IN THE SUPREME COURT OF BELIZE, A.D. 2003

ACTION NO. 555

ATLANTIC BANK LIMITED **Claimant**

BETWEEN AND

NOVELO'S BUS LINES LIMITED (In Receivership)
DAVID H. NOVELO SR.
ANTONIO D. NOVELO **Defendants**

ACTION NO. 556

ATLANTIC CORPORATION LIMITED **Claimant**

BETWEEN AND

NOVELO'S BUS LINES LIMITED (In Receivership)
DAVID H. NOVELO SR.
DAVID H. NOVELO JR.
ANTONIO D. NOVELO **Defendants**

ACTION NO. 557

ATLANTIC CORPORATION LIMITED **Claimant**

BETWEEN AND

NOVELO'S BUS LINES LIMITED (In Receivership)
DAVID H. NOVELO SR.
ANTONIO D. NOVELO **Defendants**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. E. Andrew Marshalleck, with Mrs. Liesje Barrow Chung and Mrs. Naima Barrow Badillo, for the claimants.
Mr. Fred Lumor SC for the first defendant.
Mr. Hubert Elrington for the second, third and fourth defendants.

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JUDGMENT

This judgment is in respect of the consolidated claims by Atlantic Bank Ltd. and Atlantic Corporation Ltd. as claimants, in respect of overdraft facility and loans made to the first defendant, Novelo's Bus Lines Ltd. The second to fourth defendants personally guaranteed the loans on Promissory Notes issued by the first defendant as security for the overdraft facility and loans. The first defendant eponymously bears the surname "Novelo" of the second to fourth defendants and appeared to have been a family enterprise in the transportation industry.

2. It is helpful, I think, to state even if only in outline, how the claimants came to be pressing the defendants in this case for the various sums they claim. The following outline is culled from the statements of claim filed on behalf of the claimants in this action and I have tried to state the claims in the order in which the writs which commenced the claims were numbered. The claims were first commenced in 2003 under the old writ system. But nothing turns on this.

3. *A. The first claim in Action No. 555 of 2003*

   i. On the 28th June, 2001, the claimant agreed to grant the first defendant overdraft facility on its checking account with the claimant to a limit of $4,000,000.00 and the first defendant agreed to pay on demand any amount overdrawn and to pay interest on such amount at 15% per annum.

   ii. As part of the security for this overdraft, the first defendant on the same day, 28th June, 2001, issued a Promissory Note for $4,000,000.00 together with interest at 15% per annum payable to

the claimant twelve months after date or payable if any sum due remained due and unpaid.

iii. By a guarantee endorsed on the Promissory Note, the second and third defendants agreed, in consideration of the claimant's overdraft to the first defendant, to guarantee the payment, on demand, of all sums due under the Promissory Note including interest due thereon, and to pay interest on the sum outstanding under the Promissory Note.

iv. The Promissory Note provided that in the event the claimant instituted action to enforce collection on the Note, the defendants would be liable additionally for attorneys' fees of 20% of the amounts owing and unpaid.

v. By 16th September, 2002, the balance the first defendant had overdrawn on the overdraft facility stood at $3,832,482.88. The claimant on the same date by letter demanded from the first defendant all principal and interest then owing on the overdraft facility.

vi. By letters dated 29th January, 2003, the claimant demanded from the second and third defendants all principal and interest then owing on account of the overdraft. This demand was followed by letter dated 22nd October 2003, from attorneys for the claimant demanding payment of all principal and interest owing on the overdraft.

vii. Despite these demands, the defendant failed to pay anything on the outstanding amounts.

viii. In its specially endorsed writ commencing this claim, the claimant claim the sum of $5,321,495.88 under the Promissory Note inclusive plus interest on this sum at 15% per annum or $1,596.87 per day from 31st October, 2003 until payment.

4. *B. The Claim No. 556 of 2003*

i. On 24th November, 2000, Atlantic Bank Ltd. lent to the first defendant the sum of $3,400,000.00.

ii. As part of the security for the loan the first defendant on the same day executed Promissory Note for $3,400,000.00 with interest at 15% per annum payable to the claimant by way of 47 equal monthly payments of $94,624.54.

iii. The second to fourth defendants endorsed a guarantee on the Promissory Note to repay the loan on demand plus interest thereon.

iv. The first defendant initially paid by instalment towards the principal and interest the sum of $793,605.75.

v. On 20th August, 2002 and 12th September, 2002, the claimant Atlantic Bank by letters demanded from first defendant all principal and interest owing on the loan.

vi. On 9th October, 2002, the Atlantic Bank assigned the benefits of the loan to the Atlantic Corporation and on the same day notice of the assignment was given to the first defendant.

vii. By separate letters dated 29th January, 2003, the claimant Atlantic Corporation demanded from the second to fourth defendants all principal and interest then owing on the loan. This demand was repeated in letters from the attorneys of the claimant dated 22nd October, 2003 to the second and fourth defendants.

viii. These demands for repayment were never responded to.

ix. The Promissory Note provided that in the event the claimant instituted action to enforce collection on it, the defendants would be additionally liable for attorneys' fees of 20% of the amount owing and unpaid.

x. In its Amended Statement of Claim, Atlantic Corporation is claiming the sum of $3,850,426.35 as money due inclusive plus interest at the rate of 15% per annum or $1,086.00 daily on the outstanding loan principal of $2,606,394.25 from 31st October, 2003, until payment,

5. *C. Claim No. 557 of 2003*

i. On 25th February, 2000, Atlantic Corporation Ltd. lent the first defendant the sum of $6.6 million.

ii. As part of the security for the loan the first defendant on or about 25th February, 2000, issued a Promissory Note for $6.6 million together with interest at 15% per annum payable to Atlantic Corporation by way of 60 equal monthly payments of $108,482.00 and one balloon payment of $4,475,860.00

iii. The second and third defendant endorsed on the Promissory Note a guarantee for the payment on demand, of all sums due under the Promissory Note including interest and to pay interest on the sum outstanding under the Promissory Note.

iv. After some initial instalment payments totaling $743,495.67 by first defendant there was no more payments by either first defendant or its two guarantors, the second and third defendants towards satisfying repayment of loan.

v. The Promissory note had provided that in the event the claimant institutes action to enforce collection, the defendants would be additionally liable for attorneys' fees of 20% of amount owing and unpaid.

vi. In its specially endorsed writ commencing this action, the claimant claims the sum of $8,524,139.97 inclusive, plus interest on the outstanding principal sum of $5,856,504.37 at rate of 15% per annum or $2,440.21 daily from 31st October, 2003 (when its attorneys wrote the defendants demanding repayment of the loan) until payment.

6. This was how the claims stood on 6th November, 2003 when the claimants commenced action against the defendants by specially endorsed writs. I have, for ease of reference and convenience, used the singular "it" or "this case" to refer to the three consolidated claims in this judgment.

7. By any account, the case seems to have acquired a chequered history and some chronology of events surrounding it might help:

1. *6th November, 2003*	*Specially endorsed writ filed in Actions 555, 556 and 557 of 2003*
2. *25th November, 2003*	*Default judgments entered against Defendants in default of appearance*
3. *3rd March, 2004*	*Kevin Castillo appointed Receiver/Manager of the First Defendant by Atlantic Bank Ltd. in respect of its overdraft to the former*
4. *5th March, 2004*	*This Court set aside the default judgment obtained on 25th November, 2003*
5. *17th March, 2004*	*Messrs. Pitts & Elrington entered appearance for the First Defendant*
6. *17th and 18th March, 2004*	*Defence filed on behalf of the Defendants*
7. *5th October, 2004*	*Plaintiffs filed Reply to Defence*
8. *8th November, 2004*	*Fred Lumor, SC effected change of Solicitors for First Defendant in place of W. P. Elrington, SC*
9. *11th November, 2004*	*At commencement of hearing of the case, W. P. Elrington, SC took objection to the appearance of Fred Lumor, SC for the first defendant*
10. *11th November, 2004*	*This Court ruled that Fred Lumor, SC was validly appointed by Receiver in place of W. P. Elrington, SC to represent first defendant*
11. *26th November, 2004*	*Summons filed by W. P. Elrington, SC seeking a declaration that the appointment of Fred Lumor, SC in place of W. P. Elrington, SC was invalid and void*
12. *5th January, 2005*	*Notice of preliminary objection to the hearing of the Summons filed by Fred Lumor, SC*
13. *10th January, 2005*	*This Court refused the order sought in the Summons*

14.	*9th February, 2005*	*This Court granted leave to appeal its order made on 10th January, 2005*
15.	*9th February, 2005*	*W. P. Elrington, SC filed Notice of Appeal in Civil Appeal No. 1 of 2005*
16.	*23rd February, 2005*	*Settlement of Records of Appeal by Registrar*
17.	*23rd June, 2005*	*Court of Appeal dismissed Appeal when Counsel applied to withdraw the appeal.*
18.	*22nd February, 2008*	*Pre-trial Review Conference of the case by the Court*
19.	*22nd February, 2008*	*Order of the Court amending capacity of First Defendant as "In Receivership"*
20.	*5th May, 2008*	*The consolidated claims came on for hearing before me as the trial judge but Mr. H. Elrington then appeared for the other three defendants in place of W. P. Elrington SC. The matter was then adjourned to 11th and 12th June 2008 for trial.*
21.	*11th June, 2008*	*On 11th June 2008, Mr. H. Elrington applied rather summarily to have claims struck out. This was refused.*
22.	*12th June, 2008*	*The trial of the case was concluded.*

The Defences in this case

8. I would be less than candid if I did not express my amazement at the defences that were sought to be run in this case to resist and rebuff the claims.

9. First, I reproduce the Defence filed in Claim No. 555.

DEFENCE

1. *The Defendants admit the Agreement of the 28th June 2001, the Promissory Note of June 28, 2001 and the Guarantee indorsed therein but deny that the terms of the said Promissory Note and guarantee are accurately or sufficiently set out in the Statement of Claim herein.*

2. *The Defendants make no admission as to paragraphs 6 to 10 of the Statement of Claim.*

3. *The Defendants deny that the said sum is due and owing by them to the Plaintiff.*

10. Secondly, I reproduce as well the Defence filed in respect of Claims Nos. 556 and 557.

DEFENCE

1. *The Defendants admit paragraphs 1, 2, 3, 4 and of the statement of claim.*

2. *The Plaintiff did not commence the proceedings for the recovery of the money lent before the expiration of twelve months from the date of which the cause of action accrued and the defendants will rely upon section 23 of the Money Lenders Act, Chapter 260 of the Laws of Belize, Revised Edition, 2000.*

3. The Defendants make no admission as to paragraphs 6 through 10 of the Statement of Claim.

11. These Defences, it would not be unkind to say, read like boiler-plate defence. In the case of the Defence in Claim No. 555, it is so lacking in particulars that it could be said to be an admission of the claim. It fails for example, in its para. 1 to state how and why, it avers that the terms of the Promissory Note and guarantee were not accurately stated, having expressly, in the same paragraph, admitted the Agreement of 28th June 2001, the Promissory Note and Guarantee by which the loan was provided by the claimant.

12. In the case of the Defence in both Claims Nos. 556 and 557, they are a carbon copy of one another. They both raised in their respective para. 2, section 23 of The Moneylenders Act – Chapter 260 of the Laws of Belize, Revised Edition 2000. On the pleadings in relation to these two claims, it was the only substantive defence that was advanced on behalf of the defendants.

13. The contrast between the defendants' laconic Defence to Claims Nos. 556 and 557 and the Reply by the claimants is remarkable. The claimant (Atlantic Corporation) in these two actions not only took issue with the applicability of section 23 of The Moneylenders Act to its claims, which it denied but also averred that even if it were applicable, which they again denied, the defendants waived their rights under that section and are estopped from relying on it as they had repeatedly acknowledged their obligations to the claimant and requested additional time in order to renegotiate a refinancing of their obligations, thereby inducing the claimants not to act upon the demands of 20th August 2002, 12th September 2002 and 29th January 2003, by which dates the defendants were already delinquent on the loans. The respective Reply then

proceeded to detail particulars of the defendants' conduct which the claimant says should preclude them from relying on section 23, if it is applicable to its claim.

14. Not to prolong the agony in this case, I am bound to say at this juncture that even if The Moneylenders Act were applicable to this case, in the light of the issues pleaded in the Reply and the documentary evidence attesting to the forbearance of the claimant from pressing home its claims when the defendants became delinquent on the loans, through the inducement of the defendants, I would be hard put to find section 23 of the Act a viable or sustainable defence in the circumstances of this case. (See in particular documents Nos. 17, 18, 21, 22, 23, 36, 37 in the Index of Documents showing several instances of forbearance by the claimant to enable the defendants to secure refinancing). In the light of this, it would surely sound ill in the mouth of the defendants to say the claimant did not bring the claims within the statutory one-year window in section 23 of The Moneylenders Act.

15. Having said this, I am equally bound to consider and decide the only relevant issue in this case, so plausibly argued by Mr. Hubert Elrington for the second to fourth defendants. That is to say, whether Atlantic Corporation Ltd. is a "Moneylender" for the purposes of The Moneylenders Act and if as a moneylender, it is precluded from maintaining its claims after the lapse of one year because of section 23 of The Moneylenders Act.

16. In so far as the first defendant, Novelo's Bus Lines Ltd. is concerned, it was, as I have briefly mentioned at para. 7.3 of this judgment, put into receivership on 3rd March 2004 with a Mr. Kevin Castillo appointed its Receiver/Manager. It however participated in these proceedings through Mr. Fred Lumor SC, the attorney appointed by its Receiver/Manager.

17. Mr. Lumor SC, the attorney appointed to act for the first defendant by its Receiver/Manager, handled his brief and conducted the case for the first defendant with the professionalism and candour to be expected from a Senior Counsel as an officer of this court. In his helpful; written submissions to the court on the Defence field on 18th March 2004 and sought to be run on behalf of the first defendant, Mr. Lumor SC correctly, I think, submitted that whether under the Old Rules of the Supreme Court, that is, the pre-2005 Supreme Court Rules or the New Supreme Court Rules 2005, the Defence to Claim No. 555 would not be viable or sustainable. I have already commented on this at para. 11 of this judgment and I agree. He drew attention to Order 24, Rules 1 and 2 of the old Rules (which were extant at the time the Defence was filed on 18th March 2004) which provided in terms:

> *"1. In an action for a debt or liquidated demand in money comprised in Ord. IV r. 6* (actually Ord. IV r. 7)*, a mere denial of the debt shall be inadmissible.*
>
> *2. In action upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some of fact, example, e.g., the drawing, making, indorsing, accepting, presenting or notice of dishonour of the bill or note."*

Mr. Lumor SC again, correctly I think, pointed out the Defence of the first defendant to Claim No. 555 would offend Civil Procedure Rules 10.5 of the Supreme Court Rules 2005, which were operational when the claim eventually came on for pre-trial review and trial in 2008.

18. Mr. Lumor SC accordingly urged that the Defence of the first defendant be struck out and judgment entered in Claim No. 555 for the claimant, Atlantic

Bank Ltd. It is difficult not to accede to this request even though it comes from an unexpected quarter, given my own view and conclusion on this Defence in the circumstances of Claim No. 555.

I therefore hereby strike out that Defence as non-responsive to the Claim and enter judgment for the claimant in Claim No. 555.

19. However, in relation to the Defences filed in relation to Claims Nos. 556 and 557, they may be a model of brevity which is always to be welcomed; but with respect, they fail to rise up to the standards required by Order 24, Rules 1 and 2 of the Old Supreme Court Rules at the time they were filed. I have already mentioned this at para. 17 in this judgment. They also fail, in my view, to rise up to the requirements of the Civil Procedure Rules 2005. There was no application to amend the defences filed in this respect. But in my view, it is always salutary to bear in mind the provisions of this Rule for the proper conduct of the defence in a contested case. It sets out the defendant's duty to set out his case similar to the claimant's duty to set out his case in the corresponding provisions under Rule 8.7 of the Civil Procedure Rules 2005. These provisions provide in my view, a helpful roadmap for the proper and timely conduct of litigation. Rule 10.5 speaks to a defendant's duty to set out his case and as far as is material it provides:

> *10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.*
>
> *(2) Such statement must be as short as practicable.*
>
> *(3) In the defence, the defendant must say –*
>
> *(a) which (if any) allegations in the claim form or statement of claim are admitted;*
>
> *(b) which (if any) are denied; and*

(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or statement of claim -

(a) the defendant must state the reasons for doing so; and

(b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

(5) If, in relation to any allegation in the claim form or statement of claim the defendant does not -

(a) admit it; or

(b) deny it and put forward a different version of events;

the defendant must state the reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document or a copy thereof which is considered to be necessary to the defence.

20. Given the somewhat chequered chronology of this case which I have tried to summarize at para. 7 of this judgment, it is probable that even though the claims predate 5th April 2005 when the New Civil Procedure Rules became operational and there was therefore a duty incumbent on the claimants to have applied for case management, it is not clear if this was done. But a pre-trial review was held by the Court on 22nd February 2008. This would make the Civil Procedure Rules 2005 thereby applicable to this

case in virtue of Part 72 on transitional provisions of these Rules. Be that as it may, I am satisfied however that the Defences filed in relation to Claims Nos. 556 and 557 fail to satisfy the requirements of pleadings whether under the Old Rules (extant when they were filed) or the New Civil Procedure Rules 2005, which were operational when the trial was had in this matter.

21. However, both Defences which I have reproduced at para. 10 of this judgment, aver limitation of claims as provided for in section 23 of the Money Lenders Act. To this I shall shortly return. But it is I think necessary to state that in both Claims Nos. 556 and 557 Atlantic Corporation Ltd., is the claimant.

Atlantic Corporation as claimant in Claims Nos. 556 and 557

22. From the evidence, especially the witness statements of Ms. Sandra Bedran of the Atlantic Bank Ltd. and Mr. Hector Rivera, the manager of Atlantic Corporation Ltd., the origins of the claims are recounted. Both Ms. Bedran and Mr. Rivera testified at the trial and were extensively and vigorously cross-examined by Mr. Hubert Elrington, the attorney for the second to fourth defendants. Both Ms. Bedran and Mr. Rivera tendered **Exhibit SB2** and **Exhibits HR 1 & 2** respectively, stating the inclusive amount owed on the loans by the defendants as at 12th June 2008.

23. Ms. Bedran in her witness statement filed on 2nd May 2008, after recounting the origins of the claim in Claim No. 556, from paras. 15 to 21, explains at paras. 22 to 25 how Atlantic Corporation acquired the subject-matter of this claim.

> *22. On or about the 9th day of October, 2002 Atlantic Corporation Limited purchased from the Bank and on the 9th day of October 2002 the Bank assigned to Atlantic Corporation Limited the benefits*

of the Bank's loan together with the security held therefor. The debt was sold because the Group took the view that it was better for Atlantic Corporation rather than the Bank to assume the risk of realizing collections on the debt.

23. On the 9th day of October 2002 notice of the assignment was given to Novelo's.

24. The Bank had not prior to the assignment of the benefits of the loan to Atlantic Corporation received payment from Novelo's, David H. Novelo Sr., David H. Novelo Jr., nor Antonio D. Novelo of any of the outstanding amounts then owing on account of the loan that had been demanded on the 20th August, 2002.

25. By separate letters dated 29th January, 2003 the Corporation demanded from David H. Novelo Sr., David H. Novelo Jr., and Antonio D. Novelo all principal and interest then owing on account of the loan.

24. Mr. Rivera in his own witness statement also filed on 2nd May 2008, explains from paras. 3 to 9 the origins of the loan which is the subject of Claim No. 556 and states at paras. 10 to 14 how the Atlantic Corporation Ltd. acquired the benefits of the loan and its attempts to collect.

10. On or about the 9th day of October, 2002 the Corporation purchased from the Bank and on the 9th day of October 2002

the Bank assigned to the Corporation the benefits of the Bank's loan together with the security held therefor. The debt was purchased because the Group took the view that it was better for the Corporation rather than the Bank to assume the risk of realizing collections on the debt.

11. On the 9th day of October 2002 notice of the assignment of the Bank's loan was given to Novelo's.

12. The Bank had not prior to the assignment of the benefits of the loan to Atlantic Corporation received payment from Novelo's of any of the outstanding amounts then owing on account of the loan that had been demanded on the 20th August, 2002.

13. By separate letters dated 29th January, 2003 the Corporation demanded from David H. Novelo Sr., David H. Novelo Jr. and Antonio D. Novelo all principal and interest then owing on account of the loan.

14. By separate letters dated 22nd October, 2003 sent to David H. Novelo Sr.,, David H. Novelo and Antonio Da. Novelo the Corporation, by its attorney-at-law, repeated its demand for all principal and interest owing on account of the loan.

25. The defendants in their Defence have not disputed the entitlement of Atlantic Corporation Ltd. to the benefit of the subject matter of the claim in Claim No. 556. It is clear that Atlantic Corporation was the assignee,

whether by purchase or transfer, of this loan from Atlantic Bank. The defendants aver instead that Atlantic Corporation Ltd. is precluded from maintaining its claim because of the limitation of action by moneylenders as provided in section 23 of The Moneylenders Act. They expressly rely on this section in relation to the claims in Claims Nos. 556 and 557.

26. In so far as Claim No. 557 is concerned, it is undoubted that this was a direct loan from Atlantic Corporation Ltd. to the first defendant and this loan was guaranteed by the second to fourth defendants. There is evidence that this loan of $6.6 million in 2000 was the first Atlantic Corporation made to any entity outside of the Atlantic Group of companies. The defendants have not denied or disputed the loans. They have raised instead, the limitation of action provisions in The Moneylenders Act on the recovery of loans by moneylenders. They are therefore taken to aver that the claimant, Atlantic Corporation, cannot because of section 23 of The Money Lenders Act now pursue them.

Does the limitation of time for proceedings in respect of money lent by moneylenders apply to Atlantic Corporation? That is to say, is Atlantic Corporation a moneylender for the purposes of the Act?

27. This is at the heart of the defendants' case in both Claims Nos. 556 and 557. And Mr. Elrington with some dexterity in cross-examination of both Ms. Bedran and Mr. Rivera, as well as in his written submissions for the second to fourth defendants, tried to prove that Atlantic Corporation is indeed a moneylender within the meaning and contemplation of the Act.

28. Under Part VI in section 23 of The Money Lenders Act, headed "Limitation of Moneylenders' Action" is the following provision:

> *23.-(1) Notwithstanding anything contained in the Limitation Act, no proceedings shall lie for the recovery by a moneylender of any money*

lent by him after the commencement of this Act or of any interest in respect thereof, or for the enforcement of any agreement made or security taken after the commencement of this Act in respect of any loan made by him, unless the proceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued.

(2) In every other respect, the Limitation Act shall apply to all transactions and dealings falling within the provisions of this Act.

29. In relation to Claim No. 556 in which Atlantic Corporation is the claimant, I have recounted how it inherited the loan from Atlantic Bank Ltd. in 2003: see paras. 22 to 25 of this judgment. Atlantic Bank is of course **qua** a bank, expressly exempted from being regarded as a moneylender for the purposes of The Moneylenders Act. This is expressly provided for in section 2(1)(c) of the Act which provides:

> "Moneylender includes every person whose business is that of moneylending, or who advertises or announces himself or holds himself out in anyway as carrying on that business **but does not include** –
>
> (a) …
>
> (b) …
>
> (c) any person *bona fide* carrying on the business of banking or insurance or *bona fide* **carrying on any**

business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money, or (Emphasis added).

(d) ..."

30. Atlantic Bank Ltd., the original lender of the loan which is the subject of the claim in Claim No. 556, is of course, quintessentially a bank and, it is, as any overdraft holder of any commercial bank knows full well, a part of the business of such banks to lend money. And banks, insurance companies and **other** *bona fide* **businesses who do not have as their primary object the lending of money but do lend money in the course of their businesses, are statutorily exempted from being regarded as moneylenders for the purposes of the Act:** section 2(1)(c) of The Moneylenders Act.

31. There is some evidence as to the status and operation of Atlantic Corporation from the testimony of both Ms. Bedran and Mr. Rivera; and I find that despite the forensic dexterity of Mr. Elrington in cross-examination to have these two witnesses concede that Atlantic Corporation is indeed a moneylender, the effort proved to no avail.

32. I am satisfied that from the evidence and the facts of this case in relation to the loans in Claims Nos. 556 and 557, Atlantic Corporation cannot,, in law and fact, be regarded as a moneylender within the contemplation and provisions of The Moneylenders Act. It should not be lost sight of that Atlantic Corporation had by assignment acquired the benefits of the loan originally made to the first defendant and guaranteed by the second to

fourth defendants. (The subject of the claim in Claim No. 556) and the defendants were duly notified of the assignment.

33. Also, I am satisfied from the evidence that in fact Atlantic Corporation at the very least, is a corporation *bona fide* carrying on business which does not have as its primary object the lending of money. Indeed, under cross-examination by Mr. Elrington of Mr. Rivera on the business of Atlantic Corporation, it became apparent that the corporation is engaged in providing leasing services, buying properties including real estate, equipment and vehicles and investment. I am satisfied that the corporation is anything but a moneylender within the provisions of the Moneylenders Act. It came out in evidence however, that the loan of $6.6 million to the first defendant in February 2000, (the subject of Claim No. 557), was the first every loan the Corporation made to an entity outside the Atlantic Group of Companies. I am satisfied however, that lending money **is not** the primary object of the business of Atlantic Corporation. It might in the course of its business lend money for purposes connected with that business as in fact happened in the case of the loan of $6.6 million to the first defendant. This does not, in and of itself, however, make it a moneylender. This is in fact expressly recognized and exempted by para. (c) of section 2(1) of the Act that "… moneylenders does not include … the *bona fide* carrying on (of) any business not having for its primary object the lending of money, in the course of which (business) and for the purposes (of such business) money is lent."

34. On the facts and circumstances of Claims No. 556 and 557, I am not satisfied or convinced that Atlantic Corporation (the claimant in these actions) can properly be held to be a moneylender. It is, with respect, as correctly stated in **Vol. 32 Halsbury's Laws of England 4th Ed.** at para. 129 that it is a question of fact in each case whether a person is carrying on the business of moneylending: **Kirkwood v Gadd (1910) AC 422** at

424, 428 and 431 H.L. Moreover, in order to establish that a person is carrying on the business of moneylending, it is not sufficient to prove that he has occasionally lent money at a remunerative rate of interest, it is necessary to prove as well some degree of systems and continuity in his moneylending transactions: **Kirkwood** supra at 423 and **Newman v Oughton (1911) 1 K.B. 792**. Yes, the rate of interest involved in each loan in the two claims, 15% per annum, is unarguably remunerative, but this is not by itself sufficient to make Atlantic Corporation a moneylender. As I have tried to show, it acquired one loan (the subject of Claim No. 556) and the other loan (the object of Claim No. 557) seems to be a one-off, the first of its kind outside the Atlantic Group of companies. The carrying on of business implies repetitive acts showing a system or pattern, and would exclude an isolated transaction: **Smith v Anderson (1880) 15 Ch. D 247** at 277 per Brett LJ. Moreover, the relevant time for determining whether the lender is a moneylender, is the time of making the loan: was the lender at that material time in fact, a moneylender? See **Gonzales v Hassanal (1965) 8 WIR 146** at p. 148 per Wooding CJ. I find on the facts that at the material time Atlantic Corporation could not be regarded as a moneylender for the purposes of the Act.

35. In the instant case before me, I fear the defendants did themselves some injustice when they failed to testify therefore depriving the court of any assistance in assessing whether the loans they obtained from the Atlantic Corporation was done by it as a moneylender.

36. I must perforce therefore ineluctably conclude that Atlantic Corporation in the instant case, cannot for any reason be regarded as a moneylender for the purposes of section 23 of the Moneylenders Act. Accordingly the defendants cannot rely on or avail themselves of that section to in effect, non-suit Atlantic Corporation.

37. I therefore find and hold that reliance on this section as pleaded in the respective paras. 2 of the Defences in Claims Nos. 556 and 557, is wholly specious, unfounded and without any merit whatsoever in the circumstances of this case. This is so, I find, when it is realized from the pleadings (in particular the Reply of the claimant, Atlantic Corporation) it was the defendants who induced the claimant to forebear from pressing its claims. It would, in my view, therefore, be grossly inequitable and unfair for the defendants to turn around to seek to rely on any lapse of time that might have taken the claims beyond the limitation period, if it is at all applicable. But mercifully on the facts and the law in this case, I do not have to decide this aspect of the case, which is simply a red herring.

Determination

38. In the light of the preceding analysis and conclusions relating to all three claims, I find and hold that in respect of Claim No. 555, there is no viable or sustainable defence by the defendants to the claim in that action. The question of the receivership of the first defendant and the receivables therefrom and the impact, if any, on the Claim which is not pleaded, is a matter not joined in these proceedings and was not pleaded in the Defence nor as a counterclaim. I had in fact dismissed a summary application to dismiss this claim because of the receivership. I had ruled that the loan agreement expressly provided that the remedies of the lender in the event of a default in repayment by the defendants was cumulative and not in the alternative.

39. In relation to Claims Nos. 556 and 557, I find and hold that none of the defendants can in law and in fact, in the circumstances of these claims, rely on section 23 of The Moneylenders Act. The claimant , Atlantic Corporation, is not from the evidence a moneylender for the purposes of this Act.

Conclusion

40. I accordingly enter judgment for the claimants in all three actions as follows:

i) In relation to Claim No. 555 at the conclusion of the trial on 12 June 2008, the total was $8,819,933.52 inclusive – see **Exhibit SB 2**.

ii) In relation to Claim No. 556 at the end of the trial on 12 June 2008 it was $5,780,613.43, inclusive – see **Exhibit HR 1**.

iii) In relation to Claim No. 557 at the end of the trial on 12 June 2008, the total was $10,490,967.00, inclusive – see **Exhibit HR 2**.

I award the costs of these proceedings to the claimants, to be agreed or taxed.

A. O. CONTEH
Chief Justice

DATED: 21st October 2009.