

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2012/0227

BETWEEN:

JOSEPH COX

Claimant

and

[1] JUNIE JN MARIE

[2] DENNERY COMMUNITY CREDIT COOPERATIVE SOCIETY LTD.

Defendants

Appearances:

Ms. Lydia Faisal for the Claimant

Mrs. Esther Greene-Ernest for the First Defendant

Mr. George Charlemagne for the Second Defendant

2017 : March 13th;
2017 : April 26th.

JUDGMENT

- [1] **SMITH J:** Mr. Joseph Cox is an elderly fish huckster who lives in the fishing village of Dennery. He claims that the Dennery Community Credit Cooperative Society Ltd. ("the Cooperative") breached its contractual obligation to him by allowing his assistant, Ms. Junie Jn Marie, who was not a signatory to his account, to make unauthorized withdrawals from his account (No. 002085) with the Cooperative totaling \$61,896.50. He seeks from both the Defendants an accounting of

withdrawals made, the sum of \$61,896.50 with interest at the rate of 6%, as well as general damages for breach of contract. This figure was revised downwards to \$42,937.21 in the closing written submissions filed on behalf of Mr. Cox.

- [2] Mr. Cox's business is the purchase of fish wholesale from local fishers for resale to various hotels, included some signature hotels like The Landings, Sandals Grande and Rex Resorts. Ms. Junie Jn. Marie had worked with him for several years as his assistant on a commission basis.
- [3] On 12th September 2009, Mr. Cox had to leave Saint Lucia to get medical attention in the United States of America where he would remain for six months until March 2010. He wanted his business to continue uninterrupted in his absence. So, just prior to his departure for the United States, he took Ms. Jn Marie with him to the Cooperative and introduced her to Ms. Thora Dundas, the general manager. Much turns on what happened during that meeting.
- [4] It is not in dispute that during that meeting: (a) Mr. Cox told Ms. Dundas that he was leaving Ms. Jn Marie in charge of his business and that (b) she was authorized to make deposits into and withdrawals from his account to carry on his business; (c) Mr. Cox bought a passbook from the Cooperative for Ms. Jn Marie to present when making deposits or withdrawals; (d) the Cooperative never required of Mr. Cox a power of attorney nor any written document setting out his instructions to the Cooperative; (e) the Cooperative never advised him to execute a power of attorney since Ms. Jn Marie was not a signatory to his account.
- [5] Apart from what happened at that meeting, it also not in dispute that: (a) Mr. Cox never made a power of attorney granting Ms. Jn Marie the necessary powers to operate his account in his absence; (b) no withdrawal slips signed by Mr. Cox or any other written authorization was ever presented to the Cooperative during the six months that Ms. Jn Marie made withdrawals from his account; (c) Ms. Jn Marie would go to the Cooperative, present the passbook, inform a teller how much was needed, a withdrawal slip would be prepared by the teller, Ms Jn Marie would sign the slip and receive the money. This happened over a period of six months. In his oral testimony before the Court Mr. Cox stated that he told the Cooperative that if any necessary arrangements needed to be done, they should let him know.

- [6] When Mr. Cox left Saint Lucia in September 2009, he had the sum of \$12,170.94 in his account. When he returned from the United States in February or March 2010, he had \$31,403.48. His account balance had increased by \$19,232.54. But he was not satisfied with his account balance. He observed “extremely large withdrawals” from his account which he did not think were properly connected to his business. He noticed that Ms. Jn Marie had purchased a vehicle in his absence and had commenced construction of a dwelling house. He became suspicious of her. He believed she used his money for her vehicle and house. He got an accountant, Ms. Brenda Edwin, who visited the hotels, compiled information and submitted a report which is in evidence. Based on the report, Mr. Cox concluded that \$61, 896.50 (later revised to \$42,937.21) was “over withdrawn after all expenses for the fish purchased by the hotels have been catered for.”¹
- [7] Mr. Cox filed a claim against Ms. Jn Marie and the Cooperative. The essence of his case against the Cooperative is that he, not have executed a power of attorney or signed any withdrawal slips for the money withdrawn by Ms. Jn Marie, the Cooperative was not legally authorized to facilitate or allow the withdrawals she made, notwithstanding his oral instructions to it. Since Ms. Jn Marie was not a signatory on his account, she was incapable of making valid withdrawals on her own without the written authorization of Mr. Cox. The Cooperative unlawfully facilitated those unauthorized withdrawals and was therefore liable to him.
- [8] He alleges that had the Cooperative advised or educated him on the proper procedures for making withdrawals he would have been bound to comply with that procedure. The Cooperative, he contends, should have reasonably foreseen that its failure to require proper authorization from him would have caused him loss and should have taken steps to prevent this.
- [9] The Cooperative’s defence is that: (a) Mr. Cox expressly stated that Ms. Jn Marie was duly authorized to conduct all transactions on his behalf while he was away; (b) Mr. Cox’s instructions “was an open or carte blanche authority with no express limitations on amounts to be deposited or withdrawn from the Claimant’s account”; (c) this was not unusual as Mr. Cox had given Ms Dundas similar instructions on a previous occasion in relation to his son, Kimron; (d) there was no need for

¹ Paragraph 21 of the Witness Statement of Joseph Cox filed 3rd March 2014.

any written authorization as the Cooperative was only fulfilling the expressed intention of the Claimant.

- [10] The claim against Ms. Jn Marie is that she “abused the trust and confidence reposed in her” by wrongfully accessing his account and applying some of his funds to her own use and not for the business. Her defence is that (a) all the sums she withdrew was for the operation of Mr. Cox's business; (b) she was hardly literate and signed the withdrawal slips written up by the tellers for her to sign after she had requested an amount; and that (c) Ms Edwin's report failed to take into consideration other expenses, other than the purchase of fish, which Mr. Cox authorized her to pay; (d) she had handed over all receipts she had and the passbook to Mr. Cox but could not hand over a book in which she kept records of transactions because this was kept by the police after they had arrested her on the complaint of Mr. Cox.
- [11] The issues that arise for the Court's determination are: (i) whether Ms. Jn Marie unlawfully applied Mr. Cox's funds to her own use and benefit; (ii) whether Ms. Jn. Marie and the Cooperative are jointly and/or severally liable for any funds found to have been withdrawn by Ms. Jn Marie and used for her own benefit; (iii) whether, in any event, the Cooperative is liable to Mr. Cox for any sums withdrawn and not properly accounted for since it allowed Ms. Jn Marie to withdraw sums from Mr. Cox's account when she was neither a signatory to that account nor held any power of attorney.
- [12] The trial was held on 13th March 2017. Mr. Cox, Ms. Jn Marie, Ms. Dundas and Ms. Edwin each gave evidence. Their witness statements stood as their evidence in chief and they were cross-examined. The parties were directed to file closing submissions by 27th March 2017.

Did Ms. Jn Marie apply funds to her own use and benefit?

- [13] Mr. Cox, now eighty years old, was an honest, straightforward and credible witness. Under cross-examination by Mrs. Esther Greene-Ernest, counsel for Ms. Jn Marie, he made the following relevant admissions. He admitted that he left Ms. Jn Marie in charge of the business; that buying the fish wholesale from the fishers was not the only expense of his business; other expenses included ice for the fish; he did not know how much was spent on ice. When he was in Saint Lucia

he drove his vehicle from Dennerly to Gros Islet to deliver fish to the hotels; he did not know how Ms. Jn Marie delivered the fish when he was in the United States; he didn't know if she had to pay a driver \$60.00 per day, but he was not denying it; the fish was being delivered to the hotels and he was being paid for it. He admitted that for the six months he was away he made a profit.

[14] He also admitted that he did not remember if he had instructed her to pay other bills for him; he did not remember telling her to give his son money for gas and to fix a boat; he did not know if he had asked her to give his son, Tiger, \$3,000.00 to do some business for me. He could not remember giving Ms. Jn Marie permission to withdraw \$2,000.00 to assist her with her loan, he was not saying it was not possible, but he could not remember. Plainly, Mr. Cox had some difficulty remembering if in fact he had authorized certain withdrawals.

[15] He testified that when he returned from the United States, she had refused to give him an account of the business; he had her arrested by the police but the magistrate had dismissed the case when he was away from Saint Lucia.

[16] Under cross-examination by Mr. Charlemagne, counsel for the Cooperative, Mr. Cox stated that his wife was also a signatory to the account and that she could withdraw money. He thought he might have taken his son, Kimron, to Ms. Dundas and told her he could withdraw money from the account. He did not know how many times Kimron withdrew money; he did not remember the amounts; he did not know what Kimron did with the sums he withdrew. He denied instructing Ms. Dundas to allow his other son, Tiger, to withdraw money or asking Ms. Jn Marie to withdraw money for Tiger. He stated that he would have expected the bank manager to have educated him and tell him that it could not disburse money from his account unless Ms. Jn Marie gave a signature signed by a Justice of the Peace or an Attorney or unless he signed the withdrawal slip.

[17] Ms. Edwin, the accountant who prepared the report, also appeared to be an honest, straightforward and credible witness. She admitted that her report was based on certain assumptions; she had not been given all the relevant information; if she had been given all the relevant information then it would have been declared accordingly. She admitted that in any business activity, apart from sales and purchasing, there would be other expenses.

[18] Ms. Edwin's report is obviously crucial to the outcome of the case. The claim is in fact predicated upon her findings. In her witness statement, she stated that having worked with the Saint Lucia Fish Marketing Corporation for four years she was "very aware of the price per pound of the various types of fish on the local market". Ms. Edwin went on to state in her affidavit that, by using the information supplied by the hotels she was able to determine the amount spent on purchasing fish from the local fishermen for resale to the hotels based on the established prices per pound of the various types of fish.

[19] Apart from information from the hotels, she also looked at documents provided by the Cooperative reflecting the passbook transactions by Ms. Jn Marie. It does not appear that Ms. Edwin ever spoke to Ms. Jn Marie or Mr. Cox about the expenses related to the business. Then at paragraph 8 of her witness statement, Ms. Edwin makes the conclusion that:

"Using the total of the deposits for the period (which includes the total received from the hotels), the total withdrawals made and the total spent on fish purchased from fishermen, I have been able to conclude that the sum of \$62,169.75 is unaccounted for."

[20] Ms. Edwin admitted under cross-examination that she was not given any information on expenses and that in any business, apart from sales and purchasing of the fish, there would be other expenses connected to the running of the business. Her report did not take account of expenses such as purchase of ice to preserve the product for delivery to the hotels, the cost of a driver, fuel and maintenance and other expenses Mr. Cox might have authorized Ms. Jn Marie to pay over the period of six months. This makes her conclusion incomplete and therefore defective and unsafe. The dispute has not centered on the deposits and the price paid for the purchase of fish from the local fishers, it is about withdrawals for other purposes which Mr. Cox claims were not connected to the business. While the total sum expended on ice, fuel, driver, vehicle maintenance and other miscellaneous expenses might indeed not amount to \$42,937.21 (the sum claimed), this leaves the Court in a quandary as to the amount, if any, that is unaccounted for.

[21] Ms. Jn Marie gave a small portion of her evidence in the local patois which was translated with the assistance of the Court interpreter. Shortly after her testimony commenced, all counsel however

agreed that she could give her evidence in English since she could understand and speak English. It was just that she felt more comfortable using patois. I found Ms. Jn Marie very direct and plain-speaking, not at all evasive or lacking in credibility. Under cross-examination by Ms. Faisal she admitted that she was not fully literate; her daughter helped her with billing; she had not tried to get back the book in which she kept records from the police; she did not have any notes to show the Court what she spent money on because the police had taken the book with her notes. She had not produced her own account at the Cooperative to the Court. She admitted that the expenses of ice, payment to driver, fuel, oil and fixing tires would not come to amount of \$61,896.50. She denied making any changes to withdrawal slips. She stated that she was never asked by the Cooperative to produce a power of attorney or told that she could not sign the withdrawal slips.

[22] Responsibility for the Cooperative's actions fell squarely on Ms. Dundas' shoulders. She did not try to shy away from this at all; she was forthright and credible with no attempt at all at prevaricating or equivocating. Under cross-examination by Ms. Faisal, counsel for Mr. Cox, she admitted that Kimron Cox never produced a power of attorney when he made withdrawals; that the Cooperative never advised Mr. Cox that he needed to give a power of attorney to Kimron; that on both occasions Mr. Cox had instructed her to give unlimited access to his account to Kimron and then Ms. Jn Marie; there was nothing in writing. She stated that she could not make a determination every time a withdrawal was made that it was for the business. She admitted that it was she who instructed the tellers to pay. She admitted that it would have been prudent to require a power of attorney; that since the filing of this claim against the Cooperative the policy was now to require a power of attorney in such situations. She stated that Mr. Cox called her on one occasion and approved the withdrawal by Ms. Jn Marie of \$3,000.00 to give to his son, "Tiger", to conduct some business on his behalf. She also stated that on another occasion he called her to instruct her to transfer \$2,000.00 from his account to Ms. Jn Marie's account to assist her with her personal loan payments to the Cooperative.

[23] Ms. Faisal's cross-examination of Ms. Dundas revealed that there were instances where dates of two particular withdrawals were not recorded in the passbook, where something was crossed out or written over on a withdrawal slip and initialed in one instance and not initialed in another, and an instance where there was an error in recording the sum withdrawn. Ms. Faisal in her closing

arguments submitted that these discrepancies cast a shadow of doubt on the Cooperative and show a lack of transparency. Having listened carefully to Ms. Dundas' explanation for these discrepancies and having formed the view that she was impeccably forthright and forthcoming in her answers, I conclude that these recording omissions were de minimis.

- [24] In relation to Ms. Jn Marie, the evidential picture that emerges is that: she was given unequivocal and full authority to manage Mr. Cox's business; the business recorded a profit; two other persons could access Mr. Cox's account, namely, Mrs. Cox and Kimron Cox; there were expenses related to the business that were not factored in when the decision was made to file the claim; the accountant's report that underpins the claim is defective; Mr. Cox might have authorized Ms. Jn Marie to make certain payments but just couldn't remember; Mr. Cox asked Ms. Dundas to process withdrawals for his son and for payment towards Ms. Jn Marie's loan which he could not remember.
- [25] Given that evidential picture, especially the defective report and Mr. Cox's obviously failing memory, the Court cannot conclude, on a balance of probabilities, that Ms. Jn Marie applied Mr. Cox's funds to her own use and benefit. There is simply no evidence whatsoever to support the claim against her or that she went beyond the authority given or implied by the agency. I therefore do not find that she breached either Articles 1604 or 1613 of the **Civil Code of Saint Lucia**.

Is the Cooperative liable for breach of duty of care and skill?

- [26] Mr. Cox contends that although he wanted Ms. Jn Marie to withdraw sums of money to purchase fish on his behalf, he never intended for the Cooperative to allow her to withdraw any sum of money at any time she pleased, without ensuring that she produced proof that it was for the purchase of fish for his business. There is no evidence before the Court that he asked the Cooperative to ensure that it had such proof before allowing withdrawals to be made by Ms. Jn Marie. The evidence before the Court is that he specifically told Ms. Dundas that he was leaving her in charge of his business. Producing proof would have required Ms. Jn Marie to get something like pro forma invoices from fishers, ice vendors, fuel stations and the driver to present to the Cooperative to support her requests for withdrawals. That seems not only a highly impractical scenario but also one which is not the function of the Cooperative. It seems unreasonable to have expected the Cooperative to help Mr. Cox to manage his business.

- [27] The more fundamental question, however, and the one on which the outcome of this case is hinged is whether, notwithstanding Mr. Cox's explicit verbal instructions to the Cooperative that he was leaving Ms. Jn Marie in charge of his business, the Cooperative breached its duty of care in allowing Ms. Jn Marie who was not a signatory to Mr. Cox's account to withdraw funds from his account, absent a power of attorney or withdrawal slips signed by him.
- [28] Ms. Faisal contended in her written closing submissions that insofar as the Cooperative engaged in banking activity such as the acceptance of deposits, maintenance of deposit accounts payable on demand and the granting of loans, the standard applicable to banks should be applicable to Credit Unions. The Cooperative, she contended, was equally liable to exercise the same degree of care and skill as can be expected of a reasonable banker or bank which provides similar services.
- [29] Section 2 of the **Banking Act** states that:
- “business of a financial nature” means the collection of funds in the form of deposits, shares, loans, premiums, and the investment of such funds in loans, shares and other securities and includes the types of businesses set out in Schedule II but does not include banking business
- “credit institution” means any licensed financial institution other than a bank whose business is that of money lending or the granting of credit facilities.
- [30] Schedule II of the **Banking Act** states that business of a financial nature includes the following types of business: “Credit Unions – Provision of basic savings (share accounts) for members and making loans to members”.
- [31] Section 35 of the **Co-operative Societies Regulations** provides that:
- “A credit union shall not establish and operate, without the approval of the Registrar, deposit accounts that permit funds in the account to be withdrawn or transferred by the depositor by means of - (a) cheque, (b) another bill of exchange; or any other negotiable instrument that allows the holder of the negotiable instrument to have payment on demand made to him or her from funds in the deposit”
- [32] Plainly, from the foregoing, the Cooperative is not a bank. But that finding does not mean that the Cooperative (a credit union) did not owe a duty of care to its members. No learning was placed before the Court on what is the duty of care owed by a credit union to its members. In the absence of any such learning, I think it is reasonable to conclude that the Cooperative owed a duty of care

to Mr. Cox that required it to exercise reasonable care and skill in carrying out instructions given to it by Mr. Cox. Its main duty is to adhere strictly to the terms of its mandate. What, therefore, were the terms of its mandate given by Mr. Cox?

[33] A mandate to a bank is a written order asking it to open an account and allow someone to sign cheques on behalf of the account holder and giving specimen signatures and relevant information. A mandate given to a credit union must surely be closely analogous to a bank mandate, except for the use of cheques which credit unions cannot, by law in Saint Lucia, allow the use of.

[34] It is not in dispute that Ms. Jn Marie was not a signatory to Mr. Cox's account and that she nevertheless signed withdrawal slips and withdrew money from his account. The question is whether the undisputed acts of Mr. Cox taking her into the Cooperative, informing Ms. Dundas that he was authorizing Ms. Jn Marie to make withdrawals and deposits and purchased a passbook for Ms. Jn Marie to use constitute a mandate given to the Cooperative. For the mandate to be effective was there a requirement that it be in writing in the form of a power of attorney, for example?

[35] A Power of Attorney is a written instrument granting someone authority to act as agent for the grantor of the power and to do whatever acts are authorized in that instrument. In this case, Mr. Cox orally informed the Cooperative that he was granting Ms. Jn Marie authority to run his business and to make deposits into and withdrawals from his account. He actualized the grant of authority by purchasing a passbook for his account for her. Mr. Cox does not deny any of this.

[36] A power of attorney would not have automatically or necessarily prevented the scenario that arose in this case, namely, Mr. Cox alleging, upon his return from the United States, that his agent had applied his funds to her own use and benefit. The power of attorney would have had to specifically delimit the powers of the agent. Powers of attorney are typically granted to persons trusted by the grantor. In this case, Mr. Cox trusted Ms. Jn Marie. He had left her in charge of his business once before when he went away, had given similar oral instructions to the Cooperative and had apparently been satisfied with her agency on that occasion. If a grantor sufficiently trusts a person to grant her the power to run his business and make deposits into and withdrawals from his

account it is difficult to see how those powers could at the same time be delimited to prevent misuse of funds if the agent is bent on doing so. It depends on the integrity of the agent.

[37] I therefore find that Mr. Cox effectively gave a mandate to the Cooperative that Ms. Jn Marie could make withdrawals and deposits on his account when he did the following specific things: (a) taking Ms. Jn Marie to the Cooperative and identifying her to Ms. Dundas as the person who would be authorized to access his account; (b) instructing Ms. Dundas that she was in charge of running his business and could make deposits and withdrawals on his account; (c) purchasing a passbook for Ms. Jn Marie to present when transacting with the Cooperative and handing over the passbook to her. I further find that the Cooperative adhered to the terms of that mandate and therefore did not fall below the duty of care and skill that it owed Mr. Cox.

[38] It would seem unjust to allow Mr. Cox to approbate and reprobate. His business recorded a profit in his absence under the agency of Ms. Jn Marie which he enjoyed the benefit of, yet, at the same time, he seeks to deny that she could lawfully have made withdrawals from his account as no proper mandate had been given to the Cooperative.

[38] If I am wrong on this, there is still the question of what loss was suffered by Mr. Cox. The Court has already concluded that, based on the evidence, it cannot conclude, on a balance of probabilities, that Mr. Cox suffered any loss. The “extremely large withdrawals” that piqued Mr. Cox’s suspicion of Ms. Jn Marie might well have been those withdrawals to his son and to Ms. Jn Marie’s loan payment which he called Ms. Dundas and authorized.

[39] I therefore make the following orders:

- (1) The claim against the First Defendant is dismissed.
- (2) The claim against the Second Defendant is dismissed.
- (3) Prescribed costs are awarded to the First and Second Defendants, respectively, in accordance with Part 65.5 of the CPR 2000.

**JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE**