

THE EASTERN CARIBBEAN COURT OF APPEAL
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCVAP2018/0002

BETWEEN:

BENNETTE ROACH

Appellant

and

NATIONAL DEVELOPMENT FOUNDATION MONTSERRAT LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Gerard St. C. Farara
The Hon. Mr. John Carrington, QC

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

Appearances:

Mr. Warren Cassell for the Appellant
Mr. Justin Simon, QC for the Respondent

2020: October 30;
2021: January 28.

Civil appeal — Debt recovery — Limitation of actions — Montserrat Limitation Act — Revival of cause of action — Whether question of revival of cause of action having not been pleaded in the court below can be determined on appeal — Leave to appeal — Whether the Court of Appeal has jurisdiction to hear appeals from interlocutory orders without leave first being granted — Disturbing of a trial judge's findings of fact by an appellate court — Accrual of a cause of action for debt recovery — Whether learned judge erred in refusing application to stay claim on the basis that limitation period had expired

The appellant, Mr. Bennette Roach, is the former Chairman of the Board of the respondent the National Development Foundation Montserrat Limited ("the NDF") and is also the former

President of the St. Patrick Co-operative Credit Union Limited ("the Credit Union"). In 1992, while serving in both capacities, the appellant signed an agreement between the NDF and the Credit Union by which both entities would share operational costs relating to staff and facilities.

In October 1998, the appellant borrowed \$55,000.00 from the respondent, repayable in monthly installments over 84 months. In August 2000, the respondent granted a further loan of \$50,000.00 to the appellant which increased the outstanding amount due from the appellant to \$132,181.58. The parties agreed that this amount would be repaid in monthly instalments of \$2,060.21 over 7 years. By a further agreement between the parties in June 2003, the parties agreed to vary the monthly payments due under the loan to \$500.00 per month for the next 12 months, commencing July 2003.

The appellant made sporadic payments then, after March 2011, ceased making payments completely. On 31st October 2012, the respondent made a written demand for the amount owed by the appellant and in March 2014 commenced a claim against the appellant for a debt of \$246,358.71.

At trial, the manner in which the appellant's payments were credited against the loan became critical as the appellant had also taken a loan from the Credit Union in 1999. The respondent argued that the appellant made deposits into his savings account at the Credit Union and the payments of \$500.00 due to the respondent were deducted from this account and credited to his loan account with the respondent. The appellant argued that he did not authorize the Credit Union to do this, all his payments were toward his Credit Union debt and as such the respondent's claim against him was statute barred in March 2014 as he did not make any payments to the respondent after the June 2003 agreement.

The trial judge found for the respondent. The appellant appealed. The Court considered: (i) whether the issue of revival of the respondent's cause of action in the court below could be traversed in the Court of Appeal, having not been pleaded in the court below; (ii) whether the Court could entertain the appellant's challenge to an interlocutory strike out application made in the proceedings for which leave to appeal had neither been sought or obtained; (iii) whether the learned judge erred in his findings of fact in relation to the arrangements for payment as between the appellant and the Credit Union; and (iv) whether the judge erred in dismissing the appellant's application for the respondent's claim to be stayed because the limitation period had expired.

Held: dismissing the appeal, affirming the decision in the court below, and ordering costs to the respondent be assessed by a master of the High Court, if not agreed between the parties within 21 days of delivery of this judgment, at a figure not exceeding two-thirds of the assessed costs in the High Court, that:

1. A claimant's failure to plead an issue in the court below precludes the Court of Appeal from determining that issue at trial and the claimant from raising that issue on appeal. Accordingly, as the respondent, the claimant in the court below, did not plead revival of the cause of action as part of its claim, the court below was not

entitled to address it and this Court is also not obliged to consider that issue or submissions thereon in the appeal.

East Caribbean Flour Mills Limited v Ormiston Ken Boyea [2007] ECSCJ No. 110 considered; **McPhilemy v Times Newspapers Ltd** [1999] 3 All ER 775 applied; **George Knowles (as executor and beneficiary of the Estate of Oliver Knowles) v Elaine Knowles** [2006] ECSCJ No. 94 applied; **Marie Makhoul v Cicely Foster and another** [2015] ECSCJ No. 34 applied.

2. The Court of Appeal has no jurisdiction to hear an appeal from an order made in interlocutory proceedings if no leave to appeal that order has been obtained. In so far as there may have been an interlocutory application to strike out the respondent's claim in the court below, leave would have been required to appeal that order as this would have been an interlocutory order. No such leave being obtained, the Court of Appeal does not have jurisdiction to hear an appeal from that order. Similarly, the appellant's challenge to an order allowing the admission at the trial of affidavits filed in relation to an interlocutory application fails as no leave was sought to appeal against that order.

Marvin Roy Dey v The Attorney General of Saint Lucia [2008] ECSCJ No. 216 applied.

3. An appellate court is slow to disturb a trial judge's findings of fact and the appellant has not shown any basis for this Court to depart from the lower court's finding that the payments made by the appellant to the Credit Union were not intended to be forwarded to the respondent as payments on the debts owed to the respondent.
4. It is clear that an agreement has to be considered on its own terms to determine when the cause of action accrues. Although an acceleration-type clause which calls in an entire debt on the occurrence of a specific occurrence can have the effect of causing a cause of action to accrue prior to the stated term of the contract, there was no acceleration clause in the loan agreements between the parties. The respondent's cause of action would therefore have accrued no earlier than March 2011 when the appellant stopped paying altogether or more likely when the debt was demanded in October 2012. In the circumstances, the learned judge did not err in concluding that the claim was not statute barred.

Reeves v Butcher [1891] 2 QB 509 distinguished; **Lakshmijit s/o Bhai Suchit v Faiz Mohammed Khan Sherani (as administrator for the estate of Shabhaz Khan, dec'd)** [1974] AC 605 considered; **Clifford Robertson v HM Bhola & Co Ltd.** [2012] ECSCJ No. 202 distinguished.

JUDGMENT

- [1] **CARRINGTON JA [AG.]:** The nub of this appeal is whether the cause of action raised by the claimant in the court below (the respondent to this appeal) arose more than 6 years before the claim was filed in March 2014 so that the limitation defence raised by the defendant in the proceedings below (the appellant before this Court) should succeed.

Introduction and Background

- [2] The appellant, Mr. Bennette Roach, is the former Chairman of the Board of the respondent, the National Development Foundation Montserrat Limited ("the NDF"), which is an institution which accepts deposits from its members and charitable institutions and provides loans to individuals and small businesses.
- [3] In May 1992, the appellant signed an agreement, on behalf of the respondent, with St. Patrick Co-operative Credit Union Limited ("the Credit Union"), whereby the respondent and the Credit Union would share certain operational costs (those related to staffing and facilities). At the time of signing the agreement, the appellant was also president of the Credit Union.
- [4] In October 1998, the appellant borrowed \$55,000.00 from the respondent on terms that this loan would bear interest of 8% per annum and would be repaid in monthly instalments of \$857.54 over 84 months. In August 2000, the respondent gave a further loan of \$50,000.00 to the appellant which increased the outstanding amount due from the appellant to \$132,181.58 and the parties agreed that this amount would be repaid in monthly instalments of \$2,060.21 over 7 years with interest at a rate of 8% per annum. There was yet another agreement, by way of letter dated 24th June 2003, between the parties to reschedule the monthly payments under the loan commencing in July 2003. The letter evidencing the agreement was signed by both parties and stated:

"We refer to your discussions with the Executive Director and write to confirm that the Foundation will accept payment of \$500.00 per month

towards your loan with effect from 15th July 2003 for a period of twelve months. After this period your loan will be reassessed to ascertain if you can increase the payments.”

In the ensuing years, the appellant made irregular payments of \$500.00. In May 2008, the respondent proposed in writing, to the appellant, that interest on the loan, which by then had accumulated to \$36,007.85, be frozen for one year and the appellant would pay \$500.00 monthly towards the principal.

[5] The appellant continued to make irregular monthly payments of \$500.00 towards the outstanding loan sum until March 2011, after which no payments were made. On 31st October 2012, the respondent made a written demand for the delinquent amount under the loan and, eventually in March 2014, it commenced proceedings against the appellant in the court below, claiming a debt of \$246,358.71.

[6] The manner in which the appellant’s payments were credited against the loan became one of the more important factual issues to be determined by the court below. The respondent’s evidence was that the appellant made deposits into his savings account at the Credit Union and the payments of \$500.00 were deducted from this account and credited to his loan account with the respondent.

[7] The appellant, it transpires, had also taken a loan from the Credit Union in 1999 and there was correspondence from the Credit Union concerning non-payment of its loan in 2007, 2009 and 2010. The learned judge in the court below found that Mr. Roach did receive this correspondence.

The Proceedings in the Court Below

[8] The appellant’s defence in the court below was that he never authorized the Credit Union to make the transfers to his NDF loan account and that he never made any payments towards his NDF loan after making the June 2003 agreement, and so any cause of action against him on the debt was statute barred when the proceedings commenced in March 2014. He stated that even when he realized in 2010 from the

Credit Union correspondence that his loan was in arrears, he was not interested in the manner in which the irregular payments he had been making had been applied.

The learned judge noted in his judgment that, at trial, the issue between the parties:

“...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 section 22 of the Limitation Act, and under the principles enunciated in *Busch v Stevens* 1963 1 QB 1.”

- [9] The learned trial judge made the finding of fact that the appellant knew that his payments to the Credit Union were being applied to the NDF debt as he made no inquiry of the Credit Union as to the application of monies paid to them when he received correspondence from the Credit Union in 2009 concerning his non-payment of his loan from the Credit Union.
- [10] The learned judge also found that the appellant had received the correspondence in May 2008 from the NDF concerning his non-payment of the loan, which stated: ‘[t]his is further to your discussions with the then Executive Director Mrs. Roselyn Cassell Sealy and your commitment to make a monthly payment of \$500 on your loan’ but did not respond to this letter so that, contrary to his evidence at trial, he was aware that the loan had not been written off. He was also aware of the NDF’s allegations about his commitment to pay \$500.00 per month towards the loan and never took any step to inform the NDF that he would not be repaying the loan or to correct the misunderstanding on the part of the NDF that he was committed to pay \$500.00 per month towards his loan.
- [11] The learned judge further found that the appellant intended that his sporadic deposits to his Credit Union account would be used in part towards payment of the NDF loan despite the absence of specific written authorization from him for this purpose, so that the claim based on the failure to pay after March 2011 was not statute barred as the cause of action had accrued within the period of 6 years prior to the commencement of the proceedings in 2014. Judgment was therefore entered for the respondent on the claim.

The Appeal

- [12] The appellant has appealed from the learned judge's judgment. Up until the time of hearing of the appeal, the appellant had not provided this Court with a record of appeal notwithstanding, as the Court's own subsequent efforts revealed, that the entire record was available. The appellant must therefore suffer any detriment that may occur from this bizarre turn of events.
- [13] The notice of appeal states 3 grounds of appeal from the learned judge's decision, particularly:
- (1) The learned judge erred in dismissing the appellant's application for the Claimant's claim to be stayed because the limitation period has expired.
 - (2) The learned judge erred in finding that the affidavits filed in support of ancillary interlocutory matters that were decided in the earlier stages of the matter should be considered as evidence in the trial and part of the trial bundle.
 - (3) The learned judge erred in finding that the action was revived or that there was a fresh accrual by virtue of a subsequent payment when no such revival or fresh accrual was pleaded.
- [14] At the commencement of his oral arguments on this appeal, counsel for the appellant informed the Court that the parties had agreed that the appeal will concern the narrow issue of whether the appellant had made a final payment of \$500.00 to revive the debt due to the respondent and, if so, whether such revival had been properly pleaded so that it could be referred to at the trial of the claim. In his reply, he indicated that the NDF's submissions to the court below were on revival. This was an invitation to this Court to deal only with ground (3) of the notice of appeal.

[15] This was an unusual position for counsel to adopt in light of the fact that revival of the cause of action was not pleaded by NDF as part of its claim, and the learned judge's finding that revival of the cause of action was not in issue. Accordingly, the learned judge did not deal with the issue of revival in his judgment. For those reasons, I am not prepared to accept the position which counsel for the appellant advanced before this Court. This Court is a court of appellate jurisdiction and so is entitled to the benefit of the opinion of the court below in relation to matters coming before it. The court below is a court of pleadings and so is entitled to decide a dispute on the pleadings before it. If revival of a cause of action was not pleaded, the court below was not called upon to consider that issue and was therefore correct not to consider any arguments raised before it at trial by the NDF in this regard. This Court has authoritatively stated and restated the principle that a claimant's failure to plead the particulars necessary to enable the defendant to know what case it has to defend would preclude the claimant from relying on the issue which was not pleaded. In **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**,¹ Barrow JA adopted the reasoning of Lord Woolf in **McPhilemy v Times Newspapers Ltd**² and opined:

“The ‘pleadings should make clear the general nature of the case,’ in Lord Woolf’s words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose.”

[16] In **George Knowles (as executor and beneficiary of the Estate of Oliver Knowles) v Elaine Knowles**,³ Barrow JA stated– ‘...it cannot be a satisfactory situation that one case is ‘pleaded’ and the judgment is pronounced on a different case. The judgment shows the embarrassment that this situation caused’. This Court, through the learned Pereira CJ in **Marie Makhoul v Cicely Foster et al**,⁴ has also stated in relation to matters before the appellate court that it is ‘trite that it is not permissible to argue on appeal a case which was not placed before the court below

¹ [2007] ECSCJ No. 110, delivered 16th July 2007.

² [1999] 3 All ER 775.

³ [2006] ECSCJ No. 94, delivered 18th September 2006.

⁴ [2015] ECSCJ No. 34, delivered 23rd February 2015.

save in limited circumstances. One such circumstance is where the issue goes to the court's jurisdiction.' *A fortiori*, in the instant claim, this Court is also not obliged to consider that issue or submissions thereon as any ruling on that issue would be blatantly *obiter dictum* on the part of this Court. I would therefore dismiss ground (3) of the appeal.

[17] With respect to ground (1) of the appeal, neither the appellant's notice of appeal, written submissions nor the oral submissions made on his behalf elaborated on what was meant by this ground, and counsel for the appellant did not draw the Court's attention to any such order by the learned judge in the course of the decision from which this appeal lies.

[18] As stated above, the appellant failed to file a record of appeal including any such order to assist the Court and must bear the consequences of this lapse. There is an oblique reference, however, in the appellant's written submissions, to the master's failure to uphold the submission that the matter was statute barred which would have brought the matter to an end. So far as there may have been an interlocutory application to strike out the respondent's claim that was heard by the master, if this failed, leave would have been required to appeal the order refusing the strike out as this would have been an interlocutory order. In the absence of leave, this Court has no jurisdiction to entertain an appeal from such an order as has been determined in several decisions including **Marvin Roy Dey v The Attorney General of Saint Lucia**⁵ where this Court held that the failure to seek leave to appeal from an interlocutory order refusing leave to seek judicial review meant that the Court of Appeal had no jurisdiction to hear the appeal from that refusal. Ground (1) therefore must also fail.

[19] Even if ground (1) is to be generously interpreted as an appeal from the refusal of the learned judge to uphold the limitation defence, the simple question that arises would be: when did the cause of action accrue? As recited above, the learned judge made findings that (i) the appellant was aware of the application of the payments

⁵ [2008] ECSCJ No. 216, delivered 14th October 2008.

that he made to the Credit Union; and (ii) had intended that the payments be so applied. No real basis was advanced by the appellant as to why this Court should overturn these findings of fact by the learned judge and I therefore decline to so do as they appear to be findings based on the learned judge's assessment of the credibility of the appellant.

[20] It was for the appellant to satisfy the court below that it was merely coincidence that he was repaying the Credit Union loan by the same instalments as those by which he had agreed to repay the NDF loan. He did not do so. As Mr. Simon, QC who appeared for the respondent submitted, there was no evidence that the appellant ever agreed to pay \$500.00 per month towards his Credit Union loan, on which the payments were supposed to be over \$2000.00 per month. There was a reference in the appellant's evidence that he had thought that his NDF loan was written off. A write-off of the loan, however, was not pleaded and the evidence was therefore correctly rejected by the learned judge below for that reason and for the additional reason that, as the appellant was the Chairman of the NDF until 2010, it was unlikely that he would not have been aware if his own loan had been written off.

[21] In his reply, Mr. Cassell for the appellant submitted that the June 2003 agreement was for one year and would have terminated in 2004 so that the NDF could not rely on this agreement. I reject this argument for two reasons. Firstly, this was not pleaded in the defence in the court below; and secondly, the appellant's argument ignores a critical sentence in the letter, particularly – '[a]fter this period your loan will be reassessed to ascertain if you can increase the payments.' This sentence can only sensibly mean that (i) the agreement to vary the initially agreed monthly payments was not only for one year; and (ii) if there was no reassessment of the loan to ascertain if the appellant could increase payments, he was at least arguably expected to continue paying the instalments of \$500.00 per month. Clearly this was the understanding of the appellant who continued making such payments, although not regularly, in the absence of any evidence of reassessment of the position.

[22] The appellant submitted that the cause of action accrued in 2000 when he failed to pay the agreed instalments of \$2060.21 rather than in 2011 when the last payment of \$500.00 was made, on the basis that **Reeves v Butcher**⁶ established that a cause of action accrues from the earliest time at which the claimant could have brought an action and that that was at the time of his first breach in 2000. In **Reeves v Butcher**, the plaintiff had given a 5-year loan to the defendant on terms, *inter alia*, that if the defendant defaulted in paying agreed interest, which was due to be paid quarterly, the plaintiff could call in the principal of the loan 21 days after such default. The defendant failed to pay any interest and the plaintiff commenced his action to recover the principal and interest within 6 years of the end of the 5-year term of the loan. The Court of Appeal there held that there was a good limitation defence to the claim as the cause of action accrued upon the failure of the defendant to make the first instalment of interest under the loan. The factual situation in that case is in no way analogous to that which obtains in the case at bar. As each of the three judgments of the court, none of which exceeded one paragraph in length, explained, the critical consideration was the express term which provided the plaintiff's right to call for payment of the principal accrued upon failure to pay any instalment of interest for up to 21 days after it became due. **Reeves v Butcher** was considered by the Privy Council in **Lakshmijit s/o Bhai Suchit v Faiz Mohammed Khan Sherani (as administrator for the estate of Shabhaz Khan, dec'd)**⁷ and at page 617H of the majority judgment delivered by Lord Cross of Chelsea, he indicated that in **Reeves v Butcher**, the contract imposed an obligation on the defendant to pay the principal loaned as soon as the interest fell into arrear. In **Clifford Robertson v H.M Bhola & Co Ltd.**,⁸ on which the appellant also relied, the High Court found that the contract under consideration in that case had a similar acceleration clause.

[23] It is clear therefore that each agreement has to be considered on its own terms to determine when the cause of action accrues. In the instant case, there was no pleading or evidence that the NDF loan agreement had a similar acceleration term

⁶ [1891] 2 QB 509.

⁷ [1974] AC 605.

⁸ [2012] ECSCJ No. 202, delivered 30th July 2012.

as that in **Reeves v Butcher** or **Robertson v HM Bhole & Co Ltd**. In the absence of such a clause, at best, each unpaid instalment could only give rise to a cause of action in respect of the sum due under such instalment but not in respect of the entire debt for which the cause of action would have accrued no earlier than March 2011 when the appellant stopped paying altogether or, more likely, when the debt was demanded in October 2012.

[24] Additionally, even if a cause of action did accrue when the appellant failed to pay the agreed instalment in August 2000 as alleged, the appellant's argument ignores the fact that the **Limitation Act**,⁹ at section 4, states that the limitation period is 6 years after the accrual of the cause of action arose. Within this 6-year period from August 2000, the appellant entered the June 2003 agreement referred to above where he agreed to vary the instalments payable under the August 2000 Agreement to \$500.00 per month for one year initially subject to re-assessment to determine if there should be an increase in the amount of such instalments. It was this August 2000 Agreement, as varied by the June 2003 Agreement in respect of the sum due in the monthly instalments, that NDF was enforcing and which the Court found, rightly in my view, remained a live claim when the proceedings commenced in March 2014. Therefore, even on a generous interpretation of ground (1), the ground still fails.

[25] The thrust of the appellant's complaint under ground (2) was that the learned judge considered the evidence contained in affidavits filed in relation to an interlocutory application at the trial. The notes of evidence reveal that counsel for the appellant objected at a hearing in September 2017 to the inclusion in the trial bundle of the affidavits used at interlocutory hearings and other documents. The learned judge gave his written ruling on this objection in September 2017, some two months before the trial in November 2017, and refused leave to appeal. No application for leave was made to this Court as was the entitlement of the appellant under CPR Part 62.2(1A). The order made by the learned judge was an interlocutory order and in

⁹ Cap 2.12 of the Revised Laws of Montserrat 2002.

the absence of leave to appeal, this Court has no jurisdiction to consider an appeal from that order. Ground (2) therefore also fails.

Disposition

[26] For the reasons stated above, I would dismiss this appeal and affirm the decision of the court below. I propose to apply the general rule that the costs of this appeal shall be paid by the appellant to the respondent and direct that such costs be assessed by a Master of the High Court, if not agreed between the parties within 21 days of delivery of this judgment, at a figure not to exceed two thirds of the assessed costs in the High Court.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar