

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

Claim no. MNIHCV2014/0015

BETWEEN

NATIONAL DEVELOPMENT FUND MONTSERRAT LIMITED Claimant

and

BENNETTE ROACH Defendant

Appearances

Mr David Brandt for the claimant.

Mr Warren Cassells for the defendant.

2017: September 18

September 21

INTERLOCUTORY JUDGMENT

- 1 **Morley J:** The claimant (NDF) wants money repaid under a loan agreement by the defendant (Roach)¹. A point has been raised by Counsel Cassells for Roach as trial began on 18.09.17

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

(interrupted by hurricane Maria) as to what documents the Court may see, to be decided in this interlocutory judgment.

- 2 From the outset the Court wishes to express its disappointment that counsel together did not discuss the admissibility of documents before trial. In a sense, Counsel Cassells has 'ambushed' Counsel Brandt. This Court expects that counsel will cooperate, consistent with their duty to the Court, so that any hearing is efficient and clearly argued.
- 3 Further Counsel Cassells did not prepare in advance a skeleton argument. He contends that important materials in the consolidated trial bundle prepared by Counsel Brandt for the NDF, filed on 16.12.16, running to 287 pages, should not be before the Court. He makes an important point, but clumsily, which could have been avoided if armed with a skeleton the better to focus the Court on the precise documents and the precise authorities.
- 4 It is this Court's experience that counsel within the Eastern Caribbean Supreme Court often show great ability. It is below the standard to be expected, and easily met by able counsel, that there should be a complicated argument raised, already identified in advance (though unannounced), without a skeleton argument. The failure to marshal argument in a skeleton not only fails the court, but the client too. Counsel Cassells has had a good point to make, and it could have been made much better.
- 5 In what was a lively hearing, I have had to go through the trial bundle, page by page, and identify what documents are objected to, and why, 'on the hoof' as it were, and then hear piecemeal reference to authorities, not readily flagged, while neither counsel had before them the actual trial bundle for uniform reference for each other and the Court, despite the matter being listed for trial.
- 6 We can, as Bench working with Bar, do better than this, I said so at the time, and I expect not to see it again.

The loan

- 7 By a claim form filed on 11.03.14, the NDF says Roach owes EC\$246358.71 (plus fixed costs), arising from non-payment of monthly instalments on a loan for his print business, recorded by letter of 14.08.00, where Roach borrowed EC\$132181.58 at 8%pa, to be repaid from 30.08.00 over 84 months at EC\$2060.21pm. It is contended payment has been sporadic, with a last payment of EC\$500 on '11.03.11'. Only EC\$8225.02 has been paid to the date of claim, when the loan plus interest ought all to have been paid off by 30.08.07.
- 8 It appears that on 28.05.03, Roach asked to renegotiate payment terms, which was agreed by letter from the NDF of 24.06.03, so that he pay EC\$500pm from 15.07.03.
- 9 Payments were not always monthly, so that on 07.05.08, on the claimant's case the NDF suggested Roach receive what I will term 'breathing space', and therefore that payments would be suspended for a year from 01.05.08 to 31.04.09. Roach was asked to agree, though there is nothing in writing to show that he did. Curiously, the haphazard payments totalling EC\$5000 continued on 30.06, 22.09, 06.10, and 05.12.08, and 07.01, 03.02, and 17.04.09, within the breathing space allotted. These payments may be significant, for reasons which will become clear later.
- 10 In support of its contentions, the NDF have produced all the relevant correspondence with Roach, including the letters originating the loan from 28.10.98, the original handwritten ledger entries, and the history of the loan repayment by digitised summary of Roach's loan account 2017083, which shows a last payment of EC\$500 on '21.03.11'. A final letter dated 31.10.12 was sent from the NDF to Roach to demand full repayment of the 'delinquent amount' owing of then EC\$105070.71 by 30.11.12, or legal action would commence, (which did on 11.03.14).
- 11 In short, the NDF says that the cause of action was failure to pay further after March 2011, so that its action of March 2014 was necessarily within the 6 year limitation period.
- 12 Roach however contends that he never paid any monies in respect of the NDF loan. He points to how on 28.04.99 he took out a further loan with the St Patricks Cooperative Credit Union (SPCCU) of EC\$44400, at 1%pm, payable at EC\$2125pm from 31.05.99. He adds that the

NDF is housed by the SPCCU, and it would appear that monies he deposited there were wrongly and in confusion attributed to the NDF which should have gone to the SPCCU. It is certainly true that on the NDF's case the earliest payment toward its loan is recorded as EC\$857.24 on 02.01.02, and there was never any payment of EC\$2060.21. If what he says is correct, then he argues that the cause of action accrued from August 2000, when default began, and there never having been any payment, is now statute barred under *s4 Limitation Act Cap 02.12*, as the action filed accrued far longer than 6 years earlier.

13 There are interesting arguments available to the parties as to when the cause of action accrued: August 2000 or March 2011. Of striking interest perhaps will be whether the apparent breathing space payments do indeed show Roach was only ever trying to pay the SPCCU loan, inadvertently attributed to the NDF loan, as these monies were not due on the NDF loan following the (evidentially unacknowledged) letter of 28.05.08, possibly supporting a suggestion of mix-up.

14 Of further interest in this action will be discussion of why, if true, Roach never paid anything back to the NDF, which it seems was a fund designed to help Montserrat back on her feet after the disruptive years of hurricane Hugo in 1989 and the volcano between 1995 and 1997, and it appears clear the NDF tried hard over many years to accommodate and adjust repayment by Roach. The Court is wary that the very helpfulness of the NDF may be deployed against it, so to say it should have sued earlier rather than fairly try to accommodate Roach's struggling print business.

15 In sum, the stage is set for an engaging argument on the facts.

The interlocutory point in issue

16 However, Counsel Cassells argues that the pleadings are defective, so that irrespective of the facts, the NDF is debarred from offering its purported evidence of what happened.

17 His point is that all the correspondence, history of relationship between the NDF and the SPCCU, and the digitised account summary, ought to have been pleaded from the outset when the claim was filed. Instead, all that was filed was the loan agreement letter of 14.08.00,

with assertion the last payment was on 11.03.11 (and *obiter* the Court wonders if the date ought more accurately to have been 21.03.11).

18 Counsel Cassells relies on rule 8.7(1) and (3) CPR 2000, which says:

(1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.

(3) The claim form or the statement of claim must identify any document which the claimant considers to be necessary to his or her case.

19 The point being made is that ‘all’ documents should be pleaded from the outset, and have not been. Instead, documents have been added as the claim has progressed.

20 In considering this point, I have been greatly assisted by the judgment in the Court of Appeal of the East Caribbean Supreme Court of Denys Barrow SC JA (as he then was) in **East Caribbean Flour Mills Ltd v Hudson Williams (Civil Appeal 12 of 2006, from St Vincent and the Grenadines)**, delivered on 16.07.07. A similar point arose, suddenly, at trial about the admissibility of documents not pleaded. In that judgment, there was analysis of the House of Lords case, **Three Rivers District Council v Bank of England (No.3) 2001 UKHL 16**, which is authority for pleadings being defective in an action where, as the case proceeds, an allegation of fraud arises, not pleaded from the outset, with attendant documents in support, designed to advance the primary suit and shatter the opponent’s credibility. The need for pleaded notice is because fraud or other species of dishonesty are of peculiar weight in civil proceedings, which otherwise almost always proceed under different heads of wrongful action, and a party should know from the outset that their integrity is fundamentally in issue. But no one is alleging fraud here in the NDF action.

21 Instead, to quote Lord Woolf in **Three Rivers**², ‘*pleadings should make clear the general nature of the case*’. Moreover, as Barrow JA goes on to say, at para 44, ‘*it is settled law that*

² Quoted by Barrow JA at para 43.

witness statements may now be used to supply details or particulars, that under the former practice were required to be contained in pleadings’.

- 22 Analysis of the **Flour Mills** case is augmented at page 199, being note 17.6, of *Caribbean Civil Court Practice 2011*, where the learned author opined that ‘*the need for extensive statements of case, including particulars, should be reduced by the requirement to exchange witness statements*’. Looking to the witness statements - of Karen Moore, of 21.10.14, Accounting Officer of the SPCCU, who says she processed the loan repayments for the NDF ³ and in large part repeating the evidence in the statement of now absent witness James Hixon, of 21.10.14, manager of NDF debts - it is clear that the relevant documents are properly appended.
- 23 I am quite satisfied that the ‘*general nature*’ of the NDF’s case was pleaded on 11.03.14, crisply, including the history and alleged sum total of repayment so far, and that it is alleged that the cause of action arose from March 2011 (which Counsel Brandt makes clear on his case is the accrual date pertaining to the original loan agreement and not a date arising from somehow a new or renegotiated loan, consistent with **Busch v Stevens 1963 1QB 1**). Ever since, the parties have been putting flesh on the bones of the claim, via various affidavits, culminating in appropriate in-depth witness statements. However, what the case is about has always been clear, succinctly from the outset, captured in the first pleading: the defendant has not been taken by surprise as the litigation proceeded.
- 24 In addition, Counsel Cassells argued I should not look at the affidavits filed in support at an earlier litigation stage, supplemented with documents, and placed in the first section of the trial bundle filed on 16.12.16. This argument seems moot, as those documents have been appended to the witness statements.
- 25 One document repeatedly queried by Counsel Cassells is the founding agreement of 1992 between the NDF and SPCCU, signed by Roach as then NDF Chairman, which seems to settle nothing for the claimant, and yet which is arguably much needed for the defendant’s own case, alleging confusion between both, per his statement para 16, filed on 16.10.14. I fail to

³ Per para 4 of Moore’s statement.

understand how this document is uniquely objectionable, if other unpleaded documents are admissible, as above.

- 26 I am reinforced in my approach by reminding myself of the overriding objective of the Civil Procedure Rules, at rule 1, which is '*to deal with cases justly*'. It seems to me it would be unjust, as unrealistic, to expect every document pleaded from the outset, and that the true test of what is a proper pleading is that a defendant is shown the crystallised nub of the issue, which has arisen here.
- 27 Finally, Counsel Cassells at an early stage in argument, though it was undeveloped, offered the thought that as Hixon is now unavailable, though signed the statement of claim, there is *de facto* no claimant and the case should therefore fail. I reject this. The NDF is a body corporate, there is no one person who must be in court on its behalf, and moreover, it is represented in Court by Counsel Brandt, while in evidence Moore speaks for it and for the SPCCU and the history of the loan to Roach.
- 28 For the above reasons, I have decided that the pleaded agreement of 14.08.00 (being pages 4-5 of trial bundle 1 within the consolidated trial bundle of 16.12.16), and the documents in pages 9-27 of trial bundle 3 (within the consolidated trial bundle of 287 pages, being therefore pages 269-287) are admissible in the trial, along with the witness statements (with attendant cross-examination) of Moore and Roach (plus his appended documents), being therefore pages 4-19 of trial bundle 2 (within the consolidated trial bundle of 287 pages, being therefore pages 244-258).
- 29 In delivering this judgment, there then being notice of intention to appeal, I refuse leave, and order that time to file runs from 25.09.17 (in fairness, in light of the communications difficulties created by hurricane Maria delaying receipt of an emailed copy of the judgment).
- 30 I further order costs in the cause, so that each party continues to bear their own costs.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

21 September 2017