

**THE EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL**

TERRITORY OF MONTSERRAT

MNIHCVAP2023/0001

Formerly MNIHCVAP2018/0007

BETWEEN:

BANK OF MONTSERRAT

Appellant

And

OWEN ROONEY

Respondent

Before:

The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Trevor A. Ward
The Hon. Mr. Gerard St. C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Sylvester Carrott for the Appellant
Ms. Anna-Kay Brown for the Respondent

2025: May 8;
September 18.

Civil appeal – Debt recovery – Statutory Limitation Period – The Limitation Act of Montserrat, Cap. 2:12 – Whether the Claim was statute barred – Acknowledgement of Debt – Whether the respondent’s email to the bank was an acknowledgement in law of the loan debt claimed in these proceedings – Perverse Findings – Whether the learned judge erred when he referred to matters which the respondent had alluded to in oral argument which was not pleaded in the defence and had not been given as evidence at the trial – Proof of Debt – Whether the bank discharged its legal and evidential burden of proving the debt claimed

This appeal challenges the decision of the learned judge to dismiss with no order as to costs the appellant bank’s claim against the respondent for recovery of the outstanding principal and accrued interest of an alleged loan of EC\$40,920.57 made to the respondent on or about

6th January 1993. The bank's claim, filed some 16 years later, on 30th July 2009, was for payment of EC\$76,232.27 consisting of a balance of principal of EC\$23,199.00 and outstanding interest at the rate of 12% per annum of EC\$52,801.23. It was pleaded that on or about 6th January 1993 the bank lent the respondent the sum of EC\$40,920.57 which he had not repaid. The bank also pleaded and relied on a demand letter dated 24th February 2009 issued by its solicitor, Mr. David Brandt to the respondent (then residing overseas) via his then local lawyer, Mr. Hogarth Sergeant, demanding repayment of the alleged loan debt and, most importantly, an alleged acknowledgement of the said loan debt by the respondent via email sent on 27th February 2009 to the then manager of the bank.

In his defence to the claim filed on 6th July 2010, the respondent, as defendant, admitted that he had *'received a loan from the [bank], however, he denied receiving the bank's letter dated 24th February 2009 or any letter at all. The respondent also denied that he had 'acknowledged the debt by email on the 27th February 2009 since no claim was made by the [bank] within the period of time that the debt became due and payable.'* His defence also relied on the expiration of the statutory limitation period, the bank's prolonged and inordinate delay in demanding payment and bringing a claim which led him to think that it did not intend to make the claim brought, and thus he acted on this belief to his prejudice.

The sole witness for the bank at the trial was its then manager, Mr. Michael Joseph, who provided a witness statement dated and filed on 25th May 2018. At paragraph 11 of his witness statement Mr. Joseph attested that the loan debt owed by the respondent to the bank as of 19th April 2018 was EC\$115,103.92 with interest continuing to run on that sum at 12% per annum until payment or judgment. Mr. Joseph had also provided in the proceedings below an affidavit filed on 12th June 2018 in which he attested that he was not the manager of the bank when it had entered into the loan agreement with the respondent. He also explained that the volcanic eruption in Montserrat had destroyed the buildings in the capital of Plymouth where the bank's premises was situated at the time, and because of the various moving of the bank's offices thereafter and the length of time which had elapsed, the loan agreement between the bank and the respondent could not be found, despite extensive searches having been made to find it.

In support of its claim for repayment of the "overdraft facility" of EC\$23,000.00 made in 1993 plus accrued interest, the bank produced and tendered into evidence the following documents: (i) a copy of a print-out of what purports to be the bank's record of the respondent's loan account from June 1993 to April 2018; (ii) a copy of what purports to be the bank's 'Loan Activity Statement Serviced Loan' dated 6/12/18 for Loan No: 206503527 in the name of the respondent; (iii) the Brandt demand letter dated 24th February 2009; (iv) the respondent's email dated 27th February 2009 (the alleged acknowledgement of the loan debt); and (v) a copy of the valuation by Mr. Keith Thomas of the respondent's land registered as Block 13/15 Parcel 82 – over which the bank held a caution as collateral for the said loan debt. The respondent filed no witness statement either from himself or of any other person and neither did he or anyone on his behalf gave evidence at the trial. However, he actively participated, albeit by remote means, during the trial itself, including cross-examining Mr. Joseph, responding to questions from the trial judge, and making oral submissions.

Prior to the trial, a master had ordered on 28th January 2011 that the claim be referred to court sponsored mediation. At this time the respondent was living abroad. However, he was then represented by attorney Hogarth Sergeant. The latter, on 16th February 2011, along with Attorney Brandt met with the mediator and signed a mediation agreement providing for the respondent to pay the sum of EC\$70,000.00 plus legal costs of EC\$14,000.00 and accruing interest at 4% per annum in settlement of the bank's claim in the proceedings below. On 1st April 2011 the mediation agreement was ordered by the master to take effect. However, no payment having been made by the respondent pursuant to the mediation agreement, he later agreed with Attorney Brandt to pay the agreed sums thereunder at the rate of EC\$2,500.00 per month. It is apparent from the trial that the respondent made a part payment of EC\$5,000.00 between August and October 2012 on account of the mediation debt. These payments were made by Attorneys Allen Markham & Co. to the bank purportedly on behalf of the respondent. It is these payments which were the subject of the judge's findings at paragraph 10 of the judgment, which were challenged by the bank in ground 3 of its notice of appeal but later not pursued. However, on 16th March 2018 the learned judge set aside the mediation agreement, and his reasons for doing so were set forth in a written judgment dated 18th March 2018.

The learned judge dismissed the claim on four bases; (i) the claim is statute barred; (ii) the respondent's email correspondence to the bank on 27th February 2009 in response to a demand letter dated 24th February 2009 from the bank's then lawyer, David Brandt demanding payment of the alleged loan debt and accrued interest to date, did not amount in law to an acknowledgement of the said loan debt the subject of the claim for the purposes of sections 22 and 23 of the Limitation Act; (iii) likewise, the payment of EC\$5,000.00 made by the respondent to the bank between August and October 2012 did not amount in law to an acknowledgement of the loan debt the subject of the claim; and (iv) the bank had, in any event, failed to prove, on a balance of probability, that the alleged loan debt actually existed.

The bank appealed the judge's dismissal of its claim on five grounds, however the issues for determination on appeal were condensed into (i) whether the respondent's email to the bank on 27th February 2009 was an acknowledgement in law of the loan debt claimed in these proceedings by the bank; (ii) whether the learned judge erred when at paragraph 5(g) of the judgment he referred to certain matters which the respondent had alluded to in oral argument, about the existence of a different loan for EC\$30,000.00 when the respondent had not pleaded such loan in his defence, and had not given evidence at the trial; and (iii) whether the bank had discharged its legal and evidential burden of proving the debt claimed.

Held: Dismissing the appeal and ordering each party to bear their own cost of the appeal, that:

1. It is the document itself and what is stated therein which must be read and construed as a whole by the court in determining whether what is stated therein amounts to an acknowledgement of the debt and the maker's liability to pay or repay the claim to the creditor. It is only such a finding which engages the provisions of section 22 (4) of the **Limitation Act** "the **Act**" as an acknowledgement reviving and resetting the commencement of the prescribed

limitation period applicable to a claim. Further as a matter of principle even where some evidence is given at trial (whether admissible or not) as to what the alleged debtor's "intention" was when he/she crafted and sent the document being assessed as to whether it constitutes a sufficient acknowledgement of the claim for the purposes of the **Act**, such evidence would be of little, if any, evidential value and should not be taken into account in determining whether the document was a sufficient acknowledgement. This is because *post facto* parol evidence of the maker of the document's intention or intentions when sending it to the creditor is irrelevant to any consideration of whether the document itself, read as a whole, amounted to a sufficient acknowledgement of the debt claimed.

Section 22(4) of the **Limitation Act**, Laws of Montserrat CAP 2.12 applied; **LJR Interiors Ltd v Cooper Construction Ltd** [2023] EWHC 3339 (TCC) considered; **Deutsche Trustee Company Ltd v Bangkok Land (Cayman Islands) Ltd and another company** [2019] EWHC 657 (Comm) applied, **Bradford & Bingley plc v Rashid (FC)** [2006] UKHL 37 applied; **Dungate v Dungate** [1965] 1 W. L. R. 1477 applied.

2. The respondent contended that his email sent 27th February 2009 could not be considered a valid acknowledgment of the debt because the Brandt demand letter lacked key loan details such as the year, original amount, term, and repayment terms. However, the Brandt demand letter did include specific identifiers like the loan number and the fact that it had been agreed for the bank to place a caution on the respondent's land Block 13/15 Parcel 88, St. Peter's Registration Section to secure its repayment. The said letter also gave the current balance at EC\$23,199.05 and the rate of interest being 12% per annum. Notably the respondent never claimed to have another loan with those same characteristics, nor did he deny the existence of the loan in question. Instead, his defence focused on the delay in bringing the claim, implicitly acknowledging the loan's existence. This pleading rather than being a denial of the existence of this loan claimed seems premised on the very existence of the said loan and the cause of action which it is contended was statute barred. Furthermore, his 2009 email explicitly admitted to owing the bank and promised to repay the debt, making it reasonable to conclude he was referring to the same loan identified in the Brandt demand letter. Accordingly, the learned judge erred when he determined that the email dated 27th February 2009 from the respondent to the bank was not a sufficient acknowledgement by the respondent of the loan debt claimed. His reasoning and decision on this issue was patently flawed and must be set aside.
3. It was clearly improper for the learned judge to allude in his judgment to matters not pleaded and not given in evidence, especially where the respondent had refused to give evidence, and to do so in a way negative to the claimant bank and his assessment of weaknesses in their case especially relating to their proof of the loan debt. Having done so, it left the door open for the unsuccessful claimant to reasonably feel and to conclude that the judge's assessment of their

case for repayment of the loan debt was prejudiced by the judge's consideration and weighing of issues not pleaded (denial of the loan claimed and raising another loan instead) and of unsworn statements to that effect.

4. As to whether the bank had proven the loan debt claimed, it seems from the bank's submission at paragraph 9 of its reply skeleton argument to have implicitly conceded that it had not at the trial produced the kind of documentary and oral evidence sufficient to discharge its burden of proving the debt claimed. Instead it relied on a purported admission of the debt claimed at paragraph 1 of the defence and on the respondent's email dated 27th February 2009 acknowledging the said loan debt. However, the pleading at paragraph 1 of the defence was not an admission of the loan debt claimed but merely an admission of "a" loan made by the bank to the respondent. The email dated 27th February 2009 while an acknowledgement of a liability to the bank for the loan claimed it does not go so far as to admit any precise sum of indebtedness, albeit this is capable of being ascertained by extrinsic evidence. There has been no challenge or criticism by the bank in its appeal to the learned judge's assessment of the state of the bank's evidence as set out from paragraph 5 of the judgment. There is therefore no basis upon which this Court can find otherwise or substitute its own assessment. Accordingly, the said assessment and the conclusion by the learned judge that the bank had failed to prove its claim based on the said loan debt on a balance of probabilities stands and ought not to be set aside.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an appeal from the judgment of a learned judge of the High Court of Justice dated 27th June 2018 after a trial held on 13th June 2018 in Claim No. MNIHCV 2009/0018. By the judgment the learned judge dismissed with no order as to costs the appellant bank's claim against the respondent for recovery of the outstanding principal and accrued interest of an alleged loan of EC\$40,920.57 made by the bank to the respondent, Owen Rooney, on or about 6th January 1993.
- [2] The bank's claim filed some 16 years later on 30th July 2009 was for payment of the sum of EC\$76,232.27 consisting of a balance of principal in the sum of EC\$23,199.00 and outstanding interest at the rate of 12% per annum of EC\$52,801.23. It was pleaded that on or about 6th January 1993 the bank lent the respondent the sum of EC\$40,920.57 and the respondent had not repaid the said sum or any part thereof. The bank in its statement of claim also pleaded and relied on a demand letter dated

24th February 2009 from its solicitor, Mr. David Brandt, sent to the respondent (then residing overseas) via his then local lawyer, Mr. Hogarth Sergeant, demanding repayment of the alleged loan debt and, most importantly, an alleged acknowledgement of the said loan debt by the respondent via email sent on 27th February 2009 to the then manager of the bank.

- [3] In his defence to the claim filed on 6th July 2010, the respondent as defendant admitted that he had '*received a loan from the [bank]*.'¹ However, he denied receiving the letter from the bank dated 24th February 2009 or any letter at all. The respondent also denied that he had '*acknowledged the debt by email on the 27th February 2009 since no claim was made by the [bank] within the period of time that the debt became due and payable*.'² The respondent in his defence also relied on the expiration of the statutory limitation period, the bank's prolonged and inordinate delay in demanding payment and bringing a claim which led him to think that it did not intend to make the claim brought and thus he acted on this belief to his prejudice. These latter 'defences' are set out at paragraph 5 of the Defence in these terms:

"The Defendant further contends that the period of limitation 'is against the Claimant [bank] after twelve years'. Although the Claimant was at all material times *fully aware of the facts* relied on in his statement of claim (sic) he was nevertheless guilty of prolonged inordinate and inexcusable delay in bringing this action and seeking the relief claimed herein *and thereby caused or permitted the Defendant to believe as in fact he did that the Claimant did not intend to make the claim herein or any claim against the Defendant and in this belief the Defendant acted to his prejudice as he has otherwise been prejudiced*." [Emphasis added]

- [4] The sole witness for the bank at the trial was its then manager, Mr. Michael Joseph. He had provided a witness statement dated and filed on 25th May 2018. At paragraph 11 of his witness statement Mr. Joseph attested that the loan debt owing by the respondent to the bank as of 19th April 2018 is EC\$115,103.92 with interest continuing to run on that sum at 12% per annum until payment or judgment. Mr. Joseph had also provided in the proceedings below an affidavit filed 12th June

¹ Paragraph 1 of the defence.

² Paragraph 3 of the defence.

2018 in which he attested that he was not the manager of the bank when it had entered into the loan agreement with the respondent. He referred to the loan as an “overdraft”. He also explained that the volcanic eruption in Montserrat had destroyed the buildings in the capital of Plymouth where the bank’s premises was situated at the time, and because of the various moving of the bank’s offices thereafter and the length of time which had elapsed, the loan agreement between the bank and the respondent could not be found, despite extensive searches having been made to find it.

[5] In support of its claim for repayment of the “overdraft facility” of EC\$23,000.00 made in 1993 plus accrued interest, the bank produced and tendered into evidence the following documents:

- (i) a copy of a print-out of what purports to be the bank’s record of the respondent’s loan account June 1993 to April 2018;
- (ii) a copy of what purports to be the bank’s ‘Loan Activity Statement Serviced Loan’ dated 6/12/18 for Loan No: 206503527 in the name of the respondent;
- (iii) the Brandt demand letter dated 24th February 2009;
- (iv) the respondent’s email dated 27th February 2009 (the alleged acknowledgement of the loan debt); and
- (v) a copy of the valuation by Mr. Keith Thomas of the respondent’s land registered as Block 13/15 Parcel 82 – held as collateral for the said loan debt.

[6] The respondent filed no witness statement either from himself or of any other person. However, he actively participated, albeit by remote means, during the trial itself, including cross-examining Mr. Joseph, responding to questions from the trial judge, and making oral submissions.

[7] Prior to the trial, by order of a master dated 28th January 2011 it was ordered that the claim be referred to court sponsored mediation. At this time the respondent was living abroad. However, he was then represented by attorney Hogarth Sergeant. The latter on 16th February 2011 along with Attorney Brandt met with the mediator and signed a mediation agreement providing for the respondent to pay the sum of EC\$70,000.00 plus legal costs of EC\$14,000.00 and accruing interest at 4% per annum in settlement of the bank's claim in the proceedings below. On 1st April 2011 the mediation agreement was ordered by the master to take effect. However, no payment having been made by the respondent pursuant to the mediation agreement, he later agreed with Attorney Brandt to pay the agreed sums thereunder at the rate of EC\$2,500.00 per month. It is apparent from the trial that the respondent made a part payment of EC\$5,000.00 between August and October 2012 on account of the mediation debt. These payments were made by Attorneys Allen Markham & Co. to the bank purportedly on behalf of the respondent. It is these payments which were the subject of the judge's findings at paragraph 10 of the judgment, which were challenged by the bank in ground 3 of its notice of appeal but later not pursued. However, on 16th March 2018 the learned judge set aside the mediation agreement, and his reasons for doing so were set forth in a written judgment dated 18th March 2018.

[8] The claim in the action below was dismissed by the judge on the following bases: -

- (i) the claim is statute barred;
- (ii) the respondent's email correspondence to the bank on 27th February 2009 in response to a demand letter dated 24th February 2009 from the bank's then lawyer, David Brandt, sent to the respondent sent through his then lawyer, Hogarth Sergeant, demanding payment of the alleged loan debt and accrued interest to date, did not amount in law to an acknowledgement of the said loan debt the subject of the claim;

- (iii) likewise, the payment of EC\$5,000 made by the respondent to the bank between August and October 2012 did not amount in law to an acknowledgement of the loan debt the subject of the claim; and
- (iv) the bank had, in any event, failed to prove, on a balance of probability, that the alleged loan debt actually existed.

[9] In arriving at his findings of the various key issues, the learned judge first summarised at paragraph 5 of the judgment what he found to be the weaknesses in the bank's case. These all fell within the general category of a lack of evidence in proof of the specific loan and debt stemming from the bank's inability as a claimant to produce the originating documents to evidence the pleaded overdraft facility loan. These include the loan agreement for a EC\$40,000 loan at 12% interest per annum or a copy of the original cheque issued by the bank to the respondent for the loan sum. The judge commented extensively on the bank's reliance on its computer records which were not certified as to their correctness. Importantly, the learned judge also stressed the deficiencies in the evidence of the sole witness Micheal Joseph who was not with the bank in 1993 when the purported loan was made to the respondent, and his inability to give any meaningful evidence about a raft of matters of which he had no personal or institutional knowledge. Even where he was able to produce the bank's computer records, including a spreadsheet, he was unable to demonstrate the accuracy of such records by reference to any documentation about the purported loan to the respondent.

[10] The learned judge also identified at paragraph 6 of the judgment what he considered to be the weakness in the position taken by the respondent. This was a direct reference to what he had written in his email of 27th February 2009 in response to the Brandt demand letter. However, in the end the learned judge concluded that the respondent's email dated 27th February 2009 was not intended to be and was not an acknowledgement of the precise debt claimed. He also found that the part payment of EC\$5,000 in 2012 pursuant to the loan agreement did not amount to an *ex post facto* acknowledgement of the debt claimed. While he found that there may have

been a debt for EC\$40,000.00 at 12% interest taken out on 1st June 1993, this had not been proven properly by the bank on a balance of probabilities. Accordingly, the bank had not, in any event, discharged its legal burden as claimant. Even if it had, the claim was statute-barred as pleaded in the defence.

[11] The bank appealed the judge's dismissal of its claim on five grounds. The third ground of appeal relating to the part payment of the sum of EC\$5,000.00 by the respondent's then lawyers Markham & Company to the bank between August and October 2012 and the learned judge's treatment of this evidence at paragraph 10 of the judgment, was not pursued by the appellant. Likewise, the fifth ground of appeal which contended that the learned judge had 'constantly intervened during the testimony of Michael Joseph, a witness for the appellant, and took over the questioning', was not pursued by the appellant. Thus grounds 1,2 and 4 were the grounds of appeal argued before this Court. This notwithstanding, it is to be noted that ground 2 challenges the judge's conclusions and findings at paragraph 5(g) of the judgment as being impermissible.

[12] These three 'live' grounds of appeal are set out in full in the bank's notice of appeal filed on 27th July 2018. However, with some editorial license leading, hopefully, to better clarity and understanding of each ground of appeal I have, to some extent, reworded them as follows:

Ground 1: The decision of the learned judge is perverse in that no reasonable tribunal could have reached the conclusion that the respondent had not acknowledged the debt, the learned judge having, at paragraph 6 of the judgment, stated that the respondent in response to the bank's letter from Counsel David Brandt demanding the respondent settle a debt with the bank the subject of the claim, wrote stating: *'I am in receipt of a letter from Mr. David Brandt's office this morning ... I have been asking Mr. Sergeant for over a year to make arrangements with the Bank of Montserrat to satisfy my indebtedness, which I fully acknowledge ... I undertake to settle my indebtedness in full.'*

Ground 2: The learned judge erred in law when, at paragraph 5(g) of his judgment, he took into account statements made by the respondent during his oral argument at the trial, which statements and matters were not pleaded in his defence or given evidentially at the trial as the respondent did not give evidence and did not call any witnesses. These statement were that there was no loan of \$40,000.00 but a different loan of EC\$30,000.00 made by the bank to the respondent at some time between 1991 and 1993, which loan had been largely paid off; that the respondent was not in Montserrat on 01.06.93 and the bank cannot show otherwise; nor can the bank prove there was no loan for EC\$30,000.00 or if there was one what happened to it.

Ground 4: The learned judge erred in law when he found at paragraph 11 of his judgment that the appellant had failed in its burden to prove the existence of the debt when, at paragraph 1 of the respondent's defence dated 6th July 2010, the respondent stated '[t]he Defendant admits he received a loan from the Claimant'; and the only loan pleaded by the appellant was a loan in the sum of \$40,000.00.

[13] The issues for consideration in this appeal are therefore as follows:-

- (1) Was the respondent's email to the bank on 27th February 2009 an acknowledgement in law of the loan debt claimed in these proceedings by the bank or , as the learned judge held, it was not.
(Acknowledgement of Debt ground)
- (2) Did the learned judge err when at paragraph 5(g) of the judgment he referred to certain matters which the respondent had alluded to in oral argument, about the existence of a different loan for EC\$30,000.00 when the respondent had not pleaded such loan in his defence ,and had not given evidence at the trial. **(Perverse findings ground)**

(3) Whether the bank had discharged its legal and evidential burden of proving the debt claimed. (**Proof of debt ground**)

Ground 1 – Acknowledgement of Debt by Email dated 27th February 2009

[14] The bank's pleaded case of acknowledgement of the debt claimed resetting the commencement of the limitation period of 6 years is based upon the respondent's email dated 27th February 2009 to the then manager of the bank. This email followed the Brandt demand letter dated 24th February 2009 sent on behalf of the bank to the respondent care of his then solicitor in Montserrat, Mr. Hogarth Sergeant.

The Brandt demand letter dated 24th February 2009

[15] Set out below in full is the text of the **Brandt demand letter**: -

"February 24th, 2009
Mr. Owen M. Rooney
C/o Hogarth Sergeant
Solicitor for Owen M. Rooney
St. John's
Montserrat

Dear Mr. Rooney,
I act on behalf of, the Bank of Montserrat Limited.
According to my instructions you obtained a loan (no. 206503527) from my client and agreed for my client to place a caution on Block 13/15 Parcel 88, St. Peter's Registration Section to secure payment of the loan.

Particulars regarding the loan are as follows:

Current balance	\$23,199.05
Interest accrued to February 23 rd , 2009	\$51,672.42
Late charges	\$ 231.99
Daily interest factor	\$ 7.6271
Rate of interest	12% per annum
Today's Pay off Balance	\$75,103.46
Description of Property	Block 13/15 Parcel 88

Consequently, as of the 24th day of February 2009 you are indebted to my client in the sum of **EC\$75,103.46**.

You are hereby required to pay the sum of \$75,103.46 to my office by noon on the 15th day of March 2009, plus my client's legal costs to date of \$7,510.35 or, legal action will be taken against you without further notice.

As you are aware my client has a caution on the said property.
Any payment must be made to ourselves and not our client since we may issue proceedings against you without reference to them and so be unaware of any approval (sic) you may have made.

Yours very truly,

David S. Brandt
CC. Mr. Anton Doldron
Manager – Bank of Montserrat Limited”

- [16] It is notable that the Brandt demand letter, while clearly asserting that the respondent had obtained a loan from the bank, stipulating the specific loan number and rate of interest, omitted certain other key features or particulars pertinent to any such loan. These omissions include the date the loan was made, the original principal sum, whether it was to secure an overdraft facility or for some other purpose, the terms of repayment (whether on demand or over a period of years), and whether payable by installments (monthly or annually) or in one lump sum. The respondent in his submissions argues that absent these important features or terms capable of properly identifying the loan being relied on as the basis for the claim in debt, the respondent’s email which was sent to the bank 3 days later was simply not capable of amounting to an acknowledgement of the claim. I shall return to this later.

The respondent’s email dated 27th February 2009

- [17] The terms of the respondent’s email dated 27th February 2009 are set out in full at paragraph 8 of the judgment below. I set out below the salient parts of the said email relevant to the issue of acknowledgement of the bank’s alleged debt.

“Mr. Anton Doldron,
Bank of Montserrat
Montserrat
February 27, 2009

RE: Parcel 88 in Block 13/15

Dear Mr. Doldron,
I am in receipt of a letter from Mr. David Brandt’s office this morning. As you undoubtedly know, I am in the midst of inciting legal proceedings against several lawyers in Montserrat including Mr. Brandt.....

I will also be inciting civil proceedings against David Brandt personally and others on completion of the criminal trial against Mr. Cassell in Montserrat. Disciplinary proceedings have already been filed against Mr. Brandt and Mr. Cassell before the Eastern Caribbean Supreme Court.

I have been asking Mr. Sergeant for over a year to make arrangements with the Bank of Montserrat to satisfy my indebtedness which I fully acknowledge. This above captioned lot is completely landlocked and without costly earthworks will remain that way making it unsaleable.

I would ask that the Bank of Montserrat stay any proceedings until the conspiracy trial against my former partner Walter A. Wood, III in Virginia in August of this year. Settlement of my obligations to the Bank of Montserrat is first and paramount after the civil case against Mr. Wood.

If the Bank of Montserrat proceeds in suit, I will simply move the court for a stay of the proceedings until after the criminal trial and this will only delay payment to the Bank. I undertake to settle my indebtedness in full. I can make monthly payments between March and August and then pay the balance in full after I obtain judgment against Mr. Wood this summer.

Please contact me directly if you have any questions.

Sincerely,
Owen M. Rooney”

The mediation agreement and set aside proceedings – Claim No. 18 of 2009

- [18] There was no response by the bank or on its behalf to this email from the respondent. However, by letter dated 15th November 2010 after the commencement by the bank of its claim against the respondent in the High Court, Mr. Brandt on behalf of the bank wrote to Mr. Sergeant as solicitor of record for the respondent in said claim, enclosing a copy of the Brandt demand letter dated 24th February 2009 and the email from the respondent to the bank’s manager dated 27th February 2009 “acknowledging the debt” to the bank, referencing what the respondent said in his email about having instructed Mr. Sergeant to make arrangements with the bank for its repayment, and inquiring as to whether the respondent still wanted to proceed with his defence in the said action.

[19] This ultimately led to a 'settlement' by mediation agreement dated 16th February 2011 between the bank and the respondent by which the bank agreed to accept and the respondent agreed to pay the sum of EC\$70,0000.00 in full and final settlement of the debt claimed, and part payment by the respondent of the sum of EC\$5,000.00 between August and October 2012.³ The said mediation settlement agreement was set aside by order of the judge made on 16th March 2018 in Claim No. 18 of 2009 (by which the bank sought permission of the court to sell Parcel 13/15 over which it had a caution to secure repayment of the debt claimed in No. 18 of 2009) and is the subject of his written ruling dated 18th March 2018.⁴ Interestingly, at paragraph 4 of the written ruling, the learned judge accepted that the debt had been acknowledged by the respondent's email dated 27th February 2009: '*The debt being acknowledged, the bank can argue it is no longer statute barred, per Lawton J in **Busch v Stevens**⁵, and so quickly began proceedings to recover it...*' It is in the proceedings to set aside the mediation agreement that Attorney Sergeant was required by the judge to, and did, attend and give evidence responding to questions by the judge, the respondent and Mr. Brandt. It is some of Mr. Sergeant's evidence in the set aside proceedings in a different action, to which the learned judge made reference at paragraph 5.f and 9 of the judgment.

Judge's finding of no acknowledgement of the claim

[20] The judge reasoning and findings on this pivotal issue of whether the respondent's email amounted to an acknowledgement of the loan debt set out in the Brandt demand letter is set out at paragraph 9 of his judgment, which states: -

"I find as a fact that it is probably the case the email is in response to the demand sent by Counsel Brandt on 24.02.09. However, where I struggle is with the email meaning that Rooney had intended to acknowledge the precise debt sought so that it is legally resurrected and binding. He uses the word '*acknowledge*' and uses the words '*undertake to settle in full*'. However, he does not specify a sum, and he is not a lawyer. And I have been told by attorney Sergeant Rooney had been immediately specifically told the precise debt was statute-barred, so it seems odd bindingly to

³ Paragraph 10 of the judgment.

⁴ (HB pages 105 to 179).

⁵ 1963 1 QB 1.

acknowledge it, if that is what the email intends. The bulk of the letter is about parallel proceedings against Cassell, and Brandt, and Wood, and is a request for the bank to desist until these resolve, copied to a police officer. **I find that the purpose of the email is probably not to ‘acknowledge’ the debt, but to alert the bank to the other cases.** Its subject header is not the debt, nor the letter, but the estate, while the email substance begins ‘*Re Parcel 88 in Block 13/15*’ and is [a] complaint about fraud. Having heard much from Rooney in this hearing and others, and sensing his character, he is loose with words and linguistically shoots from the hip. **I find he probably did not intend [to] acknowledge specifically the claim raised by Counsel Brandt, who in parallel he was imputing was a fraudster, but was rather to promise to get to the bottom of whatever he owned later. In short, concerning the debt he was saying ‘wait, we’ll discuss this later’, not ‘yes, I accept I owe you as you demand.’[emphasis added]**

The law on acknowledgement

- [21] Pursuant to section 4(1)(a) of the **Limitation Act**⁶ (“the Act”) any action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. By section 22(4) of the **Act**, where the right of action has accrued to recover any debt or other liquidated pecuniary claim –

“and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, **the right of action shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment.**”

‘Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.’

- [22] Section 23 of the **Act** states: -

“23.(1) Every such acknowledgement as aforesaid shall be in writing and signed by the person making the acknowledgement.

(2) Any such acknowledgement or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last foregoing section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.”

⁶ Cap 2.12 of the Laws of Montserrat.

[23] It is important to note that pursuant to the above provisions of the **Act**, an acknowledgement of a debt or pecuniary claim where the 6 year limitation period for bringing a claim therefor has expired, operates in law to reset the date on which the cause of action accrues leading to a fresh or new 6 year limitation period beginning to run. Furthermore, a debtor can acknowledge a debt without there having been a demand for payment made or sent by the creditor or their agent on their behalf. In short, the operation of the provisions of section 22(4) of the **Act** is not triggered or dependent upon a prior demand or claim by the creditor for payment or repayment of the debt. It is triggered either by an acknowledgement in writing signed by the creditor or his agent or by a part-payment of the debt itself by the creditor or his agent. For there to be an acknowledgement of a debt such as to reset the date upon which the cause of action accrues, it must be done in writing under the signature of the creditor or his agent making the acknowledgement, and not orally or by some unsigned document or correspondence.

[24] As to what constitutes an 'acknowledgement' of a debt or pecuniary claim for the purposes of section 22(4) of the **Act**, the guiding principles extracted from the English authorities were comprehensively reviewed and summarised by Justice Robin Knowles CBE of the English High Court in **Deutsche Trustee Company Limited v Bangkok Land (Cayman Islands) and another company**⁷. These principles are as follows: -

- (i) To acknowledge a claim, as a matter of ordinary English, is to **signify an admission that it is due: Surrendra (Overseas) Ltd v Government of Sri Lanka**;⁸
- (ii) The debtor must acknowledge his indebtedness and legal liability to pay the claim in question; Per Kerr J at page 575 in **Surrendra** referred to with approval by Lord Hope and Lord Brown in **Bradford & Bingley plc v Rashid**;⁹

⁷ [2019] EWHC 657 (Comm).

⁸ [1977] 1 WLR 565 at page 573 per Kerr J.

⁹ [2006] UKHL 37, [2006] 1 WLR 2066 at paras. [21] and [58].

(iii) Taking the debtor's statement as a whole, as it must be, he can only be held to have acknowledged the claim if he has in **effect admitted his legal liability to pay that which the plaintiff seeks to recover.**

Per Kerr J at page 575 of **Surrendra**.

(iv) In effect, acknowledges the claim' means that the statement in question must be an acknowledgement of that indebtedness which the plaintiff seeks to recover. Per Kerr J at page 575 in **Surrendra**;

[25] To constitute an 'acknowledgement' of a debt for the purpose of the **Act**, the signed document of the debtor or his agent under consideration need not acknowledge or identify a specific amount as the debt. This is not fatal once the precise amount of the debt is ascertainable by extrinsic evidence. In **Dungate v Dungate**¹⁰ Diplock LJ (as he then was) opined: -

"[An] acknowledgement need not identify the amount of the debt and may acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by extrinsic evidence."

[26] Likewise, where the debtor's document identifies or acknowledges "the outstanding balance owed to you" or the "outstanding amount", this has been held to be a plain acknowledgement of the existence of a debt and nothing more is required for the purposes of the Act.¹¹ At paragraph [22] of Bradford Lord Hope put it this way:

"It seems to me the plain meaning of those words is that the defendant was admitting that he owed the claimants a sum of money which for the time being he was unable to pay. There could not be a clearer way of acknowledging that the defendant was under a legal liability to pay the outstanding balance."

[27] The email sent on 27th February 2009 by the respondent to the manager of the bank, was unsurprisingly not formally signed by him. Does this document therefore meet the requirement of section 23(1) of the **Act** as being in writing '*signed by*' him? This

¹⁰ [1965] 1 WLR 1447 at 1487E.

¹¹ See Bradford & Bingley plc v Rashid per Lord Hoffman at para. [1].

issue was addressed briefly by the bank in its skeleton argument at paragraph 12 by reference to the principles at paragraphs 37 to 39 in **Deutsche Trustee Company Limited**. At paragraph 36 Knowles J cited an extract from the first instance judge at para. [61] in **The Good Challenger Navegante**¹² approved by Clarke LJ at para. [22] of his decision in the appeal:

“As a matter of general principle, in my view a document is signed by the maker of it when his name or mark is attached to it in a manner which indicates, objectively, his approval of the contents.....”

[28] Likewise, in **Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd**¹³, Christopher Clarke J opined that ‘an electronic signature is sufficient and that a first name, initials, or, perhaps, a nickname will suffice. But there must be something, which can be regarded as a form of signature, which is voluntarily affixed to the document by way of authentication thereof.’ Also, in **WS Tankship II BV v Kwangju Bank Ltd and another**¹⁴ Blair J was of the opinion that a header to a communication through the SWIFT network was a signature for the purposes of the statute.

[29] The respondent did not raise this as an issue either in the court below. It was not pleaded in the defence nor did he raise or argue in his submissions that since his email of 27th February 2009 was not signed by him it was incapable of satisfying the requirement of section 23(1) of the **Act** that any acknowledgement must be signed by the person making the acknowledgement. Neither was this issue addressed by the respondent in this appeal. However, it is clear from the principles referenced above that the absence of an actual physical signature on a document does not render the document incapable of being used as an acknowledgement of a debt claimed. The said email which bears the email address of the respondent and his name at the end is undoubtedly a document ‘signed by the maker’ having regard to the way in which that expression in section 23 has been construed by the courts. Thus, the main question for consideration on this issue is whether the reasons given by the learned

¹² [2003] EWCA Civ 1668.

¹³ [2011] 1 WLR 2575.

¹⁴ [2011] EWHC 3103 (Comm).

judge at paragraph 9 of the judgment in concluding that the email was not an acknowledgement of the debt claimed can stand up to scrutiny in light of the guiding principles as to what constitutes a 'sufficient acknowledgement' of the debt claimed.

The parties' submissions - Ground 1

- [30] The bank argued that the learned judge's reasoning and analysis at paragraph 9 of the judgment is flawed and his decision ought to be set aside. It is submitted that the judge having accepted that the respondent's email was in response to the Brandt demand letter, he went on to doubt whether it was the intention of the respondent by the said email to acknowledge the debt claimed. This says the appellant bank led to the learned judge making erroneous findings on matters not pleaded in the defence and not given in evidence since the respondent elected not to give evidence at the trial.
- [31] The bank points to three reasons for this submission. The first is that it is clear from the authorities that it was not necessary for the respondent to have specified the precise debt, as a general statement of a debt would suffice if acknowledged, provided that the precise amount can be ascertained by extrinsic evidence, which was undoubtedly so in this matter. The second is that no other meaning could, as a matter of law, be placed on the clear words used by the respondent in his email, other than the respondent had by the words used clearly admitted an indebtedness to the bank. The third reason is that the respondent, at the request of the judge, had opted not to give oral evidence at the trial and, accordingly, it was wrong for the learned judge to accept and to use statements made by him in oral submissions which had no evidential basis to reason that his intention in sending the email to the bank was not to acknowledge the debt claimed.
- [32] In relation to this third point, it is the bank's submission that there was no testimony by the respondent at the trial from which the learned judge '*could derive the seeds of doubt that he expressed [at para. 9] regarding the 27th February 2009 email.*' Moreover, the words used in that email in so far as they relate to indebtedness on the

part of the respondent to the bank, are clear; and furthermore, the loan claimed was admitted at paragraph 1 of the defence. Thus, the only question left for determination was whether the words used were sufficient acknowledgement of the said debt¹⁵.

[33] In seeking to uphold the judge's finding that the 27th February 2009 email from the respondent to the bank did not constitute or amount in law to an acknowledgement of the debt as claimed, the respondent relies on the correctness of the judge's reasoning and bases for so holding at paragraph 9 of the judgment. These bases are correctly summarised at paragraphs 27 and 28 of the respondent's skeleton argument as follows:

- “(i) the email was not intended by the respondent to acknowledge the debt but to inform the bank about the fraud cases concerning Attorney Brandt and his partner;
- (ii) it did not specify any original amount owed; it was not labelled (headed) with the subject of the debt;
- (iii) it was, in essence, a fraud complaint;
- (v) the respondent could not have intended for the email to acknowledge the debt demanded by the bank in the Brandt letter as he regarded Brandt as a fraudster, especially since his then lawyer, Mr. Sergeant, had indicated to the judge (in a previous proceeding to set aside the mediation referral order) that he had informed or advised the respondent that recovery of the debt was then barred by statute; and,
- (v) instead, the email had indicated that the respondent would investigate what he owed at a later time.”

This summary accurately represents the judge's reasoning and points in reaching the conclusion that the respondent's email was not intended to and was therefore not an acknowledgement of the debt, except for the additional reason cited by the judge that he was not satisfied that it was an acknowledgement of the specific loan debt in the Brandt demand letter and claimed in the action filed subsequently by the bank.

¹⁵ Paragraph 16 of the appellant's skeleton submissions.

[34] It is the respondent's contention, based on the principles at paragraph 34 in **Bangkok**, that for a debtor's written statement to be accepted as an acknowledgement of a debt it must be viewed in its entirety as an acknowledgement and acceptance of liability to pay the debt. In doing so, the debtor's statement must not be considered in isolation, devoid of context; and there is no rigid rule that words of acknowledgement, without regard to context, are to be construed as an acknowledgement of debt that restarts the limitation period¹⁶. This submission, which I accept to a large extent as a correct statement of principle, seeks to address the use by the respondent in his email of the words and phrases "*to satisfy my indebtedness*", "*which I fully acknowledge* ", and "*I undertake to settle my indebtedness in full*".

[35] The respondent also submits that an acknowledgement must be clear, unequivocal and unconditional. In this regard, he cites the decision of the Court of Appeal of Nigeria (Kaduna Judicial Division) dated 12th March 2024 in **Chief Simon Onyema v Edmond Ede & Anor**¹⁷ (2024) LPELR – 61758 (CV). In the summary of the *ratio decidendi* concerning what constitutes a sufficient 'acknowledgement of debt' for the purposes of the statute, it is stated: '*For an acknowledgement to avail a claimant... it must be established that such an acknowledgement was in writing, and it must be clear, unequivocal and unconditional.*' Reliance was also placed by the court on this *dicta* of Lord Herschell at page 768 in **Stamford Spalding & Boston Banking Co. v Smith**¹⁸ (: '*It cannot be disputed that an acknowledgement, in order to exclude the operation of the statute, must be absolute and unconditional, and one from which a promise to pay the debt can be inferred.*' [emphasis added])

[36] It is the respondent's submission that the learned judge was correct to conclude that the email, taken as a whole, does not acknowledge the debt, as it was intended to inform the bank of the fraud allegations involving his then counsel Mr. Brandt, and

¹⁶ Paragraph 31 of the respondent's submissions.

¹⁷ (2024) LPELR – 61758 (CV).

¹⁸ (1892) 1 QB 765.

to indicate that he, the respondent, would address the debt proceedings after the fraud proceedings. Suffice it to be said at this juncture that while the email did cover a number of matters, it also did specifically address and recognise, at minimum, the respondent's indebtedness to the bank which he undertook to settle in full.

[37] Further, it was submitted by the respondent that extrinsic evidence of the debt is "unclear" since the Brandt demand letter only referred to the loan number but did not specify the date and amount of the loan claimed, all of which are essential particulars when an institution issues multiple loans.¹⁹ It is therefore submitted that there can be no acknowledgement of the claim where the Brandt demand letter does not identify the loan upon which the claim is based²⁰ , as the email cannot be considered unequivocal and unconditional admission or acknowledgement of the debt claimed.²¹

[38] This submission seems to be premised on the bank having made more than one loan to the respondent giving rise to the necessity when making a demand to distinguish by giving the omitted particulars one loan from the other. However, the respondent did not refer in his email to there being more than one loan nor did he plead the existence of another loan or give any evidence of such loan in the proceedings below. There was a reference to the existence of another loan which may have been substantially paid off leaving possibly a small balance. However, no such loan was pleaded in the defence and no evidence of it tendered before the judge in the trial of the claim.

[39] In support of this latter submission that the acknowledgement must be of the "claim" and not any general indebtedness without reference to the specific cause of action upon which it is said to arise, the respondent relies on the decision of Justice HHJ Russen KC of the English High Court in **LJR Interiors Ltd v Cooper Construction Ltd**.²² The relevant expressions of principle are at paragraphs 108 to 111. At

¹⁹ Paragraph 34 of the respondent's submissions.

²⁰ Paragraph 35 of the respondent's submissions.

²¹ Paragraph 37 of the respondent's submissions.

²² [2023] EWHC 3339 (TCC).

paragraph 107, counsel for LJR Interiors, in response to a question from the judge, submitted that an acknowledgement of 9.84 pounds sterling under the contract was sufficient to set the clock under the statute running again for the commencement of proceedings for the recovery of a significantly greater sum under the said contract. The judge, in rejecting this submission, stated: -

“It is clear from the language of section 29(5) [of the statute] **that what is required is an acknowledgement of “the claim” which is constituted by the accrual of a right of action to recover “any debt or other liquidated claim.”** Although some indefinite language is therefore used in identifying the subject matter of any such pecuniary claim, **the acknowledgement must be of that claim, whatever its value, and not just part of it....** Therefor, it is not sufficient for the claimant to be able to say that there has been an acknowledgement of some indebtedness in a smaller sum than the otherwise time-barred claim. This conclusion is consistent with the aim of the 1980 Act being to curtail litigation over claims that are unduly stale, when the lapse of time since they arose may well lead to evidential difficulties in proving or defending them. A subsequent and clear enough acknowledgement (or an avowedly partial or ‘on account’ payment) by the defendant removes that concern based upon staleness, and resets the clock, **but only so far as it recognizes “the claim.”** [emphasis added]

- [40] In **LJR Interiors**, the judge considered that his above interpretation of the statutory provision is supported by the decision and *dicta* of Edmund Davies J in **Dungate v Dungate** (supra), where both the judge and the court of appeal opined that a written acknowledgement of the debt could be effective even though it did not express the actual amount of the debt, once it was sufficient that the actual amount could be established or identified by extrinsic evidence. Davies J pointed out that the judge had used the words “*identify the acknowledgement with the debt*”. Likewise, Kerr J in **Surrendra** had used the words “*acknowledges the claim*”; and acknowledges his indebtedness and legal liability “*to pay the claim in question*”, that being “*that which the plaintiff seeks to recover*”. For all these reasons and as canvassed in his skeleton argument, the respondent submits that the learned judge’s reasoning, analysis and conclusion on the issue of acknowledgement was correct, and he did not err in finding that the respondent’s email was not an acknowledgement of the debt claimed.

Analysis and conclusion on Ground 1

- [41] The bank argued that the respondent had at paragraph 1 of his defence admitted the loan pleaded at paragraph 1 of the statement of claim and by doing so, admitted the loan identified in as the basis for the bank's demand in the Brandt demand letter. Accordingly, it was not open to the respondent to argue (in the court below or on appeal) that his email was referring to some other loan indebtedness or that the bank had failed to discharge its burden of proving on a balance of probabilities the said loan of EC\$40,920.57 made on or about 6th January 1993. In support of this submission reliance is placed in a passage from **Phipson on Evidence**²³ dealing with "pleadings". The relevant passage states:

"Now a statement of case must be verified by a statement of truth under CPR r.22.1; such a verification is an adoption by the party that he believes in the truth in what has been pleaded, and hence **a party may have some difficulty resiling from the position taken in his pleading, even where it falls short of a formal admission**. Particulars can only be taken as admissions in respect of the issues on which they are delivered."

- [42] It is a general rule that where a defendant has in his defence or by notice of admission or otherwise admitted an allegation of fact in the statement of claim or a part of a claim, the claimant does not have to lead evidence at trial to establish that fact or part of the claim. However, any such admission must be clear and unequivocal. The **Eastern Caribbean Supreme Court Civil Procedure Rules** (Revised Edition) 2023 ("CPR") Rule 10.5 also stipulates a defendant's duty to set out his/her case in the defence. This includes the duty to set out all the facts on which the defendant relies to dispute the claim; and which allegations in the statement of claim are admitted and which are denied. However, CPR Part 10 does not stipulate any consequence from a failure by a defendant to clearly deny an allegation in the statement of claim. The consequence of this failure is that a court will not permit a defendant to lead evidence of facts not pleaded or to raise issues not pleaded in the defence in disputing the claim. This is precisely what is meant when by the words highlighted in bold in the passage from **Phipson** above.

²³ 20th Edition at para 4-26.

- [43] At paragraph 1 of the statement of claim, the bank avers: '*On or about the 6th day of January 1993, the Claimant lent the Defendant the sum of \$40,920.57 with interest thereon at the rate of 12% per annum.*' Here, unlike the Brandt demand letter, no loan number is stated, and no further particulars of the said loan are provided, including the length of the loan, and its repayment terms. The purpose of the loan is not pleaded and there is no pleading that it was for an "overdraft" as was asserted at the trial. The respondent as defendant in his filed defence did not specifically respond to what was alleged at paragraph 1 of the statement of claim. He merely states: '*The Defendant admits he received a loan from the Claimants.*'
- [44] In my considered view, this is not a clear admission of a loan from the bank on 6th January 1993 in the sum of \$40,920.57 with interest at the rate of 12% per annum. Accordingly, there has been no admission of such a loan having been made, such that the bank as claimant was not required to prove, on a balance of probabilities, the said loan. The upshot from the bank as claimant of the pleading in the statement of claim not having been expressly denied or admitted by the respondent, is that the bank is put to proof of such loan evidentially. The consequence to the respondent as defendant is that he could not provide evidence at the trial of some other loan as a defence to or in disputing the claim with respect to the loan pleaded at paragraph 1 of the statement of claim.
- [45] The second issue arising on the defence is the respondent's denial at paragraph 2 that he received any letter from the claimant/appellant bank dated 24th February 2009. This point was sensibly not pursued in oral argument by learned counsel Ms. Brown for the respondent. The learned judge found as a matter of fact that '*it is probably the case that the email [dated 27th February 2009 from the respondent to the bank] is in response to the demand sent by Counsel Brandt on 24.02.09.*' In my view, the learned judge was quite correct in reaching this finding of fact, which finding is unassailable. This is patently clear from the very first sentence of the said email from the respondent where he admits to receiving the Brandt demand letter. The upshot of this is that the

finding that the respondent's email of 27th February 2009 was in response to the bank's demand letter of 24th February 2009 stands.

- [46] The question therefore is whether the email amounts to a sufficient acknowledgement of the debt claimed in these proceedings, such as to reset the date on which the bank's cause of action accrued, and the limitation period began to run. If so, the consequence as specified at section 22(4) of the **Act** is that the loan debt was acknowledged and the cause of action and claim was not statute barred pursuant to section 4(1)(a) of the said **Act**.
- [47] It is a mandatory requirement of section 23 of the **Act** that an acknowledgement for the purposes of the Act must be in writing and 'signed by the person making the acknowledgement' or by his/her agent. However, for a signed document of the debtor or his agent on his behalf to amount in law to an acknowledgement, it must amount to an acknowledgement of "the claim" (s. 22(4)), that is, the debt claimed. This is made clear from the provisions of the statute and the dicta of Justice Russen KC at paragraphs 108 in **LJR Interiors** above.
- [48] In my opinion, this approach does not differ from the approach adopted in **Bangkok** and the authorities cited in the judgment of Knowles J, such as **Bradford & Bingley** ("legal liability to pay the claim in question"; "the outstanding amount"; the outstanding balance" "outstanding balance owed to you"; "outstanding amount"); and in **Dungate v Dungate** ("general indebtedness provided the amount can be ascertained by extrinsic evidence"). The basic principle is that for a document signed by the maker to be an acknowledgement of a debt or pecuniary claim for the purposes of the statute, it must clearly acknowledge an indebtedness and liability to pay the debt claimed, whether the precise amount, or if not specified, an acknowledgement and liability to pay whatever is the correct amount then outstanding or which can be established by extrinsic evidence.

- [49] The learned judge reasoning and decision on this issue is at paragraph 9 of the judgment. This paragraph is set out in full above. Of significance, the learned judge accepted that the respondent's email of 27th February 2009 to the bank was in response to the Brandt demand letter of 3 days earlier on 24th February 2009 addressed to him. In reasoning to his conclusion that the email was not an acknowledgement of the "precise debt" sought by the bank, the learned judge approached this issue by embarking upon a consideration of whether in his assessment the respondent had "*intended to acknowledge the precise debt.*" This is where the judge confessed to struggling and expressed doubt as to the respondent having such an intention when he wrote and sent the said email.
- [50] While underscoring that in the email, the respondent used the words "*acknowledge*" and "*undertake to settle in full*", he considers that no sum was specified in said email. As seen from the various authorities referenced above, this is not essential and does not *ipso facto* render the document incapable of being construed as a sufficient acknowledgement of the debt claimed. The learned judge also incorporated into his reasoning and factors, what Attorney Sergeant who gave no evidence at the trial, had given in answer to questions from the learned judge in different proceedings (No.18 of 2009) to set aside the mediation referral. Specifically, the judge referenced what Sergeant had said about advice he had given his client, the respondent, when he received the Brandt demand letter, to the effect that any claim for recovery of said debt was statute-barred, in exclaiming/concluding that it seemed "odd bindingly" for the respondent to nevertheless go on in his email to acknowledge the said debt to the bank. This approach and utilisation of testimony, which was not evidence in the trial of the claim, was undoubtedly impermissible, and ought not to have been taken into account by the learned judge in determining this issue at trial in Claim No. 7 of 2018.
- [51] The learned judge, having observed that the "*bulk*" of the email is about parallel proceedings for fraud against attorney David Brandt, attorney Warren Cassell and the respondent's ex-partner Mr. Wood, goes on to find that the "*purpose*" of the email

was not to acknowledge the debt to the bank but to “*alert the bank to the other cases*”. He found support for this conclusion by observing that the header to the email was not the debt nor the Brandt demand letter, but the “estate”, meaning “Providence Estate” which appears as the “subject” of the email.

[52] There are several issues with this reasoning. The first is that the email in the opening sentence expressly acknowledges receipt of the Brandt demand letter. Second, the real “header” to the email is “*Re: Parcel 88 in Block 13/15*” the very parcel of land upon the title to which the bank had entered a caution to secure the alleged loan the subject of the claim. Third, it is pellucid that the email not only deals in a substantial way with the fraud proceedings involving the named lawyers in Montserrat and Mr. Wood, but also in a substantive way with his indebtedness to the bank; his request to Attorney Sergeant to “make arrangements” with the bank to “*satisfy his indebtedness in full*” (an acknowledgement of liability for an indebtedness and his commitment to negotiate terms upon which to settle it in full); and a request for the bank’s abeyance in commencing legal proceedings to recover this indebtedness, which he “*undertakes to settle... in full*”. Moreover, the said email ends with a declaration of the respondent’s intention or ability to “*make monthly payments between March and August and then pay the balance in full after I obtain judgment against Mr. Wood this summer.*”

[53] With respect, it was therefore wholly misplaced and hence erroneous for the learned judge to conclude that the “bulk” of the email was not to acknowledge an indebtedness to the bank and to settle that indebtedness in full, but the predominant purpose was to alert the bank as to the other cases. While that may have been one purpose, it is clear from the email and from the words used therein that a primary purpose of the email was a recognition and acknowledgement of his indebtedness and liability to the bank, to declare his intention not to avoid payment but to settle and pay the indebtedness in full, to seek the abeyance or restraint of the bank in the commencement of legal proceedings against him to recover the debt, and to dissuade the bank from going after his title in the caution property, at least until he

had an opportunity to either negotiate terms of repayment or received judgment in his case in the United States against Mr. Wood set for trial that summer. This skewed approach led to the learned judge into grave error and to concluding erroneously that the sole “purpose” of the email was not to acknowledge the debt to the bank, but to alert the bank as to these other parallel proceedings against the named lawyers in Montserrat and Mr. Wood.

[54] The learned judge also strayed beyond what was permissible when at paragraph 9 he went on to assess the respondent as a person and character based on his observations of him during the trial and at other hearings, not as a witness but as a participating litigant. This led him to describe the respondent as a person “loose with words”, who “linguistically shoots from the hip”, and to thereby conclude that “he probably did not intend to acknowledge specifically the claim raised by Counsel Brandt”, but rather to promise to get to the bottom of what he owed later. The judge concludes that the respondent was saying *‘wait, we’ll discuss this later’*, not *‘yes, I accept I owe you as you demand’*.

[55] This approach by the learned judge based not upon his observations and assessment of the respondent as a witness in the trial, but on his observations of him as a participating litigant representing himself, was misplaced and incorrect. This is so for the fundamental reason that the claimant had no opportunity to cross-examine the respondent and to test his truthfulness, veracity and demeanour, since he elected not to give any evidence at the trial. It was therefore improper and impermissible for the learned judge in these circumstances to make his own assessment of the respondent and to settle upon what he saw as his characteristics and to use these to conclude that the respondent did not intend to acknowledge the debt claimed. This approach had the effect of the judge continuing to adopt what was from the very beginning of his reasoning an incorrect approach as a matter of law and principle to the issue of whether the email was a sufficient acknowledgement by the respondent of the debt claimed. As observed above, the issue of whether a document is a sufficient acknowledgement of a debt or pecuniary claim is a question of fact to be

determined, as learned counsel for the respondent accepts, upon consideration of the whole of the document itself, and not just certain words or phrases used therein.

- [56] This approach by the judge was the subject of criticism by the bank as the third point made and developed at paragraphs 15, 16 and 17 of their skeleton argument (set out above). I accept as correct that the failure of the respondent to give evidence or to lead any evidence at the trial is of significance in challenging the correctness of the judge's acceptance and use of certain statements given by the respondent in oral submissions and hence the soundness of his concluding "seeds of doubt".
- [57] However, in my view, as a matter of principle even where some evidence is given at trial (whether admissible or not) as to what the alleged debtor's "intention" was when he/she crafted and sent the document being assessed as to whether it constitutes a sufficient acknowledgement of the claim for the purposes of the **Act**, such evidence would be of little, if any, evidential value and should not be taken into account in determining whether the document was a sufficient acknowledgement. This is because *post facto* parol evidence of the maker of the document's intention or intentions when sending it to the creditor is irrelevant to any consideration of whether the document itself, read as a whole, amounted to a sufficient acknowledgement of the debt claimed.
- [58] In any event, the maker's intention when sending the document cannot outweigh the clear meaning of the words used in the document itself. If the contrary was so, it could lead to the absurd result that the maker can, by giving evidence of his/her intention or intentions undermine the very effect and efficacy of the document as a clear and sufficient acknowledgement of the claim thereby eroding and undermining the very provisions of section 22(4) of the **Act** and the clear intention of Parliament as manifested by those provisions. It is the document itself and what is stated therein which must be read and construed as a whole by the court in determining whether what is stated therein amounts to an acknowledgement of the debt and the maker's liability to pay or repay the claim to the creditor. It is only such a finding which

engages the provisions of the **Act** in section 22(4) as an acknowledgement reviving and resetting the commencement of the prescribed limitation period applicable to a claim.

[59] The respondent submitted that since some of the usual particulars of a loan were not contained or identified in the Brandt demand letter, it cannot be sensibly argued that the respondent's email could in this case amount to a sufficient acknowledgement of the debt claimed. This, it is argued, is particularly so where it is necessary to distinguish between more than one loan by giving those particulars. These omitted particulars (as has been identified above) are the year of the loan, the original principal amount, its term, and the terms of repayment. At first blush there would seem to be some force in this line of argument. However, the Brandt demand letter was not devoid of any pertinent specifics or particulars of the loan debt being demanded. Importantly, it gave the loan number and the fact that it had been agreed for the bank to place a caution on the respondent's land Block 13/15 Parcel 88, St. Peter's Registration Section to secure its repayment. The said letter also gave the current balance at EC\$23,199.05 and the rate of interest being 12% per annum.

[60] It cannot be and the respondent has never pleaded or asserted that he had some other loan which carried interest at 12 % per annum and the repayment of which was secured by a caution on the said property. If fact, the respondent in his defence has not pleaded that no such loan exists or that there was some other loan which he had with the bank, and which was outstanding or in arrears. What the respondent did plead at paragraph 5 of the defence is that the bank has been guilty of prolonged and inexcusable delay in bringing the claim *'and thereby caused or permitted the Defendant to believe as in fact he did that the Claimant did not intend to make the claim herein or any claim against the Defendant and in this belief the defendant acted to his prejudice as he has otherwise been prejudiced.'*

[61] This pleading rather than being a denial of the existence of this loan claimed seems premised on the very existence of the said loan and the cause of action which it is

contended was statute barred. Additionally, paragraph 1 of the defence speaks to “a” loan which the respondent received from the bank. That being the case as pleaded it is clear that when the respondent in the email of 27th February 2009 stated clearly and emphatically an acknowledgement of his indebtedness and liability to the bank for repayment of a loan which was then unpaid and his intention and undertaking to settle that loan in full, the only reasonable conclusion to be reached is that he knew of the loan identified in the Brandt demand letter as the loan owed to the bank by him and which he acknowledged his liability to repay as a debt and settle in full.

[62] For these reasons, the learned judge erred when he determined that the email dated 27th February 2009 from the respondent to the bank was not a sufficient acknowledgement by the respondent of the loan debt claimed. His reasoning and decision on this issue was patently flawed and must be set aside.

[63] I find on a balance of probabilities that the said email from the respondent was a sufficient acknowledgement for the purposes of section 22(4) of the **Act** in that it was a clear, unequivocal and unconditional acknowledgement of the debt claimed. Accordingly, its effect in law is that the date on which the right of action accrued on the said loan debt was deemed to be the date of the said email acknowledgement, that is, on 27th February 2009. Accordingly, ground 1 succeeds.

Ground 2 – perverse findings

[64] This ground of appeal concerns the judge’s findings at paragraph 5(g) of the judgment, which reads:-

“(g) Rooney has said in argument there was no loan for \$40000ec, but a different loan at a time between 1991 and 1993 for \$30000ec, which he points to largely having paid off, noting in materials he has filed various payment stubs, and a cheque for \$10000ec, so that any indebtedness would be pennies. It is this debt he says he means by his defence filed 06.06.10 that he admits being a loan. Moreover, he says he was not on Montserrat on 01.06.93, and the bank cannot show otherwise, not can the bank prove there was not loan for \$30000ec, or if there was, what happened to it.”

- [65] The paragraph was one of the seven “weaknesses” identified in the bank’s case by the learned judge at paragraph 5.
- [66] The “gist” of the bank’s complaint under this ground of appeal is that the judge wrongly sought to qualify the admission made by the respondent in paragraph 1 of the defence by saying that he had been referring not to the loan claimed but to a different loan for EC\$30,000 despite the fact that this was not pleaded and the respondent gave no evidence at the trial. Further, it is argued that it was not open to the judge to sue what the respondent said in oral argument as evidence as to the existence or otherwise of another loan, particularly where the debt claimed was expressly admitted in the defence, and where an issue not pleaded or raised in evidence ought not to be entertained. In support of this submission the bank cites the passage from **Phipson** dealt with above. Accordingly, it is submitted that the learned judge’s treatment of the respondent’s oral submissions was perverse and amounts to a clear misdirection by him.
- [67] The respondent’s response to this ground of appeal is at paragraphs 39 to 45 of his skeleton argument in the appeal. First, he points to paragraph 13 of the judgment where the learned judge states that he has reached his conclusions *‘without the need to consider evidence from Rooney, and I put out of my mind his various unsworn mixtures of argument and fact during the hearing. Just looking at the defence pleading, and considering the state of the evidence tendered by the bank, the burden is not met to the standard needed.’* It is submitted that it is incorrect to say that the judge relied on unsworn evidence from the respondent regarding another loan, and there is therefore no basis upon which to decide otherwise.

Analysis and conclusion – Ground 2

- [68] What was stated by the learned judge at paragraph 5(g) of his judgment was one of seven factors or matters which he considered to be a weakness in the bank’s case. He followed on by identifying at paragraph 6 the one weakness which he saw in the respondent’s case, that being, what he said in his email of 27th February 2009

acknowledging receipt of the Brandt demand letter and that he had requested Mr. Sergeant to make arrangements with the bank to satisfy his indebtedness which he fully acknowledges and undertakes to settle in full.

[69] Notwithstanding the general statement at paragraph 13 by the judge and disclaimer in relation to taking into account the unsworn statements of the respondent in reaching his conclusions, it is clear from paragraph 5(g) that the learned judge seems to have attached some significance on the question of the bank's proof of the debt claimed to what the respondent had said in argument about there being no loan for EC\$40,000.00 but a loan for EC\$30,000.00, and him not being on Montserrat on 6th January 1993 and the bank's inability to show otherwise or to disprove the existence of the EC\$30,000.00 loan.

[70] In my opinion, the bank is quite within its place to complain about this, notwithstanding what was stated at paragraph 13 of the judgment. It was clearly improper for the learned judge to even allude in his judgment to matters not pleaded and not given in evidence, especially where the respondent had refused to give evidence, and to do so in a way negative to the claimant bank and his assessment of weaknesses in their case especially relating to their proof of the loan debt. Having done so, it left the door ajar for the unsuccessful claimant to feel that the judge's assessment of their case for repayment of the loan debt was prejudiced by the judge's consideration and weighing of issues not pleaded (denial of the loan claimed and raising another loan instead) and of unsworn statements to that effect.

[71] The bank has submitted that this was particularly egregious in light of what they consider to be a clear admission at paragraph 1 of the defence of the loan debt claimed. I have already addressed that issue and concluded that paragraph 1 was not an admission of the loan debt claimed but of "a" loan made by the bank to the respondent, and to the extent that the respondent has not specifically denied the existence of the EC\$40,000.00 loan he ought not to be permitted to lead any evidence in denial of it.

[72] The upshot of this in my opinion is that having found that the email is an acknowledgement of the loan debt claimed, any question of the action being statute-barred falls away, as was accepted by both parties before the learned judge. This just leaves ground 4 for consideration concerning the bank's failure to prove the debt, as found by the learned judge. Looked at in that way, while there is some merit in ground 2 it is not determinative of the appeal.

Ground 4 – proof of debt

[73] This ground of appeal concerns the judge's finding at paragraph 11 of the judgment that the bank had failed to discharge its burden in proving on a balance of probabilities the debt claimed. Paragraph 11 reads: -

“11. To distill this case, I find that there may have been a debt for \$40000 at 12% taken out on 01.06.93, but I do not find this has been proved properly. On the evidence it is quite possible, not probable. It does not follow in logic that I have found there was probably not a debt; instead, the bank simply failed in its burden. If the bank set out to prove that an apple grown on Montserrat was probably green, and failed, it would not follow the opposite had been proved, namely that an apple was probably not green: Instead it would mean whether it was green had not been proved.”

[74] The bank relies on its submissions under grounds 1 and 2 in its skeleton argument. They stress that the respondent admitted the loan at paragraph 1 of the defence and had acknowledged the debt by his email of 27th February 2009. The bank also points out that at no stage prior to or at the trial did the respondent seek to amend his defence.²⁴ It submits that both the defence and email are clear admissions that the loan was indeed made, but the learned judge did not in his judgment deal with the effect of the admissions made, namely, that the debt had been proved.²⁵ Furthermore, nothing which the respondent said in oral argument at the trial could cast doubt on the admission or on the contents and effect of the said email. It is also submitted at paragraph 9 of the bank's reply skeleton that: *'The Appellant did not have to prove the loan because it was admitted. The only issue for the trial judge to decide was acknowledgement.'*

²⁴ Appellant's submissions in reply at paragraphs 1 to 4.

²⁵ Appellant's submissions in reply at paragraphs 6.

[75] In answer to this ground of appeal the respondent relies on their positions in answer to grounds 1 and 2. The maintain that the debt claimed had not been acknowledged by the respondent in his email, paragraph 1 of the defence is not an admission of the debt claimed and accordingly the learned judge was correct in reaching the conclusion that on the evidence adduced at the trial the bank had failed to discharge its legal burden to prove the debt claimed. Alternatively, if this Court regards the email as an acknowledgement of the debt, it serves only to restart the limitation period. In support of this submission the respondent cites **Bradford & Bingley plc v Rashid** at paragraph 16.

Analysis and conclusion - Ground 4

[76] This ground of appeal may be dealt with shortly. The statement at paragraph 9 of the bank's submissions in reply quoted at the end of paragraph [77] above seems to concede implicitly that the bank had not produced the kind of documentary and oral evidence at the trial sufficient to discharge its burden of proof in proving the debt claimed, except to the extent of its reliance on the purported admission at paragraph 1 of the defence and the clear acknowledgement by the respondent in his email of 27th February 2009 of the debt claimed. I have already found that the statement at paragraph 1 of the defence is not on the pleadings an admission of the debt claimed but merely an admission of "a" loan made by the bank to the respondent.

[77] Having found that the respondent's email was an acknowledgement of the debt claimed for the purposes of the provisions of section 22(4) of the **Act**, the question arises as to whether it is also evidentially an admission of the debt claimed. The respondent helpfully cited paragraph 16 in the judgment of Lord Hoffman in **Bradford & Bingley plc**. There the learned Law Lord address that very issue. He opined (so far as material):

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"16. But when a statement is used as an acknowledgement for the purposes of section 29(5), it is not being used as *evidence* of anything. The statement is not evidence of an acknowledgement. It *is* the acknowledgement. It may, if admissible for that purpose, also be evidence of an indebtedness when it comes to deciding this question at the trial, but

for the purposes of section 29(5) it is not being used as such. All that an acknowledgement does under section 29(5) is to allow the creditor to proceed with his case. It lifts the procedural bar on bringing the action. Questions of evidence to prove the debt will arise later.”

[78] The respondent's email dated 27th February 2009 was used in this case for a dual purpose by the bank as claimant. The first was as an acknowledgement of the debt claimed for the purposes of section 22(4) of the **Act** lifting the 'procedural bar' enabling the bank to proceed to commence a claim for the outstanding debt. On this aspect the bank has now succeeded. The second is as evidence at the trial in proof of the debt claimed. Thus, the said email was one of the documents produced by the claimant and admitted as evidence at the trial. The email is on any basis an admission of an indebtedness by the respondent to the bank relative to the loan claimed in the action.

[79] However, the said email does not go so far as to admit any precise sum of indebtedness, albeit this is capable of being ascertained by extrinsic evidence. At the trial the bank also produced and had admitted into evidence a computer print- out of the loan to the respondent. This document stamped "Owen Rooney Loan A/C" purports to show the date the loan was taken out (1/06/1993), the principal sum of the loan (\$40,920.57), the interest rate (12%), and the balance of principal and interest owing thereon as of 18th April 2018 in the combined sum of EC\$115,103.92 made up of EC\$32,787.96 principal and EC\$82,315.96 interest. A previous balance of EC\$76,501.25 comprising principal of EC\$23,199.00 and interest of EC\$53,302.25 is also shown on the print-out. Also attached to the printout and tendered as evidence at the trial is a document headed 'Loan Activity Statement – Serviced Loan dated 6/12/18 referencing loan No. 206503527.²⁶ (pages 222 and 223 of the HB)

[80] These documents were addressed by the learned judge at paragraph 5. b, c and d of the judgment in terms of weaknesses in the bank's case. Specifically at these subparagraphs the judge assessed the evidence in these terms:

“b. Instead the bank infers this (*reference to the \$40000ec loan at 12% interest*) from computer records it has no certification are correct.

²⁶ Exhibited at pages 222 and 223 of the Record of Appeal.

Computers in 1993 were growing in use, and then not the wholly ubiquitous machines we encounter now. The manager does not know what hardware was used, and says there was a software named 'Access' issued by Jack Henry & Associates, though this has since changed to 'Core Director', to reflect improvements, though (sic) does not know for what. Whatever happened with Rooney in 1993 or earlier was before his time. He has no personal knowledge of matters. He assumes records were kept correctly, and points to audit records by chartered accountants located in Plymouth, showing an annual report for each of the years 1993-2009.

c. [Michael] Joseph does not know who authorized the loan, nor who input its details in the computer, nor if the loan was rightly ascribed to Rooney, nor why there were no chasing letters, nor indeed if there were, nor is there evidence from the original manager Anton Doldron, in office in the period 1993-2009, as to what decisions were taken about this loan in his tenure, or even verification of it, or whether it may possibly have been contemplated to be written of.

d. [Michael] Joseph has produced a helpful spreadsheet of figures, exhibit **MJ1**, which is his case, namely the computer tells him Rooney owes money at 12% from 01.06.93. But the computer is not a person and cannot be cross-examined so that the court finds itself treading carefully."

[81] There has been no challenge or criticism by the bank in its appeal to the learned judge's assessment of the state of the bank's evidence as set out above from paragraph 5 of the judgment. There is therefore no basis upon which this Court can find otherwise or substitute its own assessment. Accordingly, the said assessment stands.

[82] In these circumstances, the upshot of the bank's position regarding proof of the claim is that while there has been an acknowledgement by the respondent of the loan indebtedness claimed as a matter both under section 22(4) of the **Act** and evidentially as proof of the existence of a debt which is owed, the email does not admit of any particular sum outstanding. It therefore fell to the bank as claimant to establish by admissible evidence at the trial the precise amount owing or outstanding. This the bank has clearly failed to do, the learned judge having not attached any cogency to the spreadsheet and computer records produced by Mr. Michael Joseph, the sole witness for the bank, who was not the manager at the time the loan was made and was unable to provide such proof of the amount outstanding at the time of commencement of the claim to the satisfaction of the learned judge.

[83] For these reasons ground 4 fails.

[84] In summary, the bank has succeeded on ground 1 but not on ground 4. I would therefore dismiss the appeal. On the question of costs, the bank having achieved partial success, I would order both parties to bear their own costs of the appeal.

I concur.
Vicki-Ann Ellis
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar