ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2008/027

BETWEEN

JANICE REYNOLDS-GREENE

Appellant

and

COMMUNITY FIRST CO-OPERATIVE CREDIT UNION

Respondent

Before:

The Hon. Mde. Justice Ola Mae Edwards — Justice of Appeal
The Hon. Mde. Justice Janice George-Creque — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal

Appearances:

Mrs. Janice Reynolds-Greene appellant in person
Ms. S. Ali Schneider for the respondent

2009: December 11;
2010: October 25.

Civil Appeal – outstanding moneys owing on consolidated loans and costs – whether the trial judge erred in her findings of fact and law – whether the trial judge drew wrong inferences based on the evidence and law – section 2 of the Bailiff's Commission Act - whether the trial judge wrongly refrained from making a decision on the application and interpretation of statute –

The appellant who is a long standing member and shareholder of the respondent, Credit Union obtained 2 loans from the respondent. By an amended claim filed on the 19th July 2007, the respondent claimed from the appellant the sum of $11,506.08 as the principal sum and interest and costs owing from these two loans, together with court fees $40.00, legal practitioners fixed costs on issue $750.00 personal service of the claim form $100.00, and 10 percent collection fees on the amount claimed being $1,150.61. The total claimed was $13,546.69. The essence of the appellant's case was that she was not indebted to the respondent in the amount claimed; and if she owes any amount, this was the result of the respondent's own negligence or wrongful act in not applying the appellant's shares

sooner to the satisfaction of the loan, not applying her payment of $717.53 to the loan, not reconciling and including the sum that she paid to the respondent's bailiff in the loan account, and making improper bailiff's commission payments. The appellant contended also that the 2 loans were not consolidated. The policy of the respondent, Credit Union was to consolidate outstanding loan balances with the approved new loan; and debt collection from a member attracted a commission of 20 percent of the outstanding loan amount. Under section 109 of The Co-operative Societies Act 1994 and the terms of the agreed Promissory Notes that the appellant signed, where the appellant was in any default in her agreed payments for the loans, the respondent, Credit Union was entitled to apply the appellant's paid shares and payments on account of shares to the payment of said loan, interest, costs and expenses. The learned judge rejected the appellant's contention, found that the respondent had proven that the appellant owed the sum claimed, and ordered judgment for the respondent against the appellant in the sum of $11,506.08 with prescribed costs awarded, unless otherwise agreed.

The appellant's grounds of appeal complain that the trial judge erred in her findings of fact and law, drew wrong inferences based on the evidence and law, and wrongly refrained from making a decision on the application and interpretation of statute which is indispensable to the determination of the matter.

Held: dismissing the appeal, affirming the judgment of the court below and awarding costs in the appeal to the respondent, pursuant to r. 65.13(1)(b) **CPR 2000** that is, two thirds of the costs below, which is prescribed costs unless otherwise agreed.

1. That in law, payment of a debt may be proved, either by the production of receipts, or by any other credible evidence from which the fact of payment may be inferred, and whether or not the appellant had discharged her debt to the respondent Credit Union is a matter of fact and law. The appellant was unable to satisfy this requirement in law as her credibility was clearly in issue and she tendered no receipts which established that the full debt was discharged.

2. That the law governing appellate review requires that the advantages which the judge derived from seeing and hearing the witnesses must be respected by this appellate court. The main reason why, in the absence of error and law, the judgment of the trial judge calls for utmost respect, is that she has seen and heard the witnesses including the rival parties. "The strength of this consideration will vary from case to case accordingly as conclusions have to be reached as to credibility, or based on demeanour" "The ultimate conclusion to be drawn depends much more on the setting in which this evidence was given, and the relation which it must be thought to have to the events which occurred."

   Whitehouse v Jordon [1981] 1 All E.R. per Lord Bridge of Harwich at page 286 and Lord Wilberforce at page 270 applied.

3. Though the trial judge may have erred in some of her findings of fact, those errors were not substantial errors which affected her decision as to the outcome of the case. On the evidence that was before her, and the law, the trial judge was entitled to conclude that the appellant was not credible and that on the totality of the evidence the appellant was indebted to the respondent in the amount claimed.

4. That the trial judge erred when she failed to determine the live issue as to whether the 20% commission that was paid to the bailiff of the respondent, Credit Union was unreasonable and unlawful. Section 2 of **The Bailiff's Commission Act Cap 38 of the Laws of Antigua and Barbuda** which prescribes a 5 percent commission on every sum to be levied by the bailiff as arrears of rates and taxes is irrelevant to the respondent's bailiff who was not levying a sum for any arrears of rates and taxes. In the absence of any Statute or Regulations which regulate the fees to be charged by private bailiffs in Antigua and Barbuda when collecting private debts, a fee of 20 percent of the collectible amount due was not unreasonable in the circumstances

JUDGMENT

[1] **EDWARDS, J.A.:** The appellant appeals against the judgment of Blenman J delivered on 30th October 2008, on an amended claim filed on 19th July 2007 by the respondent for outstanding moneys owing on consolidated loans and costs. The claim was as follows: $11,506.08 as the principal sum and interest together with court fees $40.00, legal practitioners fixed costs on issue $750.00 personal service of the claim form $100.00, and 10 percent collection fees on the amount claimed being $1,150.61. The total claimed was $13,546.69.

[2] The essence of the appellant's case was that she was not indebted to the respondent in the amount claimed; and if she owes any amount, this was the result of the respondent's own negligence or wrongful act in not applying the appellant's shares sooner to the satisfaction of the loan, not applying her payment of $717.53 to the loan, not reconciling and including the sum that she paid to the respondent's bailiff in the loan account, and making improper bailiff's commission payments.

[3] The learned judge rejected the appellant's contention, found that the respondent had proven that the appellant owed the sum claimed, and ordered judgment for the respondent against the appellant in the sum of $11,506.08 with prescribed costs awarded, unless otherwise agreed.

[4] The appellant's grounds of appeal complain that the trial judge erred in her findings of fact and law, drew wrong inferences based on the evidence and law, and wrongly refrained from making a decision on the application and interpretation of statute which is indispensable to the determination of the matter.

Factual and Evidential Background

[5] The documentary exhibits and evidence show that the appellant who is a long standing member and shareholder of the respondent, Credit Union, obtained 2 loans from the respondent between May 1995 and January 1997. The pleaded and proven procedure for obtaining a loan from the respondent, Credit Union, while there is an unpaid loan balance, was for the member who is applying for the loan to request consolidation, then the application for the loan is written up, and sent to the Credit Union for approval; and the new loan amount is written on the Promissory Note.

[6] The appellant's first approved loan application during this period dated 8th May 1995 was for $21,495.90 and together with an outstanding old loan balance of $8,504.10 resulted in a total of $30,000.00. By Promissory Note dated 10th May 1995, the appellant promised to repay the new loan sum of $21,495.90 by 84 installments of $530.00 "commencing 31st May 1995 with interest on the outstanding amount at the rate of 12 percent each month." Having regard to other evidence, it appears that the rate of interest was inaccurately stated in this Promissory Note and ought to have been stated as 12 percent per annum instead of 12 percent each month.

[7] The second approved loan application dated 31st January 1997, shows that a new loan for $3,500.00 was approved; and that with the old loan of $25,424.74 the total outstanding loan was $28,924.74.

[8] The document captioned "Statement of Agreement To Conditions Under Which Loan Has Been Granted" dated 31st March 1997, ("the SAC document") which the appellant signed and agreed to, stated that the total loan of $28,924.74 was for 82 months with a rate of interest of 1 percent per month on the unpaid balance or 12 percent per annum;

and the total monthly payment will be $850.00. From this monthly payment of $850.00, the sum of $289.00 would be distributed to shares, while the rest would go to interest to date and principal balance. The appellant also agreed in this document "that the amount of $13,539.00 quoted is only an approximate amount of the interest due as the true amount is dependent on the date on which each payment on the principal is made." The compelling inference from this document would be therefore that $561.00 monthly would go to interest and principal balance. One of the appellant's complaints is that the judge misinformed herself in stating at paragraph 2 of the judgment that "by promissory note, Mrs. Reynolds-Greene agreed to repay the loan by monthly installments of $561.00 for a period of 82 months." I agree with the appellant that the learned judge did misspeak in identifying the document which provided the facts for her conclusion concerning the monthly installment of $561.00.

[9] The Promissory Note dated 26th March 1997, signed by the appellant shows that she promised to pay $3,500.00 to the Credit Union in 82 installments of $520.00 commencing 31st March 1997, and a like amount every month thereafter, until the full amount has been paid with interest on the outstanding amount at the rate of 1 percent per month (equivalent to 12 percent per annum).

[10] It is immediately obvious that having regard to the respondent's procedure for noting only the new loan amount on the Promissory Note where the new loan is consolidated with the old loan balance, there is apparent disparity on the face of the first Promissory Note between the new loan sum of $21,495.90, that the appellant promised to pay in the first Promissory Note and the total sum of $44,520.00 for the 84 installment payments of $530.00 each month.

[11] Of more significance, is the disparity in the sum of $3,500 in the second Promissory Note which the appellant promised to pay and the total sum of $42,640.00 for the 82 installments of $520.00 each month. The respondent's "Amended Statement of Claim" pleaded at paragraph 3 that the appellant was granted a consolidated loan in the principal sum of $42,640.00 with interest repayable on the same at 12 percent per annum. This pleading is not supported by the approved loan application document, the Promissory

Note, or the SAC document in my view. The appellant relied on these discrepancies which she described as "contradictions in the documents" and focused on the second Promissory Note to support her contention that the judge erred in her inferences and findings of fact that the old and new loans were consolidated. These discrepancies ought to be viewed on the totality of the evidence that was before the trial judge and not in isolation from the other documentary evidence concerning the appellant's account, in my view.

[12] The learned judge stated in her judgment that the appellant made one payment of $624.00 on 18th January 1997, and did not make any other payments until 2002. This is obviously incorrect as the evidence of Ms. Angela Payne and documentary evidence reveal that the appellant paid $850.00 on 4th April 1997; $1,400.00 on 18th June 1997, and $830.00 on 14th January 1998. The respondent also pleaded in its Statement of Claim that on or about 18th November 2002, the defendant paid $500.00 towards satisfaction of the debt.

[13] The appellant subsequently wrote a letter dated 21st August 2001, indicating that her illness which commenced in 1997 had caused her to be on extended leave for over a year up to 1999, resulting in her financial distress due to the high cost of overseas medical attention/services. She indicated in this letter that she had other loans which her employers have just rescheduled as her situation with them is no different from her situation with the respondent. In this letter, she promised to commence making her rescheduled payments of $1,000.00 monthly from her additional income source which she had secured to assist in alleviating her compounded problem.

[14] Paragraph 16 of the respondent's "Reply to Defence" wrongly alleges that the appellant wrote the letter on 21st August 2002, and failed to live up to the terms. This obviously misled the trial judge in concluding at paragraph 33 of her judgment that the letter was dated 21st August 2002.

[15] Despite the discrepancies identified at paragraphs 6 to 14 above, the respondent's documentary exhibits consisting of the relevant accounting records for the appellant's loan account at pages 89 to 95, 103, 108,112 to 120 in the Record of Appeal tell the real history

of the appellant's payments and how these moneys were applied. The respondent's witnesses, Ms. Angela Payne and Ms. Claudette Simon, also testified that the Credit Union's policy was that debt collection attracted a commission of 20 percent; and that the appellant paid bailiff's fees to the bailiff, Mr. Henry.

[16] The bone of contention centers around the payments made by the appellant to the bailiff, Mr. Henry, on 14th June, 27th June and 9th August 2002, for which receipts were issued by the bailiff. These receipts show that the appellant paid $100.00 on 14th June 2002; $847.42 on 27th June 2002; and $2,000.00 on 9th August 2002. The documentary exhibits and the respondent's witnesses, proved that of these amounts, only the $100.00 and $2,000.00 payments received from the appellant were applied to the outstanding loan interest and principal. The sum of $847.42 which the appellant paid was applied as bailiff's fees.

[17] The appellant pleaded that in or about 2002, the respondent contacted her and advised her that the outstanding debt be liquidated, by the payment of approximately $5,000.00, and the application of her shares to the loan; and she paid the money to the bailiff. She testified under cross examination that she paid $5,000.00 to the bailiff, Mr. Henry, and that her receipts add up to $3,957.00 along with a payment for $1,000.00 and the payment for $500.00 (which the respondent referred to in its Statement of Claim) which would make it more than $5,000.00 in all. The Notes of Evidence at page 7, state that the appellant also testified that of the $11,506.00 claimed by the respondent, "$7,551.00 is interest and difference of $4,056.08. Of 4056.11 of this 2942.00 given to bailiff - $2,947.42, $717.53. This was not applied and leaves a difference of 291 and interest 7,219 in interest." The appellant is therefore not correct in stating that the learned judge misquoted the evidence at paragraph 24 of the judgment, by stating that Mrs. Reynolds-Greene stated that $717.53 which she gave to the bailiff has not been accounted for.

[18] The appellant agreed that having the bailiff to collect from her is an expense. She also agreed that the Promissory Note indicates that she should pay reasonable expenses.

[19] Her further testimony under cross examination is revealing, where she answered: "I have no document saying something to effect paid off debt but the document contradicts themselves. I agree in 2001. I agreed to pay off debts by monthly installments of $1,000.00, but at times I was able to pay and other times I was unable. I can't say how often I was unable to pay." The documentary evidence reveals that the appellant's loan balance as at 31st December 1999 was $28,640.70; and on 18th November 2002 when she paid $500.00, the balance that she owed the respondent was $34,751.41.

[20] Both Promissory Notes bear the following terms:

> "In case of any default in payments as herein agreed, the entire balance of this note shall immediately become due and payable at the option of the holder. I (we) hereby pledge all paid shares and payments on account of shares which I (we) now have or hereafter may have in this Credit Union as security for repayment of this loan together with interest, costs and expenses and I (we) hereby authorize the Treasurer to apply any or all such paid shares and payments on account of shares to the payment of said loan, interest, costs and expenses. Each party to this note, whether as maker, endorser or guarantor, severally waives presentment for payments, demand, protest and notice of protest and dishonor of the same."

[21] Section 109 of **The Co-operative Societies Act 1997** ("the Act")[1] states:

> "(1) A registered society has a lien on a share or any amount outstanding to the credit of a member or his legal representative for a debt due by that member to the society. (2) A registered society may enforce a lien mentioned in subsection (1) in the manner set out in its by-laws. (3) The Board may, in default of payment by any member indebted to a registered society, apply the sum paid up for the time being on any shares held by that member in or towards the discharge of the debt so due and of any expenses in or about the same, and the defaulting member shall cease to have any further claim in respect of such shares."

[22] Article 37 of **the By-Laws** states that:

> "The loan granted to a member shall immediately become due:- (1) if he fails to pay an installment of the loan within three months after the time fixed for payment and no extension of time has been granted." …However, article 35 states that "If by reason of sickness or some other cause, a member finds that he will be unable to discharge his obligations to the Society, and notifies the Secretary/Treasurer in writing before a loan is due, the Credit Committee may extend the time fixed for payment on such conditions as it thinks fit."

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[1] No. 2 of 1997

[23] Following 2 demand letters from 2 different attorneys-at-law representing the respondent on 14th July 2004, and 17th February 2005 respectively, the sum demanded as the loan debt owing to the respondent was stated as $12,182.54 with costs $100.00 in the first instance; and the sum of $12,405.33 with legal fees $1,240.53 in the second instance. The defence that the respondent failed to apply the appellant's shares sooner to the satisfaction of the loan would have been evaluated by the trial judge, in light of the relevant articles in the **By-Laws**, the letter of the appellant written in August 2001, and the subsequent demand letters written by the respondent's attorneys- at- law.

[24] The pleadings and testimony from the respondent's witnesses disclose that on 17th July 2006, the respondent applied the appellant's share savings $21,706.03 plus her deposit savings $15.84 to service the appellant's outstanding loan with interest which was then $36,192.41 inclusive of the principal $28,640.70 and $7,551.71, being interest accrued from 14th January 1998 to 29th December 2006, the date of the claim form.

The Judgment

[25] The learned judge in assessing the credibility of the witnesses and considering the evidence said: "[30] The Court is afraid that Mrs. Reynolds-Greene was not as forthcoming as she could have been. This may well be due to the fact that she was labouring under the mistaken belief that she had liquidated her indebtedness to the Credit Union because of the fact that the Credit Union had stated that "she paid $500.00 towards the satisfaction of the debt." Indeed Mrs. Reynolds-Greene prevaricated quite a bit in her evidence. Where there is any conflict between Mrs. Reynolds-Greene's evidence and that of Mrs. Simon, I am more persuaded by Ms. Simon's. The latter did not resile from her position even under intense questioning from Mrs. Reynolds-Greene, during cross examination. [31]…The Court has accepted the claimant's evidence in relation to loans that were granted to Mrs. Reynolds-Greene, even though the latter seemed to convey that she could not recall the exact number of loans she had received. …[33] The Court notes that Mrs. Reynolds-Greene was forced to admit under cross examination that she has no record to prove that she has paid off her debt to the Credit Union... [36] The Court accepts, without reservation that the Credit Union's payment of the bailiff's fees is lawful; it

falls within the expenses or costs associated with recouping moneys loaned to members and not repaid…The Court, however refrains from commenting on the fact that the bailiff's fees are 20% of the moneys collected."

The Bailiff's Commission

[26] In her contention that the fees payable to the bailiff were unreasonable, the appellant referred us to section 2 of the **Bailiff's Commission Act** [2] which provides as follows:

> "Whereby any Act any arrears of rates or taxes save and except arrears of land tax payable under the Land Tax Act, are to be levied by the Provost-Marshal, and the Provost-Marshal shall issue his precept to any bailiff directing him to levy the same there shall be raised, collected by and paid to such bailiff as and for a remuneration for collecting such rates or taxes a further sum or commission amounting to five per centum on every sum by such precept directed to be levied, and the bailiff shall levy such percentage under every such precept as if the same were included therein."

This provision is irrelevant to the fees for the bailiff in the instant case.

[27] The bailiff, Mr. Henry was not levying any arrears of rates and taxes on the occasions that the appellant made payments to him, arising from her indebtedness to the respondent. In the absence of any Statute or Regulations being brought to our attention, which regulate the fees to be charged by private bailiffs in Antigua and Barbuda when collecting private debts, I do not consider a fee of 20 percent of the collectible amount due to be unreasonable in the circumstances. The trial judge refrained from making any pronouncement as to the lawfulness of this 20 percent commission paid to the bailiff of the respondent Credit Union. The judge instead found that the appellant had agreed to this commission being paid in the course of her transactions with the respondent. The lawfulness of the bailiff's commission was a live issue on the defence raised by the appellant. Contrary to the submissions of respondent's counsel, I am of the view that the learned judge erred in her approach to this issue.

[2] Cap 38 of the Laws of Antigua and Barbuda

Conclusions

[28] Despite the submissions of the appellant, all of which have been considered, the matter is one of fact and law as to whether the debt to the respondent Credit Union was discharged. In law, payment of a debt may be proved either by the production of receipts or by any other credible evidence from which the fact of payment may be inferred.[3] The appellant was unable to satisfy this requirement as her credibility was clearly in issue, she tendered no receipts which established that the full debt was discharged, and the trial judge was entitled to conclude as she did, that the appellant was not credible on the totality of the evidence.

[29] The advantages which the judge derived from seeing and hearing the witnesses must be respected by this appellate court. The main reason why, in the absence of an error of law, the judgment of the trial judge calls for the utmost respect, "is that [s]he has seen and heard the witnesses...including the rival parties. The strength of this consideration will vary from case to case according[ly] as conclusions have to be reached as to credibility, or based on demeanour...[T]he ultimate conclusion to be drawn depends much more on the setting in which [this] evidence was given, and the relation which it must be thought to have to the events which occurred."[4]

[30] The importance of the part played by the advantages which the trial judge derived from seeing and hearing the witnesses "in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial, and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."[5]

[31] Where the trial judge's decision on an issue of fact was an inference drawn from primary facts and depended on the evidentiary value she gave to witnesses' evidence and not on their credibility and demeanour, the appellate court is just as well placed as the trial judge

[3] Mountford v Harper (1847) 16 LJ Ex 184
[4] Per Lord Bridge of Harwich at page 286 and Lord Wilberforce at page 270 in Whitehouse v Jordan [1981] 1 All E.R. 267
[5] Per Lord Harwich at page 286 paragraph c in Whitehouse v Jordan supra.

to determine the proper inference to be drawn and is entitled to form its own opinion thereon.[6]

[32] Having reminded myself of the law to be applied in reviewing the learned judge's decision, I am of the view, that the errors she made were not substantial errors that would affect her conclusion. On the evidence that was before her, and the law, the learned judge was entitled to conclude as she did, that the appellant was indebted to the respondent in the amount claimed.

[33] I would dismiss the appeal, affirm the judgment of the court below, and award costs in the appeal to the respondent, pursuant to CPR 65.13(1)(b) that is, two thirds of the costs below which is prescribed costs unless otherwise agreed.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

[6] Lord Wilberforce at page 272 para h; and page 273 para j; and page 282 para g; in Whitehouse v Jordan supra.