

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)**

CLAIM No. DOMHCV2024/0103

BETWEEN:

REPUBLIC BANK (EC) LIMITED

Claimant

- and -

KONDWANI C WILLIAMS

Defendant

APPEARANCES:

Mr Benjamin Drakes, Counsel for the Claimant

Mr Lennox Lawrence, Counsel for the Defendant

2024: September 26
November 22

RULING

FACTS

- [1] **JAWARA-ALAMI, J.:** This claim, commenced by way of Fixed Date Claim Form and filed on 27th May 2024 together with an Affidavit in Support and Exhibits attached, seeking Judgment against the Defendant for monies received pursuant to three (3) loan facilities granted to the Defendant by the Claimant, in respect of which loans the Defendant has defaulted in repayment and the outstanding sum of which has been duly demanded, together with interest, expenses and costs as set out below (in respect of Credit Facility A/C No. 720100101767 for a total of \$175,657.56; Credit Facility A/C no. 720100101304 for a total of \$531,033.23; Credit Facility A/C No. 72010097798 for a total of \$741,344.51); Interest pursuant to the Judgments Act, Chapter 4.70; Costs; Further and/or in the

alternative, an order that the Mortgaged Property identified in the Land Titles Register Book as: Certificate of Title No.:1187 of 2008 and found in the Land Titles Register Book P17 Folio 5 be sold in accordance with the provisions set forth in the Title by Registration Act, Chapter 56:50; and Such further or other reliefs as this Honourable Court, deems just”.

Application to Strike

- [2] On 26th September 2024, Counsel for the Defendant filed a Notice of Application to Strike Out Statement of Case as it failed to disclose any reasonable grounds for bringing the claim and is otherwise an abuse of the process of the Court and that all proceedings or actions on the claim be stayed pending the hearing and determination of this Application. The Defendant relied on three grounds namely:
1. Legal and Factual Ground;
 2. Locus Standi and the absence of reasonable cause of action; and
 3. Limitation of Action Ground in support of the Application.
- [3] On Ground 1, the Defendant relies on Rules 26.3(1)(b), 26.3(1)(c), 8.7(1)8.8 and submits that the Claim is restricted to the factual assertions set out in the claim form and the Affidavit in Support of Mervin Burton, as well as exhibits “RBL1” to “RBL6” which includes interest outstanding on three alleged credit facilities as at May 22, 2024 which must undergird a legal basis for bringing the claim, otherwise the claim has no prospect of success and/or otherwise is an abuse of the process of Court. The Defendant also submits that the claim filed is devoid of any contractual relationship between the Claimant and the Defendant, that the Claimant is not a mortgagee for the purpose of the Title by Registration Act Chap 56:50, and/or is not a mortgagor for the purposes of CPR Part 66.1 and is incapable of filing a mortgage action.
- [4] On Ground 2, the Defendant submits that the Claim is devoid of any factual assertions of a contractual relationship between the Claimant and the Defendant. That the Claimant premised its claim on exhibits “RBL1” to “RBL4” which purports to establish a relationship between the Defendant and a third Party who is not part of this claim, and in the premises the Claimant has no locus standi to file the claim as pleaded; that the Claimant is not a mortgagee for the purposes of the Title by Registration Act and incapable of filing a mortgage action; the Claimant does not have and has not

established any legal standing for filing or sustaining any or any reasonable cause of action against the Defendant; and the claim filed is irreparably bad and is otherwise frivolous and vexatious and also an abuse of the process of the Court.

[5] On Ground 3, the Defendant submits that a mortgage claim properly constituted is subject to the provisions of the Limitation Act UK 1980. This claim filed by the Claimant, the Defendant submits, includes a demand for interest as set out at ground 1.6 but this demand whether by the Claimant or any third Party cannot be sustained as it is subject to limitation of action and the provisions of the Limitation Act 1980. The Defendant further submits that any and all claims for interest whether by the Claimant or otherwise unsustainable in law must be struck out even at this preliminary stage.

[6] In the Affidavit in Support, the Defendant disagrees with the assertions made by the Claimant, and avers that he never had any contractual or other legal relationship with the Claimant, neither negotiated or obtained any mortgage or financial facility with the Claimant as alleged or at all. In the Supplemental Affidavit, the Defendant indicates that the Claimant's exhibits "RBL1", "RBL2", "RBL3, and "RBL4" in support of the claim do not mention the Claimant as a party and are therefore inadmissible hearsay and an abuse of the process of the Court, accordingly, he prays that these exhibits be struck out entirely. The Defendant further submits that the said exhibits refer to a Third-Party bank which discontinued operations in Dominica since November 2019, there has been no banking activity on any facility whatsoever with that Third Party in excess of six years and thus these exhibits are inadmissible and unenforceable in law, in whole or in part and should be struck out. The Defendant also submits that he never negotiated loans with the Claimant as claimed in Exhibit "RBL6".

Notice of Opposition to Defendant's Application For Striking Out of the Claim

[7] The Claimant filed a Notice of Opposition to the Defendant's Application for Striking Out of the Claim (Rule 26.3(1)(b) on 14th October 2024 with Affidavit in Support on 15th October 2024 and Index of Authorities on 6th November 2024. The Claimant opposes the Application on the grounds that the claim does disclose reasonable grounds for bringing the claim and is not an abuse of process; the Defendant's assertion that the claim is "devoid of any contractual relationship between the Claimant

and Defendant” and that the Claimant is “not a mortgagee for the purpose of the Title by Registration Act Chap 56:50 and/or not a mortgage for the purposes of CPR Par 66.1 and so is incapable of filing a mortgage action”, are incorrect and/or misconceived in law.

- [8] In the Affidavit in Support of the Notice of Opposition sworn to by Mervin Burton, a relevant background is given. The deponent explains that the Claimant, a commercial bank carrying out the business of, among other things, lending money with interest thereon to customers from its branch located at 28 Hillsborough Street, Roseau, is also the successor to the Bank of Nova Scotia (BNS) having purchased its undertakings in the Commonwealth of Dominica including its assets, property, rights, liabilities and obligations by Local purchase Agreement and Deed of Assignment for Dominica dated September 20, 2019 between BNS and the Claimant. The deponent also avers that the Claimant is BNS’ successor of among other things, all rights, loans and receivables, that the banking business and undertakings of BNS transferred to the Claimant were made into law and vested in the Claimant by virtue of the Banking (Bank of Nova Scotia Banking Business Vesting) Order 2019, Statutory Rules and Orders No. 39 of 2019. Copies of the said Local Purchase Agreement and Banking Order were exhibited, as well as a copy of the Gazetted Banking Order published on Thursday October 24, 2019 at Vol. CXLII.
- [9] It is further averred that at all material times the Defendant was a customer of the Claimant, although the initial credit facility was written with BNS, the Claimant became the successor to BNS and its banking business including loans, and that from 2019 to present, the Defendant continued to hold accounts at the Claimant’s Roseau branch. Significantly, the Claimant avers that in January 2024 the Defendant contacted the Claimant’s Roseau branch and requested that he be provided with current balances at that time which was issued to him via letter dated January 16, 2024, however the Defendant never made good on his indication that he would settle these balances.
- [10] The Claimant disagrees with the Defendant’s assertion at paragraph 5 of his Affidavit filed on 26th September 2024 that he “never had any contractual or other legal relationship with the Claimant” as this statement is inaccurate and/or untrue since vesting of the banking business from Bank of Nova Scotia to the Claimant in or around 2019. Thus, the Claimant submits that it does have locus standi to file and maintain the present mortgage action, denies that the claim is frivolous, vexatious or an

abuse of process. The Claimant asserts that the Defendant's application seeks to avoid repayment of debts lawfully due and owing to the Claimant on technical grounds and is contrary to the overriding objective, and further that striking out of the claim in the circumstances would be inequitable and unduly prejudicial to the Claimant.

Issues:

- [11] The application was heard by way of written submissions and having heard the arguments and perused the affidavits and exhibits, the issues to determine this application are formulated as follows;

Issue 1: Does the Claimant have *locus standi* to bring the present claim?

Issue 2: Is the Claimant's claim and claim for interest barred by virtue of the Limitation Act 1980?

Resolution of Issue 1

- [12] **Does the Claimant have locus standi to bring this claim against the Defendant**

The Claimant submits that the mortgage in question was provided to the Defendant subject to a credit facility on certain terms and conditions set out in a Commitment Letter dated November 2, 2011 between the Bank of Nova Scotia (at the time) and the Defendant. Pursuant to the General Terms of the Commitment Letter, it was expressly agreed by the Defendant that the Commitment Letter "shall inure to the benefit of and shall be binding upon the parties and their respective successors and permitted assigns".

- [13] Mervin Burton in his affidavit avers that the Claimant is the successor to the Bank of Nova Scotia (**BNS**) having purchased BNS's undertakings in the Commonwealth of Dominica including its assets, property, rights, liabilities and obligations by a Local Purchase Agreement and Deed of Assignment dated September 20, 2019 **Exhibit A**. On close perusal of Exhibit A and in particular clause 4, which provides as follows, that;

"(4). Assumed and Retained Liabilities

(a) Effective as of the Closing Date, the Buyer assumes in full in accordance with their terms and agrees faithfully to pay when due and perform and discharge in full in accordance with their terms, the Assumed Liabilities in the Local Jurisdiction, including the Liabilities listed

in paragraphs (a) through (i) of the definition of Assumed Liabilities in the Purchase Agreement in the Local Jurisdiction”.

[14] Still on the LPA, Schedule B to the agreement, defines the local purchased assets as

‘Means the following assets of the Branch Business in the Local Jurisdiction:

(a) the Cash Items;

(b) the Loans;

(c) the Branch Real Property Leases;

(d) the Branch Real Property;

(e) the Receivables;

(f) the Fixed Assets;

(g) the Branch Contracts,

(h) the Branch Books and Records;

(i) the Dominica Transferred Tax Refund; and the Customer Books and Records.

[15] Further to Exhibit A, Exhibit B contains the **Banking Order the Banking (Bank of Nova Scotia Banking Business Vesting) Order, 2019, Statutory Rules and Orders No. 39 of 2019** (the **Banking Order**). A copy of the Banking Order is annexed to the Affidavit as **Exhibit B**, which is advertised in the Dominica Official Gazette published on October 24, 2019 at Vol. CXLII annexed as **Exhibit C**.

[16] It is trite that courts of law are enjoined to take judicial notice of all enactments, Rules and Notices in the official Gazette, and this provision is usually found in the Evidence Act of most jurisdictions. It is in respect of this therefore, that I take judicial Notice of Exhibit C and hold it as valid.

[17] It is also fact that the Defendant was a customer of the Bank purchased by the Claimant who in effect also purchased his loan as part of the Bank’s assets above. This is proved by **Exhibit D** annexed with the affidavit in support as exhibit, under the heading **General, Successors and Assigns** that it was expressly agreed by the Defendant that:

“This Commitment Letter shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and permitted assigns.” (emphasis added)

- [18] Black's Law Dictionary defines successor as ***“a person who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor. 2. A corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation¹”***.

The commitment letter therefore is a contract initially between the defendant and the selling bank and now with the purchasing bank. Thus the defendant's contention that The Commitment Letters and exhibit RBC1 are specifically between the Scotia Bank and the Defendant and that there is no provision defining any Party to include their successor, transferee or assignee is misconceived.

- [19] For these reasons therefore I am of the firm view that the Claimant has locus standi to bring this claim, the Claimant herein is the successor of the Bank of Nova Scotia and therefore has properly commenced the mortgage claim under the **Title by Registration Act² (TRA)** and CPR 2023.

Resolution of issue 2- Is the Claimant's claim and claim for interest barred by virtue of the Limitation Act 1980?

- [20] It is the contention of the Defendant that Scotia Bank has brought an action on this mortgage when 12 years has elapsed from the grant of the mortgage facility. The defendant also contends that in the circumstances the claim does not set out any basis for the setting aside of the limitation period, whether twelve (12) years for the full limitation of action on principal or 6 years on interest

- [21] The defendant places extensive reliance on Section 20 of the Act, reproduced below for ease of reference as follows;

“20. Time limit for actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land

(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); or

(b) proceeds of the sale of land;

¹ At page 4452

² Chap. 56: 50 of the Laws of the Commonwealth of Dominica.

after the expiration of **twelve years from the date on which the right to receive the money accrued**".(emphasis mine)"

[22] It is the law that to determine whether an action is caught by the limitation period, it is necessary to first find out the nature of the cause of action and when it arose. The settled law is that in the determination of the cause of action, it is the statement of claim only that must be looked at. In other words, to determine what the cause of action is in a particular suit, the Court is required to examine only the averments in the pleadings of the Plaintiff as disclosed in the claim form and statement of claim. The most important phrase here is **"a cause of action"**. I say so because it is the be all and end all of claims that are statute barred. A cause of action will therefore arise on the date when a breach or any step taken would warrant a person who is adversely affected by an act of another to seek redress in court.

[23] The determining factor therefore is the Claim form and the averments in the statement of claim of the Claimant and in this case instant, the affidavit in support of the claim form deposed to by Mervin Burton on 24th May 2024. Now, Mervin Burton deposes that;

"It was a condition of the commitment letter and Personal Credit Agreement, that the Defendant would pay to the ***Claimant monthly instalments inclusive of interest towards the repayment of the loan until liquidation of the debt. However, in breach of this agreement, the Defendant failed, refused and/or neglected to make the monthly payments.***

Based on the Claimant's records, in relation to commercial loan Account No. 720100101304:

the Defendants made Fifty-one (51) payments, totalling \$212,862.73 which were blended payments inclusive of principal and interest;

there are One Hundred and Twenty-nine (129) payments totalling \$525,818.23^[LTT] outstanding repayments as at the 22d day of May, 2024".

[24] Further, in relation to commercial loan Account No. 720100101767:

a. the Defendant made no payments which were blended payments inclusive of principal and interest;

b. the sum of \$171,442.56 is outstanding repayment as at the 22nd day of May, 2024.

[25] In relation to residential mortgage loan Account No. 720100097798:

- a. the Defendants made Fifty-eight (58) payments, totalling \$215,165.17 which were blended payments inclusive of principal and interest;
- b. there are Three Hundred and Two (302) payments totalling \$736,129.51 outstanding

[26] The commitment letter further provides under **TERM AND REPAYMENT:**
ARRANGEMENT as follows;

Repayable in 59 monthly blended instalments of principal and interest of XCD 3,507.24 applied first to accrued interest, commencing 30 days after the initial advance, and a final payment on the 60th month of the balance of principal and accrued interest then outstanding. The term of the loan is five (5) years and the amortization is fifteen (15) years. A non-refundable Commitment Fee of XCD 3,670.00, being one percent of XCD 367,000, is payable on acceptance of this Commitment Letter.

[27] Counsel cites the case of *Reeves v Butcher* (1989) 2 OB 509 CA. The agreement in that case provided that where any instalment 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.

[28] In this case at bar, the term of payment was 5 years and the amortisation is 15 years. This means that the loan has a term of 5 years but an amortization period of 15 years. This makes the situation different from the case of *Reeves* above which clearly indicated an expiry period. One would argue that the limitation period for enforcing the debt should start at the end of the amortization period as the borrower now has an option to re-finance the loan at the end of 5 years up to 15 years. The Cause of action in this case would arise when the lender's actions indicate immediate enforcement intent.

[29] Since the cause of action accrued when the Defendant defaulted in the re-payment of the loan contrary to the terms of the commitment agreement, the next step is to establish when the claimant took steps to seek redress? The affidavit of Mervin Burton avers that;

“On June 1, 2022, Harris, Harris & Didier, then Counsel for the Claimant, on instructions, wrote the Defendant demanding payment of the then outstanding balances of \$469,332.71 with respect to account number 720100101304, \$148,411.65 with respect to account number 720100101767 and \$642,363.19 with respect to account number 720100097798 inclusive of principal and interest. A copy of the said demand letter dated June 1, 2022 is Exhibited and marked as "RBL6".

Based on the above therefore, the cause of action in this matter arose on June 1st 2022 when the demand letter for the repayment of the loan was issued which is when the claimant took enforcement action.

- [30] Having said this, assuming that the contentions of the defendant are correct, Section 32 of the limitation Act would in any event postpone the limitation period in case of fraud, concealment or mistake. **Section 32 (1)** provides as follows: -

“(1) Subject to the provisions of subsection (3) of this section, where in the case of an action for which a period of limitation is prescribed by this Act, either-

(a) the action is based upon the fraud of the defendant;

(b) a fact relevant to the plaintiff's right of action has been deliberately concealed from him or her by the defendant; or

(c) the action is for relief from the consequence of a mistake”.

- [31] The Claimant herein has not alleged any fraud or mistake on the part of the defendant in failing to pay the loan due to the Claimant and the present action is not based on the fraud of the defendant nor does it involve relief from the consequences of mistake. This leaves the question of concealment and it is settled that the period of limitation does not begin to run until the Claimant discovers the fraud, concealment or mistake, as the case may be or could with reasonable diligence have been discovered.

- [32] Based on the available affidavit evidence and in particular the affidavit evidence of the defendant in which he has denied a contractual relationship with the Claimant and raises the defence of limitation and lack of locus standi. Yet, the defendant has exhibited Exhibits RBL1 to RBL6 which included the commitment letter for the loan facility from the Claimant's predecessor. There is no way therefore that

one can say that the defendant did not conceal the loan, having in his possession the exhibits mentioned. The defendant has always been conscious of the loan, why then would he default in the payment of the loan and then mis-conceivably believed that the Bank was no longer operational. In thinking such, he has in effect deliberately concealed from the claimant the loan that he has utilised and enjoyed for his benefit. His actions in January 2024 where he contacted the Claimant's Roseau branch and requested, unprompted, that he be provided with current balances at that time which was issued to him via letter dated January 16, 2024, buttresses the fact that there was deliberate concealment on his part.

- [33] The body of English case law after 1980 makes it clear that any conduct involving recklessness or turning a blind eye or unconscionable conduct would all seem to fall within the ambit of the words '**deliberate concealment: Westlake v Bracknell District Council**³'. With regards to the issue of interest, it is well settled that by practice, usage and custom of banking, banks charge interest on loans, overdrafts and other financial facilities granted to their customers. As long as a credit facility of whatever nature is granted to a customer by a bank remains outstanding, the bank is entitled to charge interest thereon. This is simply because it is part of the business of banking to grant credit facilities, and since it is not a non-profit organization, it must charge reasonably for that service.
- [34] Coming back to the application for striking out at bar, it is apparent that the crux of the Defendant's application is that the Court may strike out a Statement of Case or part of a Statement of Case if it appears to the Court that the Statement of Case or the part to be struck out does not disclose any reasonable ground for bringing the claim, or if it is an abuse of the process of the Court.
- [35] A plethora of authorities have provided that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence: **Ian Peters v Robert George Spencer**⁴ The Court of Appeal has also held that the striking out of a party's statement of case, or most of it, is "a drastic step which should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that the claim is obviously unsustainable, cannot

³ Westlake v Bracknell District Council [1987] 10 HLR 375

⁴ ECSC Civil Appeal No. 16 of 2009 [Antigua]

succeed or in some other way is an abuse of the process of the court”: **Tawney Assets Limited vs East Pine Management Limited et al**⁵.

- [36] Having found that the Claimant has locus standi to bring this suit and that the claim is not caught by the limitation Act, I am of the firm view that the claim form and affidavit in support raise serious issues of fact which can only be properly determined at trial and refuse the application to strike out the claimant’s case.

Hon. Justice Zainab Jawara- Alami
High Court Judge

BY THE COURT

REGISTRAR

⁵ BVIHCVAP2010/007