**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**ANTIGUA AND BARBUDA**

**CLAIM NO. ANUHCV 2008/0386**

**BETWEEN:**

**FIRSTCARIBBEAN INTERNATIONAL**

**BANK (BARBADOS) LTD**

**(formerly Barclays Bank PLC)**

Claimant

**AND**

**ORIEL WALTER**

Defendant

**Appearances:**

Clement E.M. Bird for the Claimant
John E. Fuller for the Defendant

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2011: February 14
May 11

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**JUDGMENT**

**INTRODUCTION**

[1] **REMY J.:** The claim is in respect of a loan granted by the Claimant to the Defendant at his request, for the purchase of a vehicle and which loan was secured by a bill of sale over the vehicle.

**THE PLEADINGS**

[2] By Claim Form and Statement of Claim filed on the 26th June 2008, the Claimant, First Caribbean International Bank (Barbados) Limited, pleaded that on the 16th July 1999, it

agreed to loan to the Defendant the principal sum of $25,528.00 on certain express terms including the following:-

a) The Defendant would be liable for the repayment of the said principal sum with interest thereon, which interest was calculated at the rate of 11.27 % per annum.

b) The Defendant was liable to repay the said principal sum and interest thereon as aforesaid by regular and monthly installments of $713.00 over a period of 48 months commencing on the 30th day of July 1999, or on demand.

c) The Defendant would pay a late fee of $150.00 on each installment which remained unpaid for fifteen days after the due date.

[3] The Claimant further pleaded that it was an implied term of the Agreement that:-

(a) The loan facility would be repayable on demand which demand the Claimant was entitled in the event of default or breach of any of the conditions of the facility on the part of the Defendant.

(b) The Defendant would meet all costs, expenses and charges including attorney's collection fees incurred by the Claimant in recovery of the debt.

[4] The Claimant pleaded that the Defendant made payments totalling $12,578.00, the last of which was received by the Claimant on or about the 10th February 2007, leaving an outstanding unpaid balance in the amount of $ 56,625.22. That since February 2007, the Defendant has failed and/or neglected to repay the balance or any part thereof.

[5] The Claimant's claim is for:-

a. The sum of $62, 988.48 outstanding as at 4th June, 2008.
b. Interest at the rate of 15.17% per annum ($13.51 per day) thereafter until payment.

c. Collection costs of 11.50% of (a) and (b) above.

d. Judgment interest pursuant to statute.

e. Costs.

f. Further and/ or other relief.

[6] By his Amended Defence filed on the 11th February 2009, the Defendant pleaded that:-

i. In the month of September 1999, the Defendant made the last payment of the loan and returned the vehicle to the Claimant who accepted the said vehicle and who agreed to sell the vehicle in satisfaction of any balance that was then owing on the loan.

ii. The Defendant has no knowledge of any payments after September 1999, and in particular has no knowledge of any payment made on or about 10th February 2007.

iii. The Claimant took possession of the Defendant's vehicle in September 1999 and sold the said vehicle in February 2007 at an undervalue.

iv. The debt is statute barred.

**EVIDENCE**

**THE CLAIMANT'S EVIDENCE**

[7] Glendina Jacobs was the sole witness for the Claimant. In her Witness Statement, Ms. Jacobs stated that, as Credit Counselor for the Claimant bank, she has immediate oversight of delinquent loan accounts. That on or about 16th July 1999, at the Defendant's request, the Claimant loaned to the Defendant the sum of $25,528.00 for the purchase of a motor vehicle. The said loan was subject to certain terms including a monthly repayment sum of $713.00 over a period of 48 months. Further that in the event of "default or breach of condition, the loan was repayable on demand at the Claimant's

discretion." Ms. Jacobs stated that between the period September 1999 to February 2001, the Defendant made "intermittent payments" totalling $11,528.00. That the vehicle was repossessed by the Claimant on or about the 8th April 2002 at which time the principal balance on the loan stood at approximately $22,816.00.

[8] Ms. Jacobs stated that after "several unsuccessful attempts" to have the car sold, it was finally sold in February 2007 for the sum of $1050.00 which sum was then applied to the Defendant's credit to his account. That despite "urgings" from the loan officers, the Defendant failed to make payments to the account and that the Claimant made "formal demand" via its Solicitors in or about January 2008.

[9] Ms. Jacobs stated that as at June 2008, the balance on the Defendant's account stood at $62,988.48 and that on 25th February 2010, the date of filing the claim, the amount outstanding to the Claimant (inclusive of interest) is $ 71,502.03.

[10] By way of amplification of her Witness Statement, Ms. Jacobs re-iterated that the amount due on the loan as at 25th February 2010 was $71,502.03 and stated that the outstanding balance as of the date of the trial was $76,228.28.

[11] Under cross-examination, Ms. Jacobs testified that the loan agreement was signed by the parties on the 13th July 1999. She also testified that:-

(a) The last payment was made by the Defendant in February 2001.
(b) "Formal demand" according to the Bank was made on the 8th January, 2008.

[12] Ms. Jacobs testified that she did not agree that "the Bank should make formal demand immediately." That the full amount did not become due and payable until formal demand was made, as per the loan agreement. She agreed that the Bill of Sale was dated 15th July 1999, two (2) days after the date of the loan agreement. She further stated that the Bill of Sale was also an agreement. Ms. Jacobs was referred to the preamble in the Bill of Sale and agreed that (a) The last payment made by the Defendant was on 5th February 2001, (b) the next payment would have been due on February 28th, 2001 and

(c) the whole amount became due and payable then. Ms. Jacobs further stated that since the claim was filed on the 26th June 2008, that would have been "seven (7) years and a few months" after the whole amount became due and payable. She stated that the payment of $1,050.00 was paid by the Bank and not the Defendant, after the sale of the vehicle, and that this was about six (6) years after the Bank had received the vehicle.

[13] Ms. Jacobs testified that from the Claimant's records, the vehicle "came into the hands of the bank" in April 2002 and that from the records, though not from her personal knowledge, a wrecker was utilized to transport the vehicle to the Claimant's storage site. That she was not aware that Mr. Walter brought the vehicle to the bank and gave the keys to the bank. She stated that she was not sure if and how the vehicle ever went up for auction or what the reserve price would have been if such sale took place. Further, that she would not know whether the sale was advertised or how often it was advertised. She stated that the vehicle was re-possessed in April 2002 and that no valuation report was got before 2003.

[14] Under re-examination, Ms. Jacobs testified that they (the bank) usually obtain valuation reports in the event of an auction. That when a vehicle is in the bank's possession, it is kept in storage at well known storage sites and is on display at all times. That interested parties can look at the vehicles and if they are desirous of purchasing, they make an offer for any particular vehicle. That, from time to time, the vehicles are advertised for an auction sale.

**THE DEFENDANT'S EVIDENCE**

[15] The Defendant Oriel Walter gave evidence on his own behalf and called no witnesses. In his Witness Statement, Mr. Walter stated that, in July 1999, he obtained a loan from the Claimant for the purchase of a motor car. The loan was for the sum of $25,528.00 and was to be paid over a period of 48 months at $713.00 per month, as from 30th July 1999. He stated that he made payments totalling $11,578.00 up to February 2001 when his driver's license was suspended because of his epilepsy.

[16] Mr. Walter stated that he delivered the keys for the vehicle to the Claimants in or about February 2001 and that he requested the Claimants to sell the vehicle, which was then valued at about $18,000.00 and to apply the proceeds of sale to the balance of the loan which was then about $14,000.00. The Claimants' representative agreed to do so.

[17] Mr. Walter stated that he made no payment on the loan after February 2001 and has not acknowledged the debt in writing since that date. He added that the Claimant filed the claim against him on the 26th June 2008 and served the said claim on him on 12th November 2008. He stated that the Claimant kept the vehicle in its possession for over six years and sold it in February 2007 for $1,050.00. He stated that the sale was unlawful as, at the time of the sale, the powers of sale given to the Claimant under the Bill of Sale had expired in September 2004. He stated that, between 2001 and 2007, the Claimant compounded the interest on the balance of the debt and are now claiming in excess of $60,000.00. Mr. Walter further stated that the debt is statute barred.

[18] By way of amplification of his Witness Statement, Mr. Walter stated that he personally returned the keys for the vehicle to the Bank. He added that the vehicle was not a new vehicle but that when it was purchased, the Bank valued it at $27,000.00. He further stated the vehicle was never damaged between the time that it was bought and when it was returned to the Bank.

[19] Under cross-examination, Mr. Walter testified that the vehicle was the one which was involved in an unfortunate accident with a lady and which led to her death, but that it was correct to say that the vehicle was never damaged. He agreed that his evidence did not state to whom he gave the keys for the vehicle nor did he disclose any written statement with respect to the return of the vehicle or satisfaction of the debt.

[20] When he was referred to the evidence in his Witness Statement that the balance on his loan in February 2001 was about $14,000.00, Mr. Walter testified that he arrived at that figure by deducting the $11,000.00 which he had paid from the amount of $25,000.00.

When referred to the "Loan Enquiry Data" with respect to his loan (Page 35 of the Trial Bundle), Mr. Walter agreed that the amount of $25,000.00 was principal and did not include interest which he knew had to be applied towards the loan, and further agreed that the amount of $14,000.00 was not correct.

[21] The Defendant testified that he never received correspondence from either the Claimant or its Solicitors, and that he only became aware of the $1050.00 being applied by the Bank at the trial.

**FINDINGS OF FACT**

[22] Based on the pleadings and the evidence adduced in this case, I make the following findings of fact:-

i. The Defendant made the last payment on the loan in February 2001 and not September 1999 as pleaded in his Amended Defence. The date of February 2001 was confirmed by the Defendant in his evidence and was confirmed by Ms. Jacobs, the Claimant's witness.

ii. The Defendant has provided no evidence, other than his say so, that he personally delivered the keys and the vehicle to the Claimant. The more logical and plausible explanation of the vehicle's being in the Claimant's possession, as provided by the evidence of Ms. Jacobs with respect to the wrecker "towing fees" charged to the Defendant's loan account, is that the said vehicle was seized by, rather than delivered to, the Claimant's premises.

iii. The Defendant has also provided no evidence that there was any agreement with the Claimant for acceptance of the vehicle "as satisfaction for the sum outstanding on the loan, or as a cancellation of the loan".

iv. A loan agreement existed between the parties; this fact is not in dispute by the Defendant. Also not in dispute is the fact that the Bill of Sale was the later document signed by the parties, having been executed two (2) days after the

loan agreement. It is conceded by the Witness for the Claimant that the loan agreement itself provides that "where there is any inconsistency between the Loan Agreement and the security document (i.e. the Bill of Sale) the provisions of such a security document shall prevail."

**ISSUES**

[23] Although Counsel for the Claimant and the Defendant have both identified several other issues, I find that the main issue to be determined by the Court is:-

Whether the loan is statute barred.

**THE LAW AND SUBMISSIONS OF COUNSEL**

[24] Before dealing with the main issue as stated above, I will deal with the submission of Counsel for the Claimant that the Defendant's Amended Defence sets up a defence of "accord and satisfaction." Counsel contends that paragraph 3 of the Defendant's Witness Statement sets up this defence. Counsel has quite correctly stated that the principles surrounding "accord and satisfaction laid down in **D&C Builders v Rees** (1965) 3 ALL ER 837, are to the effect that where a creditor agrees to accept, and accepts a lesser sum in discharge of a greater, the creditor will not be allowed to enforce legal right to payment of the balance." Based on my findings in paragraph 22 above, I agree with Counsel's submission that "the Defendant has failed to discharge an evidential burden such as would sustain the assertion of accord and satisfaction." Accordingly, no further discussion on this issue is necessary.

[25] I will now deal with the issue of limitation, i.e., whether the loan is statue barred.

[26] In Antigua and Barbuda, the law of limitation of actions is governed by the Limitation Act 1997 (the Act). The main provisions of the Act as it affects the law of contract are to be found in Sections 7 and 8 of the said Act.

(1) Section 7 of the Act states:-

"An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Section 8 of the Act states:-

8. (1) Subject to subsection (3), section 7 shall not bar the right of action on a contract of loan to which this section applies.

(2) This section applies to any contract of loan which ---

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

(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 where in connection with the taking the loan the debtor enters into any collateral obligation to pay the amount of the debt or any part of it (as, for example, by delivering a promissory note as security for the debt) on terms which would exclude the application of this section to the contract of loan if they applied directly to repayment of the debt.

(3) Sub-section 3 states:-

"Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them) section 7 shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made."

[27] In his Amended Defence, the Defendant pleaded that the debt is statute barred by virtue of Section 7 of the Act. It is the submission of Counsel for the Defendant that the six years for recovery of monies expired in April 2007. Counsel contends that, on the evidence of Ms. Jacobs herself:-

a) the last payment of the Defendant was made on the 5th February, 2001.

b) as contained in the Bill of Sale dated 15th July 1999, that if any (single) monthly payment is not paid when due, the whole balance of the loan unpaid on that date would fall due for immediate payment.

[28] Counsel for the Defendant further contends that the full balance of the loan would have become due from either March 2001, or as Ms. Jacobs testified, by February 28th 2001, "the due date of the next payment by the Defendant". Counsel further submits that the limitation period would therefore have expired on March 1st 2007; and that the present action was filed on June 26th 2008, "well over a year past the expiration of the limitation period."

[29] Counsel quotes Halsbury's Laws of England, Volume 28 at paragraph 866 which states:-

> "If the agreement provides that the occurrence or non-occurrence of a particular event is to trigger the obligation to repay, time will run from the date of that occurrence or non-occurrence."'

Counsel cites the case of **Reeves v Butcher** (1989) 2 QB 509 CA. The agreement in that case provided that where any installment of interest became overdue by 21 days, then the right to reclaim the principal sum was triggered. It was held that the time for the cause of action commenced from the expiry of the 21 days, rather than the expiration of the 2 year duration of the loan.

[30] Counsel therefore submits that, in the case at bar, the outstanding balance did not become due "upon demand" and as such the time properly commenced from the date of the Defendant's first missed payment. Further, that the Bill of Sale was the later of the two documents, the other being the loan agreement, and as such, in the event of any conflict, this later document will take precedence and supersede the earlier. Thus, contends Counsel for the Defendant, "it is clear that it is the Bill of Sale establishes the date upon which full payment became due."

[31] Counsel for the Claimant on the other hand submits as follows:-

"(a) Section 8 and not Section 7 of the Act is applicable in the instant matter: the issue being a loan which inter alia does not provide for repayment of the debt on or before a fixed date.

(b) Under the loan agreement, the Claimant maintained the discretion to continue the agreement in the face of default, with the resultant consequential effect of extended repayment date.

(c) In accordance with subsection 3 of the Act, the cause of action to recover accrues on the date on which the demand was made; to wit, January 2008, in which event the claim was issued within the applicable limitation period."

[32] Counsel for the Claimant further submits that "in any event, the Claimant maintains that the 2007 payment into the Defendant's account of the sum of $1,050.00 constituted monies paid for and/or on behalf of the Defendant; the Claimant being trustee for the sale." Counsel contends that, "in this event, the issuance of the Claim similarly fell within any applicable limitation period."

[33] Counsel for the Claimant concedes that Ms. Jacobs under cross-examination, testified that (a) she agreed that the preamble to the Bill of Sale said that the entire amount of the loan was due and payable if any monthly payment was not paid when due, (b) having failed to pay after February 2001, the Defendant was in breach of the terms of the Bill of Sale.

[34] Counsel contends however that:

> "Notwithstanding that the non-payment could be said to trigger the obligation to repay, and that time would run from the date of non-payment, the English Court of Appeal in **Thakore (t/a Sunil Credit Finance) v Malik** has opined (and it is hereby submitted) that there must be "... some overt demonstration of the lender's requirement that the borrower be held at once accountable for the whole residue of the loan..."

Counsel submits that the sum falling "due and payable" does not found the cause of action for the purposes of limitation of action in the case at bar.

[35] Halsbury's Laws of England, Volume 28, page 447, at paragraph 866, states:

> "... In an action for money lent, it is a matter of construction of the contract to determine the date from which time will run. If a time is stipulated for repayment, the limitation period will run from that time; if the agreement provides that the occurrence or non-occurrence of a particular event is to trigger the obligation to repay, time will run from the date of that occurrence or non-occurrence. Where the contract, either expressly or by implication, provides that a demand by the creditor is a necessary prerequisite to the right to repayment, time will not start to run until such a demand is made."

[36] A similar point is made in Chitty on Contracts, Volume 1, 30th edition, page 1788, at paragraph 28-037:-

> "Where the contract of loan does provide for repayment of the debt on or before a fixed or determinable date, or does effectively make the obligation to repay conditional upon a demand for repayment or any other matter, it is a question of construction when the lender's cause of action accrues..."

[37] The relevant provision in the agreement, namely the Bill of Sale, which deals with the issue of the repayment of the loan, is contained in the preamble which states as follows:-

> "IN CONSIDERATION of the sum of $25,528.00 now paid to the Borrower by the Bank which the Borrower hereby acknowledges the Borrower doth hereby assign unto the Bank and its assigns All and singular the several chattels and things specifically described in the Schedule hereto (hereinafter called "the property") by way of security for the payment of the said loan of $25,528.00 with interest thereon accruing at the rate of 15.17% per annum calculated on so much of the said loan as shall from time to time remain unpaid for the period of the loan by 48 monthly payments of $713 on the 30th day of each month

commencing from the 30th day of August 1999, until the said loan and interest thereon are fully paid PROVIDED that if any monthly payment shall not be paid when due the whole balance of the loan unpaid on that date (less any interest accrued but unpaid) shall fall due for immediate payment with interest accruing on so much of the balance of the loan as remains from time to time unpaid at the rate of 18% per annum from the said date of default until payment."

[38] I am unable to give the above provision the construction contended by Counsel for the Claimant, namely that time did not begin to run until the Claimant made a demand for payment. This would mean that the Claimant, in the exercise of its "sole discretion", could make formal demand for payment eighteen rather than eight years after the date of the Defendant's last payment, or sixteen rather than six years after the vehicle was seized. This surely could not have been the intention of the parties to the Agreement.

[39] The submission of Counsel for the Defendant is that time properly commenced from the date of the Defendant's first missed payment. I agree with this submission. I find the case at bar in line with the case of **Reeves v Butcher**, cited by Counsel for the Defendant. Lindly L J in that case stated that: "... it has always been held that the statute runs from the earliest time at which an action could be brought." I find that on the true construction of the provision in Paragraph 37 above, there was no precondition that a demand be made in order for the obligation to repay to be triggered.

## CONCLUSION

[40] As stated above, I find that the Claimant's claim is statute barred, the claim having been filed outside of the limitation period. I wish to make the further point on the rationale behind the imposition of limitation periods.

In doing so, I can do no better than quote from Chitty on Contracts (supra) at paragraph 28 – 001 as follows:-

"It is the policy of the law that there should be an end to litigation and that "stale demands" should be suppressed. The reasons for this policy have been said to be: first, that defendants should be protected against claims being made on them after a long period during which they may have lost the evidence available to them to rebut those claims; secondly, that claimants should be encouraged not to go to sleep on their rights, but to institute proceedings without unreasonable delay; thirdly, that defendants should be in a position to know that, after a given time, an incident which might have led to a claim against them is finally closed... Accordingly, the legislature has laid down certain periods of limitation after the expiry of which no action can be maintained."

**ORDER**

[41] In view of the foregoing, I hold that the Claimant's case has not satisfied me on a balance of probabilities and I hereby dismiss it.

Judgment is entered as follows:-

1. The Claimant's case is dismissed.

2. Prescribed costs to the Defendant in accordance with the Eastern Caribbean Supreme Court Civil Procedure Rules (CPR) 2000.

JENNIFER REMY

High Court Judge