

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

[CIVIL]

SUIT NO.: DOMHCV2013/0180

BETWEEN: NATIONAL BANK OF DOMINICA LTD
Applicant/Claimant
And
PURPLE TURTLE DEVELOPMENT CO. LTD.
1st Respondent/1st Defendant
VINCENT ETIENNE
2nd Respondent/2nd Defendant
PATRICIA ETIENNE
3rd Respondent/3rd Defendant

APPEARANCES: Mr. Stephen Isidore and Ms. Ernette Kangal of Isidore & Associates
Counsel for the Claimant/Applicant
Mr. Glen Ducreay Counsel for the Defendants/Respondents

2013: November 15th

2014: March 14th

DECISION

[1] **THOMAS, J. (Ag.):** Before the court is an application filed by the applicant on 18th July, 2013 seeking an order that:

1. The Defence filed by the Defendants on 27th day of June, 2013 be struck out.
2. Upon the striking out of the Defence that judgment be entered for the Claimant .
3. The cost of the application be borne by the Defendants.
4. The time for the hearing of the application be abridged.
5. Further and/or other relief, that the court may deem fit.

- [2] The grounds of the application are:
- I. The claimant instituted debt recovery proceedings against the Defendants by the filing of a fixed date mortgage claim on the 21st day of May 2013. The Defendants filed their defence on June 27, 2013. The Defendants only defence to the claim is that it is statute barred. Such a defence is untenable as the claim is not statute barred.
 - II. The Defence does not disclose any reasonable grounds for defending the claim and is accordingly an abuse of the court process.
 - III. The maintenance of the defence in these proceedings serves no other purpose but to obstruct the fair and swift disposal of these proceedings.

[3] The affidavit in support is sworn to by Alana Dinnard, Recoveries Assistant of the claimant. The main issue deposed by the affiant is that the only defence alleged in the defendants' defence is that the claim is statute barred, which it is not.

Factual background

- [4] In the affidavit in support of mortgage claim the following is deposed at paragraphs 4 to 9 thereof:
4. By an agreement made on the 6th day of December 1996 between the Claimant Banque Francaise Commerciale, Banque Francaise Commerciale agreed to grant an overdraft credit facility to the Defendants with an authorized limit of \$20,000.00 together with original interest at the rate of 13.50 percent per annum (Overdraft Account No. 80606490061).
 5. It was further agreed by the parties that the said loan would be secured by an equitable mortgage over a portion of land at Borne in the parish of St. John, Commonwealth of Dominica containing 0.81 acres and registered in the name of Patricia Etienne in Book of Titles S3 folio 89 of the Register of Titles of the Commonwealth of Dominica.
 6. Pursuant to the said agreement the claimant disbursed the agreed loan amount of \$20,000.00 to the Defendants on the 6th day of December 1996.

7. The Defendants have failed and/or refused to meet their payment obligations in accordance with the aforementioned agreement. The last payment made by the said defendants was \$500.00 on 21st May 1998.
8. The amounts due from the defendants as at March 26, 2013 are: principal due but unpaid - \$30,826.15; Interest due but unpaid - \$41,942.77; Total due as at March 2013 - \$72,768.92.
9. By letter dated¹ March 20, 2013 a formal demand for payment was served on the defendants. The defendants have refused to pay.

Issue

[5] The issue for determination is:

Whether the claim filed on 21st May 2013, to recover a debt arising out of an overdraft facility which ended on 30th November 1997, is statute barred by virtue of the **Limitation Act 1980, U.K.**

Relevant Law

[6] It is common ground that by virtue of section 11 of the **Eastern Caribbean Supreme Court (Dominica) Act², the Limitation Act 1980, U.K.** is applicable to Dominica. The section referred to extensively in the submissions is section 20, which will be outlined and analyzed at a later stage.

Submission

[7] Learned counsel for the applicant, Mr. Stephen Isidore's, basic submission is that the action is not statute barred. This is reached by the following route: dicta from a number of cases and leading texts are quoted³; provisions of the Overdraft Agreement form executed by the parties are cited.

¹ It is to be noted that: AD1 & AD2 being true copies of the Overdraft Agreement and Guarantee Agreement; AD3- a true copy of the Certificate of Title and Memorandum of Deposit; and AD4 a true copy of the demand letter dated March 20, 2013 are exhibits to the affidavit in support of the said Alanna Dinnard

² Cap. 4:02 Laws of the Commonwealth of Dominica

³ Reeves v Butcher [1891-94] ALL ER Rep. 943; First Caribbean International Bank (Barbados) Limited (formerly Barclays Bank PLC) v Oriol Walter Claim No. ANUHCV2008/0386; Limitation Periods (6th ed.); Halsbury's Laws of England; Blackstones's Civil Practice, 2004.

[8] Against that background the following submissions are made on behalf of the applicant: there is evidence that the Overdraft Agreement provides for the entirety of principal and interest to become payable upon demand will rebut the assumption that the entirety of the outstanding sum falls due upon the date of redemption; under the **Limitation Act** the right to recover starts from the date when the right to recover the debt accrued; there was no time for repayment of the overdraft was agreed, and it was agreed that the overdraft will be repayable on demand, as stated at clause 4 of the Overdraft Agreement; a proper reading of the agreement would lead to only one conclusion that the facility was repayable on demand and not by monthly installment and there is no place in the loan documents where it was agreed that the overdraft facility becomes payable other than on demand.

[9] In submissions on behalf of the respondents/defendants learned counsel Mr. Glen Ducreay cites a number of authorities also cited on behalf of the applicant⁴. For him, the period 1997 to 2013 is more than significant in this context. Learned counsel's submission in essence is that the case came down to the proper instruction of the Overdraft Agreement, the **Limitation Act** 1980 U.K. and various authorities and the policy of the **Limitation Acts**, including the **Limitation Act of 1980**.

Relevant provisions of the Limitation Act, 1980

[10] The court determines that sections 5, 6 and subsections (1), (2) and (5) of section 20 are relevant.

Section 5 places a limitation of 6 years with respect to an action founded on simple contract, while section 6 seeks to make section 5 applicable to contract of loan which does not provide for repayment of the debt before a fixed or determined date; and does not effectively make the obligation to pay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any matter.

⁴ See footnote 3, supra

- [11] The foregoing conditions for the application of section 6 are conjunctive but the section goes on to create an exclusion to the application of the said section 6: "if there is a collateral obligation to pay the amount of the debt by, for example, delivering a promissory note in terms which would exclude the application of this section to the contract if they applied directly to repayment of repayment to the debt."
- [12] On an interpretation of section 6, the court comes to the conclusion that it is inapplicable since the conjunctive requirements in paragraphs (a) and (b) thereof are not met in the case at bar. For one thing, clauses 4 and 5 of the Overdraft Agreement serve to provide, expressly or impliedly, for the repayment of the debt on or before a fixed or determined date. In any event, the facility is for one year unless renewed or extended.
- [13] The foregoing rules out sections 5 and 6 and lets in section 20 of the said Act.
- [14] In the case at bar, both principal and interest are being sought by the applicant. This lets in subsections 20 (1), (2) and (5) which are in these terms:
- "20. (1) No action shall be brought to recover-
- (a) any principal sum of money secured by a mortgage or other charge on property (whether real or personal)
 - (b) the proceeds of sale of land,
- after the expiration of twelve years from the date of which the right to receive the money accrued.
- (2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued.
- (5) Subject to subsections (6) and (7) below, no action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of the proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due."
- [15] The fact that the case at bar involves the provision of real property as security rules out subsection 20 (2). This leaves subsection 20 (1) and (5) alone in the equation.

Reasoning

- [16] Learned counsel for the respondents/defendants in his submissions⁵ makes the point that both sides agree that subsections 20 (1) is the relevant provision in this case but that the reasoning and conclusions are different.
- [17] Therefore, for all present purposes the issue boils down to the twelve years limitation being applicable because the security for the principal sum of money secured is by way of the surrender of a certificate of title. So it is an "other charge on property." And the further issue is when is the twelve year period limitation period triggered.
- [18] In terms of the resolution of the issues, the court agrees with the submission by the learned counsel for the respondents that: "The case boils down to a determination of the matter as to a proper construction of the provisions of the Overdraft Agreement and interpretation and construction of the Statute: **Limitation Act** 1980 U.K. and the interpretation of the various authorities within the context of the policy justification, the enactment and enactment of the Limitation Act."
- [19] Learned counsel for the applicant comes to the conclusion that "without a doubt the overdraft becomes due on the last date for the payment requested in the demand." According to learned counsel, the claimant demanded payment of the overdraft within 14 days of receipt of the demand letter dated April 03, 2013.
- [20] Learned counsel arrived at this conclusion by examining the dicta and or holding in **Reeves v Butcher**⁶, **First Caribbean International Bank (Barbados) Limited v Oriel Walter**⁷ as well as learning at para. 447 of Vol. 28, **Halsbury's Laws** and Vol. 1 of **Chitty on Contracts**, at para. 28-037.

⁵ At paragraph 27 thereof

⁶ [1891-4] ALL ER Rep. 942

⁷ Claim No. ANUHCV2008/0386

- [21] In the main these authorities speak to the demand for payment in the context of sections 6 and 20 of the **Limitation Act**, 1980 U.K. or its predecessor. This does not create a difficulty where the relevant limitation period has not expired, whether it be six or twelve years. Learned counsel also placed reliance on clause 4 of the Overdraft Agreement which basically deals with the duration of the overdraft facility with an option to renew. Further, on the question of demand, clause 5 (b) of the said Agreement is quoted. This gives the bank, as one of the conditions of the facility, the right to close the account and demand payment of any outstanding sum.
- [22] What learned counsel for the applicant has failed to address is the circumstance where the six year or twelve year period has elapsed since the loan account has been closed or ceased to operate and its demand is then made. The question is whether that demand has legal effect in the context of the **Limitation Act**.
- [23] Learned counsel for the respondents submits that a demand has no legal effect especially in this case when the facility ended in November 1997 and the demand was made in March 2013.
- [24] The following represents a summary of the operative submissions on behalf of the respondents: the policy of the **Limitations Acts**, including the **Limitation Act 1980** is that state demands should be suppressed; a claim which has hibernated for seventeen years is one of cruelty and not one of justice; claims which are delayed give rise to difficulty for defendants to find evidence; the claimant confirms in its supplemental affidavit that several demands were made on the defendants regarding the debt but cannot locate the demand letters and the court is left to draw inferences whether the demands were in 1997, or 1998 or even 2012; the claimant has 'gone to sleep' on its rights; although 28 **Halsbury's Laws** cites section 6 of the **Limitation Act** as being applicable, the defendants contend that the said section 6 does not apply to an Overdraft Agreement; instead the applicable sections are sections 20 (1) and 20 (5) of the **Limitation Act**; applying the said sections 20 (1) and 20 (5) of the said act the statute started to run upon the expiration of the overdraft facility on 30th November 1997; in keeping with the ruling in **Reeves v Butcher** the right to bring

the action starts from the earliest time at which the action could be brought, and the earliest time is at the expiration of the overdraft facility on 30th November 1997; the Overdraft Agreement confers a decision⁸ upon the claimant to call in the loan at anytime after the expiration of the overdraft facilities but that discretion cannot be an unlimited and unfettered discretion and as such is limited by the maximum limitation period of 12 years by virtue of section 20 (1) in period of recovery of any principal sum of money; section 20 (5) refers to an action for the recovery of arrears of interest within a limitation period of six (6) years from the date on which the interest became due; the proposition at page 866 of Vol. 28 of **Halsbury's Laws of England** supports the defendants' submission that upon the occurrence of the expiration of the overdraft on 30th November 1997 the overdraft can be demanded and time will run from the date of the occurrence; in keeping with the proposition stated at para. 28 –03 Vol. 1 of **Chitty on Contracts**.

Conclusion

[25] In a real sense the case of **Reeves v Butcher**⁹ has all to do with the answer to the issue before the court. On account of its relevance, the headnote is reproduced in its entirety:

"By an agreement in writing, under which the plaintiff lent a sum of money to the defendant, the defendant agreed to pay interest quarterly, and the plaintiff agreed not to call in the money for five years if the defendant should regularly pay the interest. It was further provided that if the defendant should make a default in the payment of any quarterly payment of interest for twenty one days, the plaintiff might immediately call in the principal. Nothing was paid by the defendant on account of interest or principal. Within six years from the end of the term of five years the plaintiff commenced this action to recover the principal and also the interest due thereon for the period within six years before the date of issue of the writ.

HELD: The cause of action arose at the expiration of twenty-one days from the date when the first installments of interest became due, which was the earliest time at which the plaintiff could have brought the action, and, therefore, the plaintiff's claim was statute barred."

[26] Lindley, LJ gave one of the judgments in the case and reasoned in this way: "The Statute of Limitations, 1623, enacts that such actions as therein mentioned, including 'all actions of debt grounded upon any lending or contract without specialty', shall be brought 'within six years after the cause of such action or suit, and not after'. This expression 'cause of

⁸ Sic

⁹ [1891-4] ALL ER Rep. 943

- action' has been repeatedly the subject of decisions, and it has been held, particularly in **Hemp v Garland** decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events, but it has always been held that the statute runs from the earliest time at which the action could have been brought."
- [27] The two other justices concurred as to when the Statute of Limitations begins to run; and Lopes, LJ added the following: "When had the plaintiff a cause of action? When the default was made for twenty-one days in payment of an installment of interest **Hemp v Garland** is on point. It is said that this case is not good law, and that it has not been referred to for many years. I think it has been referred to because it has been acquiesced in, but it does not appear that it has ever been questioned."
- [28] It will be noted immediately that section 3 of the **Limitation Act 1623** and section 20 (1) of the **Limitation Act 1980** are not in *pari materia* in so far as the critical wording is concerned. For while the former says that all actions on debt grounded upon any lending on contract without specialty shall be brought within six years after the cause of such action on suit, and not after; section 20 (1) of the **Limitation Act 1980** ends with the words: "after the expiration of twelve years from the date on which the right to receive money accrued."
- [29] In **R B Policies at Lloyds v Butler**¹⁰, Streatfield J. had this to say: with respect to a loss in 1940 and a claim made in 1947:
- "I am not suggesting that the plaintiffs here are guilty of heartless or cruel conduct, but a claim made seven or eight years after the loss of the car against a perfectly innocent holder who has given good consideration for it without any knowledge that it was stolen does not seem just. I think that one object of this Act is to prevent injustices of that kind and to protect innocent people against demands which are made many years afterwards. In my view, the proper construction of the words 'the action accrued' involves the finding that the cause of action here accrued in 1940 when the car was stolen"
- [30] It is clear that the ratios in the cases is that once a right to demand money arises the demand must be made immediately. This is where a legal issue and policy arise. How has these been addressed?

¹⁰ [1949] 2 ALL ER 230.

- [31] In Vol. 28 of **Halsbury's Laws of England** at para. 266 in discussing the learning on the Policy of the **Limitations Acts** notes that: "The courts have expressed at least three different reasons for supporting the existence of statutes of limitation, namely (1) that long and dormant claims have more cruelty than justice in them¹¹ ; (2) that the defendant might have lost the evidence to disprove a state claim; and (3) that persons with good causes of action should pursue them with reasonable diligence."
- [32] The policy is also reflected in **Chitty on Contracts** at para 28-001, "That there should be an end to litigation and that 'state demands' should be suppressed." It is further stated that: "The state also has an interest in that trials are heard at a time when there is sufficient evidence and in promoting legal certainty from the benefit not only of potential defendants but also third parties."
- [33] Much of the foregoing came to a head in **First Caribbean International Bank (Barbados) Limited and Oriel Walter**¹² which essentially involved a loan in July 1999 to be repaid in 48 months, the last payment made was in February 2001 at which time there was a balance on the loan. An action was filed on 26th June, 2008 claiming the sum of \$62,988.48 outstanding as at 4th June, 2008. The question for the court's determination was whether the loan was statute barred.
- [34] Madame Justice Jennifer Remy presided and in holding that the claim was statute barred reasoned in part of follows:
- "38. I am unable to give the above provision the construction contended by Counsel for the Claimant, namely that time did not begun to run until the Claimant made a demand for payment this could mean that the claimant, in the exercise of its sole discretion could make a formal demand for payment eighteen rather than eight years after the date of the Defendant's last payment, on 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 on 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 is in line with the case of **Reeves v Butcher** cited by Counsel for the Defendant.
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 a further point on the

¹¹ In relation to this reason the cases cited are: *A'Court v Cross* [1825] 3 Bing 329, 332- 333 per Best CJ; *R B Policies at Lloyds v Butler* [1950] 1 KB 76,81,82; [1949] 2 ALL ER 229, 230 per Streatfield J.

¹² Claim No. ANUHCV2008/0386

rationale behind the imposition of limitation periods.”

[35] Given the authorities cited on both sides and in particular the case of **Reeves v Butcher** and the sequel thereto, the court cannot accept the applicant’s submission that the limitation period began from the date of the demand letter with respect to a debt that fell due in November 1997. Rather, the court accepts the submissions on behalf of the respondents that the demand letter of 20th March 2013, is entirely of no legal effect since the demand was made some 17 years after the right to receive the money accrued. It is outside the limitation period of 6 years and 12 years prescribed by sections 20 (1) and (5) of the **Limitation Act, 1980 U.K.**

Costs

[27] The applicant must pay the respondents costs in the sum of \$2,500.00.

Appreciation

[28] The court wishes to record its deep appreciation to counsel for research done in this matter.

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Errol L. Thomas
High Court Judge [Ag.]