

JUDGMENT

- 1 **Morley J:** By a claim form filed on 11.03.14, the claimant (NDF) wants to be paid \$246358.71ec (plus interest and costs) under a loan agreement with the defendant (Roach) ¹, who claims the action is statute-barred. The question I have to decide is whether part-payments from 2003 up to 2011 by Roach, placed into the NDF, were payments intended for the NDF or were in fact intended for the St Patrick's Cooperative Credit Union (CU). If on balance intended for the CU, it is conceded by Counsel Brandt that the action is indeed statute barred.

Overview

- 2 The matter was tried on 13.11.17. There was preliminary inquiry into the banking procedures and correspondence between Roach and the CU. I then heard evidence from Karen Moore (Moore) for the NDF and from Roach, working through a 287-page trial bundle, plus six letters to Roach from the CU produced by the parties by agreement on the day of trial.
- 3 Roach took out loans from the CU and from the NDF.
- a. The loan from the CU was for \$40400ec on 28.04.99, repayable at \$2125ecpm² for 22 months³. As at 30.12.09, on final demand, he still owed \$14134.38ec⁴.
 - b. The loan from the NDF, giving rise to this action, was for \$132181.58ec on 14.08.00, repayable at \$2060.21ecpm for 84 months⁵, (being a refinancing of and addition to an earlier loan of \$55000ec on 28.10.98 repayable at \$857.54ecpm for 84 months⁶). As at 31.10.12, on final demand, he still owed \$105070.71ec⁷.

¹ For the purposes of this ruling, the parties will be referred to as bracketed for ease of reading, and no disrespect is intended by not writing out on each mention full names and titles.

² 'ecpm' – east caribbean dollars per month.

³ See pages 251-2 of the trial bundle (TB p 251-2) – CU loan 28.04.99.

⁴ See CU correspondence introduced at trial, letter 5, dated 30.12.09 (CUC 5).

⁵ TB p4-5 – NDF loan 14.08.00.

⁶ TB p272 – NDF loan 28.10.98.

⁷ TB p287 – NDF final demand 31.10.12.

- 4 Two peculiar features of this case are:
 - a. The NDF is housed within the CU, to share facilities and reduce costs, where there are about 12 staff working for the CU, and Moore is an accounts officer for more than 15 years with oversight over both the CU and NDF.
 - b. Roach was President of the CU for 1988-2004, and Chairman of the NDF for 1989-2010, being head of both when taking out and structuring his own loans.

- 5 The CU is a 'credit union', which means it is a not-for-profit financial cooperative, and the traditional model is that earnings are paid back to members in the form of higher savings rates and lower loan rates.

- 6 The NDF was set up on Montserrat in about 1987 as a non-profit vehicle for micro-financing small businesses, with sponsorship from DFID⁸, and it has made more than 5000 loans, of which only around 35 have not been paid back. Its operation out of the CU was established by a memorandum of understanding (MOU) dated 15.05.92⁹, signed by Roach as NDF Chair and by one Roosevelt Jermotte as 'President' of the CU (though in fact he was only vice-president, as Roach was actually President, so that if one peers closely at the MOU, in a sense it was arguably more an understanding between Roach as CU President and Roach as NDF Chair).

- 7 The CU loans out money, paid back by deposits into the CU via CU deposit slips¹⁰. If deposits to the CU are sent in by cheque¹¹, then the teller fills in the deposit slip in the absence of the depositor¹², placing the money in the relevant CU loan account.

- 8 The NDF loans out money, paid back by deposits into the NDF via NDF deposit slips¹³. If deposits to the NDF are sent in by cheque¹⁴, then the teller fills in the deposit slip in the absence of the depositor¹⁵, placing the money in the relevant NDF loan account.

⁸ DFID – UK department for international development.

⁹ TB p269-70 – MOU between the NDF and CU 15.05.92.

¹⁰ TB p223, 255 – example of CU deposit slips.

¹¹ TB p231, 232, 253, 254 – 10 examples of cheques paid by Roach to the CU.

¹² TB p60, 62, 64, 228, 229, 230, 257, 258, 281, 283, 285, (noting document repetition) – examples of CU deposit slips generated on receipt of cheques from Roach.

¹³ TB p224, 256 – examples of NDF deposit slips.

¹⁴ TB p225 – 3 examples of cheques paid by Roach to the NDF.

- 9 However, what can sometimes happen is that money sent in by cheque into the CU gets transferred internally by the CU to the NDF, by way of a withdrawal by the teller from the CU account as a 'credit to the NDF', and marked as such by the teller on a CU withdrawal slip where the depositor is supposed to sign though is absent¹⁶.
- 10 This procedure lies at the heart of the case. Various cheques of \$548ec and \$552ec payable to the CU from 2003 to 2011 sent in from Roach were deposited by the teller into his CU account, and the sum of \$500ec was then transferred by the teller as a credit to the NDF. But Roach says he did not agree to this, and in reply the NDF through Moore says it assumes he did because of a letter he signed on 24.06.03¹⁷.

In detail

- 11 Roach runs a print business named Montserrat Printing and Publishing (MPP), which also operates the island newspaper, named the Montserrat Reporter. He is an intelligent and articulate man. He needed money to purchase equipment and to build the business.
- a. On 28.10.98, he borrowed \$55000ec from the NDF, repayable as \$857.54ecpm¹⁸. Three examples of paying this monthly sum by cheque specifically to the NDF on 05.02.01, 02.05.01, and 05.11.01 appear as exhibits¹⁹.
 - b. Then on 28.04.99, he borrowed \$40400ec from the CU, repayable as \$2125ecpm²⁰, into account 1017342. There are no exhibited records in the case of this monthly sum ever being paid by cheque to the CU.

¹⁵ TB p60, 62, 64, 228, 229, 230, 257, 258, 281, 283, 285, (noting document repetition) – examples of CU deposit slips generated on receipt of cheques from Roach.

¹⁶ TB p 61, 63, 65, 282, 284, 286, (noting document repetition) – examples of withdrawal slips, moving money to the NDF from having been deposited by cheque by Roach in the CU.

¹⁷ TB p279 – NDF letter to Roach of 24.06.03, signed by Roach, agreeing to pay \$500ec monthly to the NDF.

¹⁸ TB p272 – NDF loan 28.10.98.

¹⁹ TB p225 - examples of cheques paid by Roach to the NDF.

²⁰ TB p 251-2 – CU loan 28.04.99.

- c. Then on 14.08.00, he renegotiated the loan from the NDF and borrowed more, being a total of \$132181.58ec, repayable as \$2060.21ecpm²¹ into account 2071083²². There are no exhibited records in the case of this monthly sum ever being paid by cheque to the NDF.
- d. It follows that as at 2001, to maintain both loans Roach was supposed to pay \$4185.21ecpm, but the only examples of payments in 2001 are of \$857.54ec to the NDF for the 1998 loan, by now defunct as it had been restructured.
- e. On 28.05.03, Roach wrote to the NDF on MPP letterhead requesting to further restructure the NDF loan²³.
- f. This was agreed by the NDF, bearing in mind Roach was Chairman, so that by a letter from the NDF of 24.06.03²⁴, countersigned by Roach, he would pay \$500ecpm with effect from 15.07.03 for 12 months, thereafter to be reassessed.
- g. The evidence then shows that Roach sent in cheques payable to the CU, not to the NDF, for \$548ec, and later \$552ec, not always monthly, and there are 10 examples of such cheques for the dates 07.09.04, 02.11.05, 10.07.06, 08.01.07, 24.07.09, 01.02.10, 23.12.10, 27.01.11, 23.02.11, and 30.03.11²⁵.
- h. The reason the cheques were for \$48ec, and later \$52ec, more than a round \$500ec was to pay an insurance to the CU.
- i. On 07.05.08, the NDF wrote to Roach²⁶ (who was still Chairman), to help him, noting his loan balance was \$154332.51ec, with accumulated interest of \$36007.85ec, and further

²¹ TB p4-5 – NDF loan 14.08.00.

²² TB p58-9 – printout of NDF loan account 2071083 in the name of Bennette Roach, showing digitised records from 01.02.02 (balance owing of \$132436.14 ec) to 03.12.13 (balance owing of \$146207.49ec), noting that prior to February 2002 there had been a pre-digital handwritten ledger system.

²³ TB p278 – MPP letter to NDF requesting restructure of NDF loan.

²⁴ TB p279.

²⁵ TB p231, 232, 253, 254 – 10 examples of cheques paid by Roach to the CU.

²⁶ TB p280.

noting his 'commitment' to pay \$500ec monthly. It was suggested to Roach that there be a freezing of interest for the year 01.05.08 to 31.04.09, and that the \$500ec monthly be applied only to his principal sum. He was requested to provide a financial statement for the period ended 31.12.07. There is no evidence of any reply to this letter.

- j. In the end, on 31.10.12, there was the final demand for payment to the NDF for a delinquent amount of \$105070.51ec²⁷, with a claim being filed at the High Court on 11.03.14 for \$246.358.71ec plus costs²⁸.

- k. In parallel however, concerning the CU loan, correspondence produced at court on the day of the trial, 13.11.17, shows six letters²⁹:
 - i. On 17.08.00, (while President) there is complaint the loan has not been serviced since February 2000, showing a balance of \$29497.40ec with interest of \$1809.58ec.
 - ii. On 20.02.03, (while President) there is complaint the loan has not been serviced since 02.01.02, showing a balance of \$8566.30ec with interest of \$1157.51ec.
 - iii. On 18.04.07, (no longer President) there is complaint the balance is \$14015.93ec, though no mention of when there was last payment.
 - iv. On 14.08.07, there is complaint the balance is \$14343.57ec, though no mention of when there was last payment.
 - v. On 30.12.09, there is final demand for payment for \$8566.30ec plus interest of \$5568.08ec (totalling \$14134.38ec), though no mention of when there was last payment.
 - vi. On 13.01.10, there is a letter to Roach, saying '*Reference is made to our final demand for payment letter of 30.12.09 and your subsequent communication with this office requesting details of this loan and indicating you had not been in receipt of previous correspondence*', thereafter listing the above correspondence dates.

²⁷ TB p287.

²⁸ TB p 1.

²⁹ CUC 1-6.

- I. In court on 13.11.17, concerning correspondence from the CU, Roach said that he had only ever received the letter of 13.01.10, in person when enquiring of the CU loan at the CU, though the letter makes reference to his communication being 'subsequent' to the letter of 30.12.09. I find as a fact he did receive the letter of 30.12.09, which is what prompted his enquiry, and the question which is begged is whether he received the earlier four letters, to which I will return later.
- m. There is no evidence before the court as to what has happened to the CU loan.
- 12 Distilling matters, Roach has taken out a loan from each the CU and NDF, while head of both, neither of which on the evidence have been paid back, and the only correspondence chasing him is three letters from the NDF (of 24.06.03, 07.05.08, and 31.10.12), and five letters from the CU (of 17.08.00, 20.03.03, 18.04.07, 14.08.07, and 30.12.09) of which Roach has said he received none.
- 13 As a preliminary observation, the court is greatly surprised that there has been so little correspondence chasing two loans in arrears over so many years, being only eight letters between first loan inception in 1998 and the last final demand in 2012. The impression emerges that both the CU and NDF are not robustly managed, and that perhaps there was hesitation to chase Roach as he had been head of both.
- 14 It is the case for Roach that, despite countersigning the letter of 24.06.03 he would pay \$500ecpm toward the NDF loan, in fact he never made a single payment. This could mean that from 15.07.03 the cause of action arose, to be filed within six years³⁰, so that a filing on 11.03.14 is long statute-barred. Instead, Roach says he chose to pay off the CU loan, at \$500ecpm, (with insurance on top of \$48ec, later \$52ec), sending in cheques for \$548ec and later \$552ec payable not to the NDF but specifically to the CU. In evidence to the court he said that he had made an arrangement in 2003 with the CU executive director Roselyn Cassell to make the payments of \$500ecpm to the CU, though there is no written record at the CU to this effect, nor does he have any.

³⁰ As per s4(2) *Limitation Act* cap 2.02.

- 15 The absence of such a written record by the CU is strange as there is a written record of the arrangement to pay \$500ecpm toward the NDF loan by way of the counter-signed letter of 24.06.03. What is also strange is that it seems Roach did not tell the NDF, ever, that he would not honour the agreement of 24.06.03.
- 16 Concerning deposits of \$500ec after the restructuring created by the letter of 24.06.03, payments were irregular, with the last on 21.03.11³¹. It is to be noted again that all deposits were by cheques payable to Roach's CU account 1017342, and internally the teller would transfer \$500ec to NDF account 2071083³².
- 17 Despite all the figures which have been laid out above (with footnotes), the narrow factual question to which this comes is this: *has the NDF proved on balance that, after 24.06.03 when Roach was sending in irregular sums of just over \$500ec by cheque to his CU account 1017342, he was fully aware under the agreement of 24.06.03, and can therefore be deemed to have intended, that \$500ec would be then moved to NDF account 2071083 to service his NDF loan?*

The law

- 18 The law governing this action is straightforward. On Montserrat, under s4 *Limitation Act* Cap 02.12, whether an action under contract or for an account, no action shall be brought after the expiration of six years from the date on which the cause of action accrued³³.
- 19 Roach suggests the cause of action arose on the first date of delinquency, which was 30.08.00, when the sum of \$2060.21ec was not paid, and was never paid as such a sum at any time.

³¹ TB p285-6 – showing for 21.03.11 the teller having filled in the CU deposit slip for \$500ec to account 1017242, with immediately after, the CU withdrawal slip for \$500 from account 1017242 as a 'credit to NDF'.

³² TB p246 – witness statement of Moore, para 15.

³³ See *Limitation Act* - s4. (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say— (a) actions founded on simple contract or on tort... (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

- 20 He goes on to say that the cause of action cannot be revived by part payment, if the limitation period has already expired, and relies on the cases of **Reeves v Butcher 1891 2QB 509** and of **First St Vincent Bank v McDowell 2012 ECSC**³⁴. This argument is moot, as the issue at trial has narrowed, by agreement with counsel, so that there is no argument on the part of the NDF that the action was 'revived', but instead their argument is that part payment was persistent during 2003 to 2011, so that the cause of action 'accrued' to 21.03.11, under s22 *Limitation Act*³⁵, and under the principles enunciated in **Busch v Stevens 1963 1QB 1**.
- 21 I reject the argument that 30.08.00 was the date from which the limitation period was to run. The letter of 28.05.03 by Roach to the NDF was an acknowledgement of the debt under s22 *Limitation Act*. This means that having agreed to pay at \$500ecpm in the letter of 24.06.03, the argument as to the correct accrual date is whether it is 15.07.03 (as the date payment was due but Roach says was never made), or 21.03.11 (as the date there was a last internal transfer of \$500ec by the teller from CU account 1017342 to NDF account 2071083).
- 22 If 15.07.03, then it is conceded by the NDF that their action of 11.03.14 is statute-barred. If 21.03.11, then the action is within the six years, and Roach owes the money.

The evidence

- 23 To decide this question I must pay close attention to the evidence of Roach. I must examine what on balance I find he was thinking when sending in the CU cheques.
- 24 Concerning evidence for the NDF from Moore in court, she said:
- a. In isolation, without knowing more, it would be reasonable for a third party to think that a cheque for the CU is not for the NDF³⁶.
 - b. She could not say for a fact which loan the CU cheques were for; it had been assumed they were for the NDF loan, as a result of the letter of 24.06.03³⁷.

³⁴ See *First St Vincent Bank Limited v Brian McDowell* claim 76 of 2012 Eastern Caribbean Supreme Court St Vincent.

³⁵ See *Limitation Act* - s22 (4) Where any right of action has accrued to recover any debt..., and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

³⁶ Judge's notebook 6 p97.

- c. She agreed to the proposition under cross-examination that, without a written authority from Roach, there was no way of 'proving' the monies in the cheques were for the NDF³⁸.
- d. While there was no recorded delivery system for mail, the CU letters, which had been sent to the home of Roach in Olveston, would have been returned to the CU if undelivered, and none were³⁹.
- e. She produced the CU file in court and there was no written agreement from 2003 or at all to show a renegotiation with Roselyn Cassell to pay the CU loan at \$500ecpm⁴⁰.

25 Concerning evidence from Roach in court, he said:

- a. He was an expert in how the CU and NDF worked, which can get confused as they are housed together⁴¹, having been president of the CU 1988-2004, and chairman of the NDF 1989-2010⁴².
- b. To put money from a CU account into an NDF account, there ought to be written authorisation, and he gave none⁴³.
- c. He did not receive the first five of the six CU letters⁴⁴.
- d. He had no idea that between 2003 and 2010 the cheques were not being paid to his CU account, thinking instead he had been paying off the CU loan as often as he could⁴⁵.
- e. When in January 2010, he learned the CU loan was in arrears, he did not ask for the missing letters, nor did he ask into where his CU cheques had been paid, as he was 'not interested'⁴⁶.
- f. When he received the writ of 11.03.14 he was surprised, as he had believed the NDF debt would be 'written off' in 2006/7, because of a discreet writing-off policy about which he was aware having been head of both the NDF and CU, attending meetings, for which there would be minutes he had received though he had none to hand. He had therefore, after receiving the writ, visited an auditor named Ralston Allen of Allen Thomas & Co to enquire

³⁷ Ibid p97.

³⁸ Ibid p97.

³⁹ Ibid p98.

⁴⁰ Ibid p95.

⁴¹ TB p249 – Witness statement of Roach of 24.10.14, para16.

⁴² Judge's notebook 6 p100.

⁴³ Ibid p100.

⁴⁴ Ibid p101.

⁴⁵ Ibid p101.

⁴⁶ Ibid p 101.

if the debt could rightly be written off. After, he had then settled on defending the action by arguing it was statute-barred⁴⁷.

- g. He could give no reason to the court for never writing to the NDF, having been its head, to say he had no intention of paying the loan at \$500ecpm, having asked on 28.05.03 for a restructuring and countersigning the agreement of 24.06.03⁴⁸. Moreover, it is to be noted that he only ever sent one letter concerning the loan, that of 28.05.03, and thereafter on his own case he has not sought to be kept informed as to the loan's status after 24.06.03.
- h. He maintained as he had asserted in his witness statement⁴⁹ that he had indeed made an agreement with Roselyn Cassell at the CU in 2003 to pay the CU loan at \$500ecpm⁵⁰, but said he had nothing in writing. Moreover it was conspicuous to the court that there was no evidence from her in support, though she was contactable as now working for Delta Petrol⁵¹.

Findings of fact

26 Assessing the evidence, I am quite sure that Roach knew full well that his CU cheques were being offset against the NDF debt pursuant to the agreement of 24.06.03. This is because:

- a. On his own admission, he made no enquiry as to where his monies had been paid when he attended the CU prompting the letter of 13.01.10 (and the court finds he received of 30.12.09) when he was told no money had been paid to the CU, suggesting on balance he knew where the money had been going.
- b. On his own admission, he was an expert in how the CU and NDF worked, together, sharing the same space and staff, and he was alive to, and on balance therefore capable of taking advantage of, the confusion which might arise over what monies could and should be paid between the CU and NDF.

⁴⁷ Ibid p101-2.

⁴⁸ Ibid p102.

⁴⁹ TB p248 – Witness statement of Roach of 24.10.14, para 8.

⁵⁰ Ibid p101.

⁵¹ Judge's notebook 6 p95.

- c. I find it highly improbable, and therefore do not accept, that he did not receive the first four of the CU letters, particularly the two letters of 2007, no letters having ever been returned: he has to say he did not receive the letters, because it follows if he had received them he would have been on notice that his CU cheques were not being paid against his CU loan, giving him inescapable knowledge the money was going to the NDF loan.
 - d. I find it highly improbable, and therefore do not accept, that there was ever an agreement in 2003 to pay the CU loan at \$500ecpm, as it beggars belief there would be nothing in writing, (while of course I note there is in writing the NDF restructuring of 24.06.03, signed by the same Roselyn Cassell who Roach claims entered an unrecorded agreement concerning the CU loan).
 - e. Finally, there was no denial at trial or in the papers that Roach had received the NDF letter of 07.05.08, showing he was aware the loan persisted, had not been written off, and in which there is reference to his commitment to pay \$500ecpm, further supporting that he was aware the CU cheques were being offset against the loan.
- 27 I do not find the evidence of Moore to be definitive where she agreed to counsel's proposition under cross-examination that, without a written authority from Roach, there was no way of 'proving' the monies in the cheques were for the NDF. Proof is not a matter for the witness: instead it is a matter for the court, reviewing all the circumstances, including what Roach has said.
- 28 The court notes *obiter* that at one point, when it asked of defence Counsel Cassell where is the evidence to support what Roach was saying, as part of thorough defence preparation, the reply was that it was not for the defence to prove anything, and that reliance was placed on the burden of proof, being on the claimant to the balance of probabilities, who counsel asserted could not prove its case. The court wishes to point out that, leaving aside proper litigation tactics, it is always the role of the lawyers defending fully to prepare all documentation and any witnesses in support, and it is short-sighted and professionally dangerous to assume the

claimant cannot meet the burden. If there could have been evidence in support of Roach, for example a presentation of the witness Roselyn Cassell, or how mail regularly goes missing on Montserrat, it did not occur, when it should have done if it might have helped, and so Roach faces an assessment on the limited evidence as was placed before the court. In short, in preparing a case, counsel must always go the extra mile.

Conclusion

- 29 Weighing matters, on the evidence before the court, I find on balance that Roach has been advantaged by his position as head of both the CU and the NDF, knowing the confusion which can arise, and having deliberately agreed to pay the NDF at \$500ecpm, he predicted a confusion he has exploited later, namely he has sent in the cheques payable to the CU, fully expecting \$500ec would be paid to the NDF, but allowing him later to claim the NDF acted in error in the absence of express written permission, never engaging with enquiry, positing in tandem that the debt should have been written off, and overall can now attempt to deny any claim for recovery of the money as statute-barred.
- 30 Moreover, if his position were true, that he had all along intended never to pay anything to the NDF after countersigning the letter of 24.06.03, never telling the NDF so, it beggars belief he was ever chairman, and remained so until 2010.
- 31 Insofar as he anticipated the CU cheques were monies which the bank would put into his NDF account, I find that his foresight of consequence shows intent. This means that he can be deemed to intend what he foresaw as the highly likely or inevitable consequence of his action, namely of signing the agreement of 24.06.03, and it is no defence later to say he did not in writing authorise the specific internal transfers. Therefore I do find the deposit of 21.03.11, and the other CU cheques from 2003, were 'intended' to be a part payment toward the NDF debt under s22 *Limitation Act*, meaning the action is not statute-barred, so that the debt is fully recoverable as sought.

- 32 Finally, it might be said that this judgment accords with common sense. How can it be right that the NDF chairman can avoid a debt to the NDF, having on 24.06.03 promised to pay, then deliberately did not, without notice, never communicating about the debt again, later seeking to exploit a possible internal confusion he could foresee, all the while hoping the debt would become a write-off.
- 33 I therefore order payment of the sum sought (subject to any argument as to correct quantification) of \$246358.71ec, plus interest of \$99751.22ec as at 11.03.14, and continuing at 8% from then to judgment.
- 34 I also order that the reasonable costs of the claimant be paid by the defendant.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

28 November 2017