. Having read and heard the evidence presented in this case so far, but without making any findings of fact, I am left with a strong impression that the Plaintiff was misled into lending money to Mrs Levers and forbearing, based on what seem to have been false pretences, from taking steps to obtain repayment. The friendship between the Plaintiff and Mrs Levers appears to have been exploited. The money lent to Mrs Levers appears to have been paid into bank accounts held jointly with the First Defendant. The loans themselves seem for the relevant periods to have been the sole source of income for Mrs Levers. They appear to have been used for a variety of purposes including to maintain and preserve assets which the Plaintiff was told would be available to repay the debts due to her but which, instead, were, in fact, not part of Mrs. Levers' estate.. As I say, I make no findings of fact in relation to these matters and they have not been fully pleaded or argued but it does seem to me that the position in which the Plaintiff has been left is, at best, unconscionable.

[24] (No 3) [2001] UKHL 16.
[25] Paragraph 51 of the judgment.

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43. Part of the difficulty with this case is that it was commenced by way of Originating Summons as opposed to a Writ and Statement of Claim and many of the issues have also been ventilated by the Plaintiff in affidavits. In my view, pursuant to GCR O.28, r.8 the action should be continued as if the cause had been begun by Writ and the affidavits stand as pleadings.

44. The Parties shall be at liberty to make written submissions on costs within 21 days of this Judgment.

JUSTICE ALISTAIR WALTERS (ACTG)
JUDGE OF THE GRAND COURT