

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1178 of 2010

BETWEEN:

**STUDENT LOAN FUND MANAGEMENT
COMMITTEE**

CLAIMANT

AND

**CHERISE TANIA O'GRADY
(nee HAREWOOD)**

FIRST DEFENDANT

BERNARD MCDONALD CHASE

SECOND DEFENDANT

WADE ANSON GIBBONS

THIRD DEFENDANT

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 11 January 2018

Mr. Edmund Hinkson in association with Ms. Avian Bissessar for the Claimant

Mr. Roger Forde Q.C. for the Second Defendant

DECISION

INTRODUCTION

- [1] The claimant is a body corporate established by section 4 of the *Student Loan Revolving Fund Act, Cap 54A*. One of its statutory functions is to provide loans to students on such terms and conditions as it determines.
- [2] The first defendant (“Ms. O’Grady) is a beneficiary of the claimant’s loan scheme. She borrowed \$50,000.00 on terms and conditions set out in a contract made between the claimant and her on 13 August 1997 (“the loan contract”).
- [3] The second defendant (“Mr. Chase”) and the third defendant (“Mr. Gibbons”) allegedly assumed secondary liability in respect of the loan under a deed dated 13 August 1997 and purportedly executed by them (“the disputed document”).
- [4] Ms. O’Grady failed to repay the loan and as a consequence, the claimant commenced these proceedings on 31 August 2010 in an effort to recover the loan amount, accrued interest and charges. It claims the sum of \$137,175.75 “or such other sum as may be owing to it at the date of hearing”, interest and costs.
- [5] Neither Ms. O’Grady nor Mr. Gibbons defended the claim. The trial proceeded against Mr. Chase only. He does not challenge the amount claimed. However, he disputes liability on two distinct grounds. He contends

(1) that the claim is statute barred; and (2) that he did not sign and, therefore, is not bound by the disputed document. Those contentions frame the two issues which fall to be determined.

[6] In order for the claimant to succeed, the Court must be satisfied that the claim against Mr. Chase is not statute barred and that he signed the disputed document. After due consideration, I have determined that the claim is not statute barred but that the claimant has not proved that Mr. Chase signed the disputed document. I have detailed the reasons that propelled me to these conclusions below.

THE UNDISPUTED FACTS

[7] The claimant's Financial Manager, Ms. Andrea Callender gave evidence relating to the loan history and performance. That evidence was unchallenged and I found no reason to reject it. Based on it, I made the findings which I next set out.

[8] Ms. O'Grady was obligated to commence repayment in July 2000. At the time of the commencement of the proceedings, she had made no payments. The principal, interest and related charges due to the claimant at 31 July 2010 totalled \$137,151.75. As at 12 October 2012, the outstanding amount was \$178,396.72.

[9] It is also not disputed that on 19 July 1997 Mr. Chase signed an affidavit as part of Ms. O’Grady’s loan application process. I will come later to the evidence relating to how it came about that Mr. Chase signed that document.

[10] Finally, on 25 November 2013, the parties consented to an order that eleven (11) letters be admitted into evidence as part of the claimant’s case. These letters related to the loan and passed between the claimant or its Attorney-at-law Mr. Edmund Hinkson and Ms. O’Grady. I will refer to two of the letters later.

THE RELEVANT DOCUMENTS

[11] To properly contextualise the issues, I must say more about the loan contract and the disputed document.

(i) the loan contract

[12] Clause 1(b) of the loan contract provided for the repayment of the loan and interest by equal monthly instalments over a period of twelve years. Two clauses enabled the claimant to terminate the contract and demand full payment from Ms. O’Grady in the event of her default. Clause 3(vi) made the right exercisable on breach of any contractual covenant or stipulation while clause 4 specifically applied on a breach of the obligation to repay.

(ii) **the disputed document**

[13] The disputed document was purportedly made between the claimant of the one part, and Mr. Gibbons and Mr. Chase of the other. It comprises a parties' clause, two recitals, three substantive provisions, an authenticating clause and two execution clauses.

[14] The parties' clause sets out Mr. Chase's full name and address. It also indicates that he and Mr. Gibbons are collectively referred to in the document as "the Guarantors", and the claimant as "the Committee". The recitals state that the disputed document is supplemental to the loan contract; and that Mr. Gibbons and Mr. Chase agreed to guarantee due performance of the loan contract as shown later in the disputed document.

[15] Of the substantive clauses, only clauses 1 and 3 are relevant. They are in these terms:

1. If the student (unless relieved from the performance by any clause of the contract, or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect commit a breach of **her** obligations under the contract then the guarantors shall jointly and severally indemnify the Committee its successors and assigns against all losses damages cost and expenses which may be incurred by it by reason of any default on the part of the Student in performing and observing the agreement and provisions on their (*sic*) part contained in the contract."

2. ...

3. “The guarantors shall not be discharged or released from this guarantee by any arrangement made between the Student and the Committee without the assent of the guarantors or by any alteration in the obligations undertaken by the Student or by any forbearance whether as to payment time performance or otherwise.

[16] The authenticating clause states that the parties executed the document “the day and year first before written” *i.e.* on 13 August 1997. Only the first execution clause is relevant here. It reads: “SIGNED SEALED AND DELIVERED by the said **BERNARD McDONALD CHASE** in the presence of:” The signature “Bernard Chase” appears to the right of the clause and the signature “M. Best” next to the colon.

IS THE CLAIM STATUTE BARRED?

[17] I will now consider whether the claim against Mr. Chase is statute barred. In this respect, I have had the benefit of the written submissions of Mr. Hinkson who along with Ms. Avian Bissessar appeared for the claimant, and those of Mr. Roger Forde Q.C. who appeared for Mr. Chase.

[18] Both parties made submissions with respect to the length of the relevant limitation period and the accrual of the cause of action. Mr. Hinkson urged that the applicable period is 12 years while Mr. Forde Q.C. contended that it is only 6 years. I will return to the other aspects of those submissions after considering two additional ones made by Mr. Hinkson.

[19] In summary, Mr. Hinkson's further submissions were (1) that clause 3 of the disputed document constitutes a waiver of the right to rely on a limitation period; and (2) that Mr. Chase is bound by various acknowledgements of the debt made by Ms. O'Grady with the result that any limitation period relevant to him is extended. I shall consider these in the order mentioned.

Is clause 3 a waiver?

[20] Mr. Hinkson based his submission as to waiver on the words contained in clause 3 of the disputed document that "[t]he Guarantors shall not be discharged or released from this guarantee ... by any forbearance whether as to payment time performance or otherwise". I reproduced the full terms of clause 3 at paragraph 15 above.

[21] Counsel submitted that it is legally permissible to waive the benefit of a limitation period by a valid agreement, and that Mr. Chase had done so by assenting to clause 3. Therefore, urged Mr. Hinkson, the claimant could enforce the contract beyond any limitation period. He cited *East India Co. v Paul (1849) 7 Moo. P.C. 85* and *Lubovsky v Snelling [1943] 2 All ER 577* in support of the legal proposition he advanced.

[22] I do not think that *East India Co.* assists Mr. Hinkson. That case held that a defendant could successfully rely on a limitation period despite any agreement not to do so. However, contemporary judicial opinion suggests that if a

contract not to take the limitation point is established, the defendant would be precluded from so doing. This was acknowledged by Buckley J in *Cotterell (Executors of Reeve deceased) v Leeds Day (a firm)* [2001] WLR 435 and provides a rational basis on which the decision in *Lubovsky* can be explained. In the latter case, a defendant who had agreed that liability was not in issue but that quantum had to be determined by the court was subsequently precluded from relying on a limitation statute.

[23] Be that as it may, I must determine whether clause 3 constitutes or includes a waiver by any surety of the right to rely on the limitation point. Hence, I must construe the provision and, in doing so, I am mindful of the general approach to the interpretation of written contracts confirmed by Burgess JA in *RBTT Bank Barbados Limited v Fitzroy Adolphus Davis et al Civ. App. 2 of 2010 (date of decision, 1 September 2016)*.

[24] That approach requires me to determine what the contracting parties meant from the words which they used. I must do so through the discernment of the ever-helpful reasonable man asking myself what he would have understood the parties to mean by the words used. He must bring with him any background knowledge available to the contracting parties and give the words their ordinary and natural meaning, due regard being had to their documentary and commercial context.

- [25] If on adopting that approach the words manifest a clear intent, my task is at an end. If, however, there be some ambiguity or uncertainty, I must be guided by the well-established principle of construction which requires that the contract be construed in favour of the surety and against the claimant whose document it is. In the event of any doubt, the interpretation most favourable to the surety must be adopted. This rule is acknowledged in *Eastern Countries Building Society v Russell* [1947] 1 ALL ER 500. Additionally, clear words must be used to deprive a surety of a statutory right.
- [26] Based on the evidence, the only background knowledge which can be fairly credited to the reasonable man is the purpose of the disputed deed. This was stated in the recitals and, as such, forms part of the documentary context within which clause 3 falls to be considered. The purpose of the document was to render any sureties bound by it liable for any financial loss suffered by the claimant on account of any breach of the loan contract by Ms. O’Grady.
- [27] Giving its words their ordinary and natural meaning, clause 3 precludes the discharge or release of any surety from liability under the disputed document on account of any of the events specified in the provision. The words relied on by Mr. Hinkson mean exactly what they state. Any surety bound by the document remains liable to the claimant despite any act of forbearance by the claimant whatever the nature of the forbearance.

[28] Therefore, clause 3 preserves liability in circumstances in which a guarantor might otherwise be discharged. It does not in any way deal with the issue of limitation as between the claimant and any contracting surety. The provision is devoid of uncertainty and its language clear but, were it not so, I would have been inclined to construe it against the claimant and safeguard a surety's statutory right to plead limitation since there are no clear words to oust it.

[29] I conclude, therefore, that clause 3 contains no agreement to waive the right to plead limitation.

The effect of Ms. O'Grady's acknowledgements

[30] I turn now to Mr. Hinkson's other submission. Counsel urged that two letters dated 21 May 2007 and 18 August 2009, respectively constitute acknowledgements of the debt by their author, Ms. O'Grady and, in effect, extended the limitation period against Mr. Chase. These letters were among those admitted into evidence.

[31] Mr. Hinkson sought to rely on *section 50(6)* of the *Limitation of Actions Act Cap 231* ("*Limitation of Actions Act*") as authority for his submission as to the legal effect of any acknowledgements by Ms. O'Grady. Before I address that submission, I must contextualise *section 50(6)* by reference to some preceding provisions.

[32] *Sections 48 to 50* of the *Limitation of Actions Act* deal with acknowledgements and part payments. As reflected in the marginal note, *section 48* provides for the “[f]resh accrual of rights on acknowledgment or part payment”. *Section 48(5)* provides:

(5) Subjection to subsection (6), where any right of action has accrued to recover

(a) any debt or other liquidated pecuniary claim;

(b)...

and the person liable for the claim makes any payment in respect of it, the right shall be treated as having accrued on and not before the date of the acknowledgement or part payment.

[33] Section 48(6) is not relevant. Section 48(7) provides:

Without prejudice to subsection (6), a current period of limitation may be repeatedly extended under this section by further acknowledgements or payments, but a right of action, once barred by this Act, is not received by any subsequent acknowledgement or payment.

[34] I pause to highlight two obvious drafting errors in those provisions, one in *section 48(7)* and the other in *section 48(5)*. The former subsection provides that once barred, a right of action is not “**received**” by any subsequent acknowledgement or payment. The intended word must have been “**revived**” rather than “**received**”.

[35] In **section 48(5)**, reference to the making of an acknowledgement seems to have been inadvertently omitted from the first line of the tail which reads: “and the person liable for the claim makes any payment in respect of it”. It is clear, though, from the words which follow and **section 48(6)** that the legislative intent is that an acknowledgement, or a part payment, may extend the limitation period.

[36] I have applied a rectifying construction (as Bennion calls it in section 287 of the 5th edition of *Bennion on Statutory Interpretation*) to *sections 48(7)* and *48(5)*. In both instances, I am persuaded by the authorities discussed in *Bennion* that the Court can modify the provisions to fulfil the obvious legislative intent.

[37] *Section 49* prescribes various rules as to form, signatories and addressees in relation to acknowledgements. For present purposes, I accept that Ms. O’Grady’s letters of 2007 and 2009 meet the statutory requirements. This brings me to section 50 which deals with the effect of an acknowledgement or part payment on third parties. Mr. Hinkson relies on section 50(6). I will reproduce sections 50(6) and (7). They read:

50(6) An acknowledgement of any debt or other liquidated pecuniary claim binds the acknowledgor and his successors **but not any other person [Emphasis mine]**.

50(7) A payment made in respect of any debt or other liquidated pecuniary claim binds all persons liable in respect of the debt or claim.

[38] The effect of these provisions is that, unlike a part payment of debt, an acknowledgement does not bind third parties. Consequently, any acknowledgements made by Ms. O’Grady to the claimant do not bind Mr. Chase and have no effect on the limitation period as it relates to him.

Simple contract or specialty?

[39] I return to the submissions relating to the length of the limitation period and the accrual of the cause of action. Sections 14, 15 and 17 of the *Limitation of Actions Act* were cited by Counsel. I will set them out.

[40] Section 14 reads:

“14. Subject to section 15, no action founded on simple contract may be brought after the expiration of six years from the date on which the cause of action accrued.”

[41] Section 15 follows:

15. (1) Subject to subsection (2), section 14 does not bar the right of action on a contract of loan that

(a) does not provide for repayment of the debt on or before a fixed or determined date; or

(b) does not, effectively, whether or not it purports to do so, make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter,

except when, in connection with taking the loan, the debtor enters into a collateral obligation to pay the amount of the debt or any part of it by delivering a promissory note, within the meaning of the *Bills of Exchange Act*, as a security for the debt or otherwise, on terms that would exclude the application of this section to the contract of loan if the terms applied directly to the repayment of the debt.

(2) Where a demand in writing for repayment of a debt under a contract of loan described in subsection (1) is made to the debtor

(a) by or on behalf of a creditor; or

(b) if there are joint creditors, by or on behalf of any one of them,

Section 14 applies as if the cause of action to recover the debt had accrued on the day on which the demand was made.

[42] Section 17 reads:

17. (1) No action on a specialty may be brought after the expiration of 12 years from the date on which the cause of action accrued.

(2) Subsection (1) does not affect any action for which a shorter period of limitation is prescribed by any other provisions of this Act.

[43] Mr. Forde Q.C. made a two-pronged submission in support of his contention that the claim is statute barred. He urged (1) that the action against Mr. Chase is one for breach of contract to which section 14 applies; and (2) that the accrual of the cause of action was not conditional on any demand by the claimant but occurred on the occasion of Ms. O'Grady's breach of the loan contract. Counsel cited *Bosma v Larsen [1966] 1 Lloyd's Rep 22, Swansea*

City Council v Glass [1992] QB 844 and *Parr's Banking Company Limited v Yates [1898] 2 QB 460* in support of the legal proposition he advanced.

[44] Mr. Forde Q.C. also submitted that Ms. O'Grady had breached the loan contract by 2001. He deduced this from the fact that the claimant's first letter to her with respect to the loan arrears is dated 10 May 2001. However, I have found that Ms. O'Grady first breached the loan contract in July 2000 when she failed to pay the first instalment due.

[45] Mr. Hinkson submitted that (1) *section 14* is inapplicable since the disputed document is not a simple contract; and (2) the document is a specialty and the relevant period is 12 years, as prescribed by *section 17* of the *Limitation of Actions Act*. He agreed with Mr. Forde Q.C. that the making of a demand was not necessary for the accrual of the cause of action.

[46] Counsel made two further submissions intended to support the maintenance of the claim, if I hold the limitation period to be six years. First, he urged that a separate cause of action accrued with each monthly breach by Ms. O'Grady and, therefore, the claimant is entitled to recover monies that were payable by her during the six-year period immediately preceding the commencement of the claim. Secondly, he contended that *sections 15(1)(a)* and *(b)* would render *section 14* inapplicable. However, *section 15* applies only to contracts of loan. The disputed document is a contract of suretyship.

[47] Mr. Hinkson referred me to two passages which assist in distinguishing a simple contract from a specialty. The first found at page 465 of *Blackstone's Commentaries* states the former to exist:

“Where the contract upon which the obligation arises is neither ascertained by matter of record, **nor yet by deed** or special instrument, but by mere oral evidence, the most simple of any; or by any notes unsealed, which are capable of more easy proof, and (therefore only) better than a verbal promise. [Emphasis mine]”

[48] The second passage is contained in *G Franks, Limitation of Actions (3rd ed., 1959) p. 188* and was approved by Potter J in *Aiken v Stewart Wrightston Members' Agency Ltd [1994] 3 All ER 449, 459*. It explains that the term “specialty” “includes **contracts and other legal obligations in documents under seal** ... [Emphasis mine]”.

[49] The disputed document is under seal and, hence, is undoubtedly a specialty. It follows that *section 17* is the governing provision and the relevant period 12 years. The *Limitation of Actions Act* does not provide for a shorter period in respect of contracts of suretyship.

[50] That leaves the question as to when time started to run against Mr. Chase. The search for the answer must begin with the disputed document itself. *Parr's Banking*, which was cited by Mr. Forde Q.C., supports the proposition that unless otherwise agreed, the liability of a surety to the creditor arises on the

principal debtor's default. Thus, time starts to run at the moment of that default.

[51] Clause 1 of the disputed document provides that the guarantors shall indemnify the claimant "against all losses, damages, costs and expenses which may be incurred by it" on account of any default by Ms. O'Grady. It contains nothing that requires the making of a demand by the claimant or the fulfilment of any other condition a precursor to liability.

[52] Hence, the mutual submission of Mr. Forde Q.C. and Mr. Hinkson that time started to run on the occasion of Ms. O'Grady's breach is correct. However, Mr. Forde Q.C. appears to have assumed that liability for the entire debt, interest and occasioned loss would have arisen on Ms. O'Grady's first breach. In this regard, I agree with Mr. Hinkson that a series of causes of action would have arisen with each breach. General support for this is found at paragraph 28-035 of *Chitty on Contracts, Vol. 1* (30th ed.). Citing examples from *Bowyer v Woodman* (1867) *L.R. 3 Eq. 313* (failure to pay instalments of interest) and *Archbold v Scully* (1861) *9 H. L. C. 360* (failure to pay periodic rent), the editors expressed the position in this way:

There may also be a series of breaches of a single covenant. ... In such a case the claimant will succeed in respect of so much of the series of breaches ... as occurred within the six (or 12) years before action brought.

[53] Ms. O’Grady’s first breach was in July 2000 and the claim against Mr. Chase commenced in 2010. It follows that it is not statute barred. Mr. Forde Q.C.’s stipulation that Mr. Chase raises no issue with respect to the sum claimed obviates the necessity for close judicial scrutiny as to how that amount was calculated. In any event, as will now become obvious, it matters not.

DID MR. CHASE SIGN THE DISPUTED DOCUMENT?

[54] This brings me to the second issue. Did Mr. Chase sign the disputed document? Four witnesses gave evidence in relation to this question: Ms. Best for the claimant; Mr. Chase on his own behalf; and forensic document examiners Ms. Nola Murphy and Mr. Patrick Sealy. Ms. Murphy was called at the claimant’s behest and Mr. Sealy at Mr. Chase’s. I accepted them both as expert witnesses. I note that *section 67* of the *Evidence Act, Cap.121* (“**the Evidence Act**”) abolished the common law rule that such witnesses may not be asked the ultimate question which the court itself has to decide.

the evidence of Ms. Best

[55] Ms. Best adopted the contents of her witness statement as part of her evidence-in-chief. That evidence is that in August 1997, she was employed by the claimant as a loans officer and that, in that capacity, she had cause “to witness the signature of one Bernard McDonald Chase who gave his address as Church Hill, Christ Church.” She identified the disputed signature as that of

“the said Bernard McDonald Chase”. She stated that “Bernard McDonald Chase” signed in her presence and that she signed as a witness immediately after him.

[56] Ms. Best described the person who affixed the disputed signature as “a tall dark guy with locks”. She stated, though, that she could not now recognise that individual, due to the passage of time. In response to Mr. Forde Q.C., she said that she had described the person as best she could and that she was sure the document was signed on 13 August 1997. I found her to be a forthright witness.

The evidence of Mr. Chase

[57] It is convenient to juxtapose Ms. Best’s evidence with that of Mr. Chase, if only because he denied being in Barbados on 13 August 1997, the date she stated that the document was signed. He adopted his witness statement and gave additional evidence-in-chief. He was cross-examined by Mr. Hinkson.

The material portions of his witness statement follow:

1. ...
2. In or about the year 1997, [Ms. O’Grady] asked me to sign a Guarantee in respect of a loan which she was seeking from the Student Revolving Loan Fund.
3. I recall that I told her that I would sign the Guarantee provided that my liability was limited to \$25,000.00 and that the Lender will only have recourse to me in the event that she did not repay the loan.

4. I also recall that I obtained a copy of the Prescribed Loan and Guarantee Agreements used by the Student Revolving Loan Fund for queries and the same did not meet my requirements.

5. I have now seen the Agreement dated the 13th day of August, 1997 and state that I have never signed the said Agreement on the said day or any other day. I do not know nor have I ever met Ms Marlene Best who allegedly witnessed a signature.

6. In or about the year 2001 I received a letter from the Claimant advising that payments were due or overdue. I tried to contact [Ms. O’Grady] but without any success.

7. In or about the year 2010 I received a letter from the Claimant and/or Mr. Edmund Hinkson, Attorney-at-law stating that [Ms. O’Grady] had not repaid the loan. I do not recall who was the author of the letter.

[58] Additionally, Mr. Chase stated that he travelled from Barbados to the United Kingdom on 31 July 1997 and returned on 1 September 1997. He pointed to two stamps in his passport, one of which reads “IMMIGRATION OFFICER ... 31 July 1997 HEATHROW” (3) and the other “ENTRY BY AIR 16 -1 SEP 1997 BARBADOS”.

[59] This evidence was admitted without objection by Mr. Hinkson. I accept that it is not first-hand evidence of Mr. Chase’s absence from the jurisdiction. His oral evidence is. However, that documentary evidence provides proof that stamps are imprinted in his passport bearing dates and showing points of entry that correspond with his assertions. There is no allegation that those entries

are fraudulent. In my judgment, Mr. Chase's production of his passport bolsters his oral testimony and makes him more believable on that issue.

[60] Under cross-examination, Mr. Chase stated that he had signed the affidavit of surety since he intended to sign the second document which Ms. O'Grady had told him was necessary, if it had met his conditions. His further evidence is that sometime after he returned from England, a female had telephoned him to indicate that the document had been signed. This female had refused to identify herself but the voice was not Ms. O'Grady's. He then became aware that Ms. O'Grady had obtained the loan. He did not approach the claimant or Ms. O'Grady before or after the telephone call.

[61] Questioned as to when he first became aware that he had purportedly signed the disputed document, Mr. Chase stated that he had first done so when the documents relating to these proceedings were served on him. However, he then admitted to earlier receiving a letter from the claimant in which the latter had asserted that he had "signed a contract ... agreeing to be surety" and, thus, assumed responsibility for the repayment of the debt.

[62] Mr. Chase's further evidence is that he did not respond to that letter but sought, unsuccessfully, to contact Ms. O'Grady. He denied that he had refused to contact the claimant since he knew that the assertions in the letter were correct. He said that he did not consider that the letter was sufficiently

serious to merit a response and that he never thought of calling the police. He denied that his motive for trying to reach Ms. O'Grady was to avoid having to repay the money himself. He also said that his reason for doing so was because he felt that she ought to repay the money and that if he had signed the disputed document, he would have repaid it.

[63] Mr. Chase was then questioned about some specimen signatures he had provided for his expert witness, Mr. Sealy. He admitted that (i) when he made some of the signatures, he knew that they were to be used in connection with the proceedings; and (ii) he had seen the signature on the disputed document before providing the specimens.

[64] Finally, Mr. Chase stated that he normally signs his name "B. Chase" and that he signs his name the same way all the time. However, he accepted that on occasions he had used the signature "Bernard Chase", as was evident from an examination of his passport. He stated that the signature in the passport had been made prior to 1997 and that more recently he would sign "B. Chase".

[65] I will return to some disquieting aspects of Mr. Chase's evidence. However, I found no reason to disbelieve that he was not in Barbados on the date Ms. Best claims that the disputed document was signed. His unhesitating production of his passport affirms my feeling as to the reliability of his evidence in that regard.

the expert witnesses

[66] I turn to the expert witnesses. They disagreed on the likely source of the disputed signature. Ms. Murphy opined that it was “highly probable” that Mr. Chase was the author. She explained that rating to mean that “the conclusion is very near identification with extremely high probability”. On the other hand, Mr. Sealy’s view was that it is highly probable that the signature was not made by Mr. Chase. He gave it a rating of “elimination” and explained that to mean that he was in no doubt that Mr. Chase had not written the disputed signature. He opined that the signature is “a simulated signature prepared by another writer drawn from memory”. I will set out the evidence of each in detail.

the evidence of Ms. Murphy

[67] Ms. Murphy’s evidence-in-chief comprised two witness statements adopted at trial along with further evidence adduced by Mr. Hinkson. In her first witness statement, she stated that she made a microscopic examination of a photocopy of the disputed signature and compared it against three specimens made by Mr. Chase. Those specimens all read “B. Chase” and were made on 18 July 1997, 30 September 2010 and 19 November 2010, respectively.

[68] The witness opined that, though it would have lacked some of the details present on the original, the photocopy of the questioned signature was of

sufficient quality to allow for a meaningful comparison. Additionally, she acknowledged that the specimens were “limited in number”. She stated that they covered “a significant period (i.e. 1997 through 2010)”. Her further evidence is that they “reflect a mature signature style that has undergone few modifications over time”; and that “pen movements continued to be rapid and fluently executed”.

[69] Turning to the results of her comparative examination, Ms. Murphy stated that there are “several fundamental similarities” between the specimens and the disputed signature. She identified nine (9) features as being among these. Puzzlingly, she noted the first similarity to be that the author of the disputed signature used all the letters in the name “Bernard Chase”, while the author of the specimens “used the initial letter “B” and the surname “Chase”. Secondly, she stated that the disputed signature is “similar” to the specimens “excluding letters e,r,n,a,r and d”.

[70] The witness went on to detail what she regarded as similarities between the disputed signature and the specimens with respect to the initial letter “B”, the letter “C” in the name “Chase”, and the letters “h”, “a”, “s” and “e” in the name “Chase”. Additionally, she stated that all the letters were slanted similarly.

[71] I had the benefit of seeing the disputed signature, the specimens used by the witness and the comparison charts prepared by her for the purpose of her analysis but was unable to detect some of the similarities to which she referred. She stated that the initial letter “B” on the disputed document “has the same letter formation” as on the specimens and that the initial letter “C” “has the same style”. I was unable to detect any such similarities.

[72] I also had some difficulty with Ms. Murphy’s findings with respect to the ending stroke after the letter “e” in the name “Chase”. She stated that in both cases, the stroke is written above the baseline, returns to the baseline and moves across the signature from right to left. However, on the disputed signature, the stroke returns to the baseline and moves right to left ending under the initial letter “C” ; while, on the specimens, it moves right to left through and beyond the entire signature then loops upwards and returns from left to right through the signature.

[73] I will return to these aspects of the evidence. I come now to the witness’ evidence-in-chief as adopted from her second witness statement. That evidence related to her comparison of the disputed signature with one attributed to Mr. Chase and contained on an affidavit of surety with respect to one Shaka Harper.

[74] Ms. Murphy stated that she found that “the writing goes beyond mere pictorial resemblance and shows consistent and significant structural similarities and practically no dissimilarities” and that it was “highly probable” that the two signatures were written by the same author. However, the witness did not identify the similarities or dissimilarities to which she referred and provided the Court with no basis for her findings.

[75] Ms. Murphy also gave evidence relating to a comparative analysis of the disputed signature and one attributed to one David O’neale Chase and contained on an affidavit (“the David Chase affidavit”). She stated that she found that “the handwriting points away” from David Chase being the author of the disputed signature. Again, Ms. Murphy did not state the basis of her findings. In any event, that evidence is unhelpful in resolving the issue as to whether Mr. Chase signed the disputed document.

[76] Questioned by Mr. Hinkson, Ms. Murphy disagreed with Mr. Sealy’s findings that there were a number of structural differences between characters in the disputed signature and the specimens which he had examined. She stated that what Mr. Sealy had identified as differences were natural variations in the author’s handwriting. The witness explained that no one writes the same way when repeating and that consideration must be given to variations.

[77] Ms. Murphy was brought back to this theme under re-examination. She stated that if different writings are the work of a single author, you can have natural variations but they can be no differences. She explained further that “the unique characteristics in the forming of the lettering will not be different”.

[78] Under cross-examination by Mr. Forde Q.C., Ms. Murphy agreed with a number of propositions contained in a passage that was put to her from the text *Scientific Examination of Questioned Documents* by *Orday Hilton*.

These were that:

- (a) In a problem involving the authorship of handwriting, all characteristics of both the known and unknown specimens must be considered.
- (b) Basic writing habits common to both must agree if all are the work of the same writer. A single significant difference between the two is a strong indication of two writers, unless this divergency can be logically accounted for by the facts surrounding the preparation of the specimen.
- (c) Several repeated, fundamental dissimilarities establish without a doubt that two writings are not the work of a single person. Under no circumstances, however, can identity be established by one, two, or even several “unusual” characteristics. Rather, if two writings have been produced by one individual, there must always be a combination of a sufficient number of points of agreement without any fundamental dissimilarities that all chance of accidental coincidence is excluded ...
- (d) Pictorially the writings of two different persons may be very much alike but not identical. ... Repeated small differences

establish clearly that two specimens are the work of two individuals despite a great number of similarities.

[79] Questioned about the number of specimens she had used, Ms. Murphy stated that an analysis cannot be done with one specimen but disagreed that three were insufficient. She also disagreed with a proposition put to her from page 686 of *Forensic Science Handbook* by *Saferstern* that “though an examination could be done with one or two specimens, the practice should be avoided.” She stated that there is no optimum number of specimens but acknowledged that the more known samples examined, the greater the likelihood of coming to a correct conclusion.

[80] Mr. Forde Q.C. also questioned Ms. Murphy about the letters she had compared and the accuracy of her findings. She admitted that it would have been better to have compared the writing “Bernard Chase” with specimens of the same words. She disagreed, though, that she had not compared “like with like” by comparing the letter “B” in Bernard and the word “Chase” on the disputed document with the initial “B” and the word “Chase” on the specimens.

[81] The witness admitted that there are differences in relation to some of the letters compared but she characterised these differences as natural variations. She disagreed with the suggestion that the letter “C” in the disputed signature did not look like that on the specimens. After being pressed, she admitted to

the difference in appearance of the final stroke after the letter “e” in the word “Chase”. She agreed after some hesitation that the final stroke did not end under the letter “C” on any of the specimens used by Mr. Sealy.

[82] I found Ms. Murphy’s denial and hesitation in these respects puzzling. It is obvious to the untrained eye that on the disputed document the letter “C” has a closed circle at the bottom giving it the appearance of the number 6. This feature is absent from the specimen signatures. I have already commented on the appearance of the ending stroke coming off of the letter “e” in “Chase”. Despite her expertise, she seemed unsure under cross-examination and did not defend her findings convincingly.

The evidence of Mr. Sealy

[83] I come to Mr. Sealy’s evidence. He adopted the contents of his witness statement filed on 14 May 2012 as his evidence-in-chief. He stated that he had a photocopy of the disputed document which was handed to him by Mr. Forde Q.C. and a copy which he received from the claimant on 7 March 2015.

[84] With regard to the specimens, his evidence is that he had a copy of the affidavit signed by Mr. Chase on 19 July 1997, a letter attributed to Mr. Chase, the certificate of truth contained on Mr. Chase’s defence, eight specimen signatures prepared by Mr. Chase, a copy of an affidavit of surety signed by Mr. Chase on 21 October 2000, and a copy of the David Chase affidavit.

[85] The witness stated that he examined each document “to determine whether the writings on them were comparable, adequacy of sample, writing quality and form” and that he then compared the disputed signature with “the relevant writing” on each known document. He went on to detail his analysis of each letter contained in the signature on the disputed document as compared with corresponding letters on the known specimens.

[86] Mr. Sealy’s evidence is that there were significant structural differences with respect to the letters “B”, “r”, and “d” in the word “Bernard” and the letters “C”, and “s” in the surname “Chase”. He also considered that there was a significant difference in the formation of the embellishment after the letter “e” in “Chase”. He described that difference in this way:

There is an embellishment formed after the “e” in “Chase” in the [disputed signature]. There is a heavy thickening of the line that indicates greater pen pressure and slower speed. **This is not consistent with the signatures in the specimen where this embellishment is very ornate with a thinner line going right through the signature and returning with a thin end indicating a greater speed in the writing of the signature. This is a significant difference the value of which indicates that this part of the signature is drawn to resemble the genuine signatures of Bernard Chase.**

[87] I was able to detect the differences Mr. Sealy highlighted. He also identified what he regarded as similarities in respect of the letters “e” and “n” in “Bernard” and the letter “a” in “Chase”. With respect to the letters “a” in

“Bernard” and “h” in “Chase”, he identified similarities and differences but did not describe the differences as significant.

[88] This witness concluded his witness statement in this way:

The analysis of handwriting is based on the examination of the characteristics questioned and known signatures to arrive at a conclusion. This examination is done by comparing the similarities and differences in the signatures and also noting the variations in the writing. A person will not write the identical way all the time but will hold within certain variations to create a master pattern for the writing. What is of note is that the presence of a single significant difference is a strong indication of different writers. For writings to be by the same person there must always be a combination of sufficient points of agreement without any fundamental dissimilarity (Hilton: 154). In this case there were some similarities but the presence of a number of fundamental dissimilarities lead to the conclusion that there are two different writers.

[89] Mr. Sealy gave additional evidence-in-chief. He stated that he had taken specimens of the signature “Bernard Chase” from Mr. Chase since he could not compare the signature “B Chase” with “Bernard Chase”. He noted that Ms. Murphy was unable to examine a number of letters in the questioned signature and opined that she had used an inadequate number of signatures.

[90] Under cross-examination, Mr. Sealy stated that he had carried out his examination in his home lab which he considered adequate for the purpose and that he had used equipment similar to that used by Ms. Murphy. He defended the quality of a photograph of the questioned signature which he had

taken from the claimant's office. In any event, he said that he had used the photocopy given to him by Mr. Forde Q.C in carrying out his analysis.

[91] Mr. Sealy admitted that there were similarities in four of the twelve letters compared but insisted that the compared writings were not authored by the same person. His further evidence is that people from a common writing background may share certain writing characteristics but he maintained that a single significant difference which could not be explained or accounted for is a strong indication of different writers.

[92] The witness stated that the posture of a writer can affect handwriting and give rise to variations, as can the quality of the pen used in the process. He did not know the posture assumed by the person who had signed the questioned signature. He said that those factors could not lead to a conclusion that another author was involved. Generally, I found his testimony to be credible.

SUBMISSIONS AND DISCUSSION

[93] The parties filed and exchanged written closing submissions. They declined the opportunity to make oral submissions.

[94] As Mr. Forde Q.C. submitted, the claimant must prove, on the balance of probabilities, that Mr. Chase signed the disputed document. He who alleges must prove. Confirmation of this general rule was expressed by Lord Maugham in *Constantine Line v Imperial Smelting Corporation [1942] A.C.*

154, 174. As for the standard of proof, the balance of probabilities is prescribed as requisite by *section 133(3)* of the *Evidence Act*.

[95] I have considered what assistance, if any, the law affords the claimant in discharging this burden. The disputed document is dated 13 August 1997. *Section 130* of the *Evidence Act* creates a rebuttable presumption that a document was executed by the persons it purports to have been executed by, if it is more than 20 years old and produced from proper custody. At the date of trial, the disputed document was insufficiently old for the claimant to benefit from that presumption.

[96] Ordinarily, Ms. Best's direct evidence that she saw someone sign the document in Mr. Chase's name might have been enough to identify him as the signatory. However, that facilitation of proof is insufficient where, as in this case, the circumstances require investigation. Citing *Roden v Ryde (1843) 4 QB 626* and *Jones v Jones (1841) 9 M & W 75*, J D Heydon in *Cross on Evidence: Eighth Australian Edition* ("Heydon") states the relevant law, at paragraph 39095, in this way:

"... it is usually unnecessary, in the first instance, for a witness to the signature to do more than swear that he saw someone sign in a particular name. The name will, in itself, be sufficient evidence of the identity of the signatory with the person whose handwriting is to be proved, unless there are circumstances calling for investigation, or unless, perhaps, the name is a very common one."

[97] There is an ancient presumption that a document was executed on the date it bears. It was applied by Bosanquet J in *Anderson v Weston et al (1840) 6 Bing NC 296; 133 ER 117*, and acknowledged 100 years later in *Dillon v Grange (1941) 64 CLR 253*. The disputed document is dated 13 August 1997. It is presumed to have been executed on that date. Furthermore, Ms. Best's evidence is that it was executed on that date.

[98] Mr. Chase has not only disputed that he signed the disputed document. He asserts further that he was not in Barbados on 13 August 1997. These circumstances preclude any acceptance of Ms. Best's evidence that she saw someone sign the document in his name, as proof that it was he who signed it. Hence, more is required before I can reach that conclusion. In this regard, the absence of evidence verifying the identity of the person who appeared before Ms. Best is a significant lacuna in the claimant's case.

[99] However, before making a finding as to whether or not Mr. Chase signed the disputed document, I must consider the expert evidence. If that evidence leads me to conclude that he signed the document, that finding would be incompatible with Ms. Best's evidence as to the date on which it was executed in his name. So, what do I make of the expert evidence?

[100] Naturally, Mr. Hinkson submitted that Ms. Murphy's evidence is to be preferred to Mr. Sealy's. He considered that her opinion ought to carry weight

on account of her training, qualifications and experience. He also highlighted the fact that she is attached to the Royal Barbados Police Force while Mr. Sealy is an independent document examiner, and that she carried out her examination in a purpose-built police laboratory.

[101] I found no evidence to support the speculative conclusion drawn by Counsel that Mr. Sealy may not be regularly involved in practising in his area of expertise because he is self-employed. I found both experts to be experienced, well-qualified and extensively trained, and that they conducted their analysis under conditions and with equipment that were adequate for the task. However, after due consideration, I found Mr. Sealy's evidence to be more persuasive.

[102] Mr. Hinkson submitted further that Ms. Murphy had examined a sufficient number of specimens and that she had thoroughly and minutely detailed the basis for her opinion. On the other hand, Mr. Forde Q.C. submitted that little weight should be given to her evidence because of the few specimens used and the fact that she was unable to compare all the letters in the disputed signature. Mr. Sealy considered those to be negative features of her analysis.

[103] Ms. Murphy defended the adequacy of the number of specimens she used. However, she accepted that the larger the number of samples, the less the likelihood of error. She also admitted that it would have been better if she had

been able to compare all the letters in the disputed signature. Those factors affect the weight that I can give to her evidence.

[104] With respect to Mr. Sealy, Mr. Hinkson submitted that many of the specimens he used were of limited usefulness, having been made fifteen years after the disputed signature. However, nothing was put to either expert to enable me to determine how this might have impacted the analysis.

[105] Additionally, a number of the specimens were made by Mr. Chase after he had seen the disputed signature and specifically for the purpose of the analysis. However, it was not put to him that he might have drawn the signatures in such a manner as to improperly influence the outcome of the analysis, and I cannot assume that he did so. Furthermore, Mr. Sealy also used specimens which predated the disputed signature.

[106] To his credit, Mr. Sealy detailed both the differences and the similarities that he found, in his evidence-in-chief. By contrast, Ms. Murphy reported only on what she considered to be similarities. She pointed to no differences, even if only to characterise them as natural variations. I have commented already on her apparent reluctance under cross-examination to accept that there were certain differences in the formation of certain letters.

[107] Mr. Forde Q.C. submitted, and I accept, that there are some differences in the formation of the letters in the disputed signature as compared to the known

specimens. Outstanding examples are the letter “C” in the word “Chase” and the stroke on the final “e”. I accept Mr. Sealy’s evidence that these along with the other differences so characterised by him are not natural variations but significant differences.

[108] Accordingly, I am not persuaded by Ms. Murphy’s evidence that Mr. Chase signed the disputed document. This coupled with the lack of evidence from Ms. Best as to the identity of the person who appeared before her and signed the document renders it well-nigh impossible for me to find that Mr Chase signed it.

[109] I will deal briefly with a further submission made by Mr. Hinkson. He submitted that it can be inferred from Mr. Chase’s conduct that he had signed the disputed document. Counsel did not identify the particular acts or omissions to which he alluded but indicated that they occurred after the document had been executed. However, based on his cross-examination, I surmise that he must have had in mind Mr. Chase’s evidence that he did not respond to the claimant’s letter of demand, and that he had attempted to contact Ms. O’Grady on receipt of that letter.

[110] It is not open to the claimant to rely on this argument since it did not plead its cases on this basis. **CPR 8.5(1)** requires a claimant to set out in the claim form or statement of claim, a statement of all the facts on which he relies. **CPR**

8.5(3) precludes a claimant from relying on any allegation or factual argument which is not set out in the statement of claim, but which could have been set out there, unless the court gives permission. Mr. Chase was entitled to know based on the statements of case, the case he had to meet.

[111] As set out in the statement of claim, the claimant's case is that Mr. Chase signed the disputed document on 13 August 1997. In his defence, Mr. Chase denied that he had executed the disputed document and asserted that he was not in Barbados on the date alleged. The claimant filed a reply in which it indicated that it would rely on the evidence of its handwriting expert to establish that Mr. Chase had signed the document. The notion that Mr. Chase's liability was to be implied from his conduct was never made a part of the claimant's case.

[112] In any event, the facts which I have assumed Mr. Hinkson may be alluding to do not support a legal inference that Mr. Chase signed the disputed document. There is no general duty cast on the recipient of a letter to answer it. A failure to do so does not amount to an admission as to the truth of its contents unless it would be reasonable to infer such an admission from that fact.

[113] Authority for the above proposition is to be found in *Wiedmann v. Walpole [1891] 2 Q.B. 53*. Citing that case and a host of other decisions from Commonwealth jurisdictions, **Heydon**, at paragraph 33435, states it to be the

law that, in the absence of an innocent explanation, consciousness of liability may be shown by “failure to reply to a letter where the relationship between the parties is such that a reply might have been expected (eg where it is the ordinary practice of people to reply)”.

[114] Much as this Court has been troubled by Mr. Chase’s failure to respond to the claimant’s letter, there is nothing to put him outside the general rule that precludes an inference of liability from silence. Equally, I do not consider that his having made an effort to contact Ms. O’Grady points inexorably to some concession by him that he is liable. His evidence is that he tried to contact her because he felt that she should have repaid the money.

[115] I am not satisfied that the claimant has proved its case. Rather, on the evidence adduced, I am persuaded that it is more probable than not that Mr. Chase did not sign the document. He has established to my satisfaction that he was beyond this jurisdiction on the date that the claimant maintains that it was signed in his name. Mr. Sealy’s evidence lends credibility to his assertion that the disputed signature is not his.

DISPOSAL

[116] I have concluded that the claim against Mr. Chase is not statute barred but the claimant’s failure to establish that Mr. Chase signed the disputed document must result in the dismissal of this claim. If not him, then who? That question

may forever lurk in the mind of the curious. It might never have arisen had the claimant required proof of identification from the signer and kept some record of that proof. Therein lies the moral of this case.

[117] The claim against Mr. Chase is dismissed. I will hear the parties on the issue of costs.

OLSON DEC. ALLEYNE
JUDGE OF THE HIGH COURT