

EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. AXAHCV 2024/0074

BETWEEN:

CARIBBEAN COMMERCIAL BANK (ANGUILLA) LTD.

Claimant/Respondent

and

TOSH SHARNII CARTY BIN-NASSIR

Defendant/Applicant

Before: His Lordship, The Honourable Justice Ermin Moise

Appearances:

Mrs. Jacinth Jeffers of counsel for the Claimant/Respondent.
Defendant/Applicant self-represented.

2025: January 28,
March 28.

DECISION

- [1] **MOISE, J.:** This is the court's ruling on a preliminary point raised by way of application of the Defendant. The narrow question is whether the **Limitation Act**¹ applies to the statutory power of sale contained in the **Registered Land Act (RLA)**² in Anguilla. I have determined that the **Limitation Act** does not apply. These are the reasons for my decision.

The Facts

- [2] The Claimant, Caribbean Commercial Bank (Anguilla) Ltd. (CCB) is a commercial bank in receivership. The Defendant Tosh Sharni Carty- Bin Nassir (Mr. Bin Nassir) is the owner of a parcel of land registered in the Land Registry of Anguilla as South Central Block 38511B Parcel 90. In 2007

¹ R.S.A. c. L60

² R.S.A. c. R30

and 2009, respectively, the parties entered into a loan agreement which was secured by way of mortgage as a charge registered against Mr. Bin Nassir's property. It is not disputed that Mr. Bin Nassir has defaulted on this loan. CCB seeks to have the property sold by auction. Notice was provided to Mr. Bin Nassir of this intention on 11th November, 2024.

- [3] It is alleged, however, that Mr. Bin Nassir is interfering with this process and failing to provide access to the property. CCB has commenced litigation to direct that Mr. Bin Nassir provides the necessary access to the property in order to move forward with the auction. Mr. Bin Nassir has argued that the debt is statute barred in accordance with the **Limitation Act** and therefore prevents CCB from proceeding with the sale. He has therefore filed an application for the claim against him to be struck out.
- [4] There is, however, a dispute of fact, in that CCB argues that the last payment and acknowledgement of the debt was in 2016 and 2017 respectively. If this fact turns out to be accepted by the court, then the limitation of 12 years would not have expired in any event. I have therefore dismissed Mr. Bin Nassir's application on that point alone, as this dispute of fact is a trial issue. However, it is perhaps important to rule on the question of the applicability of the **Limitation Act** to the statutory power of sale under the **RLA** in general as this is an issue which has arisen in litigation more recently.

The Limitation Act

- [5] Although Mr. Bin Nassir was persistent in referring to section 18 of the **Limitation Act** in his submissions, it is clear that the section he relies on is section 17. This section states as follows:

- (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of 12 years from the date when the right to receive the money accrued.*
- (2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of 12 years from the date on which the right to foreclose accrued but if, after that date the mortgagee was in possession of the mortgaged property, the right to*

foreclose on the property that was in his possession is not, for the purposes of this subsection, deemed to have accrued until the date on which his possession discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge is not deemed to accrue so long as that property comprises any future interest or any life insurance policy that has not matured or been determined.

(4) Nothing in this section shall apply to a foreclosure action in respect of mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action.

[6] The first observation to be made here is that it is quite clear in subsection (4) that these provisions of section 17 do not apply to foreclosures of mortgaged land. In any event, subsection (1) refers to actions to recover principal sums secured by mortgage. It is stated in the interpretation section of the Act that action includes any proceeding in a court of law. As I will examine later on, there is no requirement to commence proceedings in court to invoke the statutory power of sale in the **RLA**. Subsection (2) of section 17 does not refer to foreclosure of land, but rather “personal property” and is therefore not applicable to the present proceedings. The limitation as outlined in section 17 is therefore of no relevance to the statutory power of sale being exercised by CCB.

[7] However, at the hearing of the matter I asked counsel for CCB to consider whether the provisions of section 5 of the **Limitation Act** may apply. This was because of the express wording of section 17(4) which states that ***[n]othing in this section shall apply to a foreclosure action in respect of mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action.*** Section 5(3) of the Act states as follows:

No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person but, if the right of action first accrued to the Crown or a spiritual or eleemosynary corporation sole through whom the person bringing the action claims, the action may be brought at any time before the expiration of the period during which the action could have been

brought by the Crown or the corporation sole, or of 12 years from the date on which the right of action accrued to some person other than the Crown or the corporation sole, whichever period first expires.

- [8] It is important to also note the provisions of section 1(5) of the **Limitation Act** which states that ***“A reference in this Act to a right of action to recover land shall include a reference to a right to enter into possession of the land or, in the case of rent charges, to distrain for arrears of rent, and a reference to the bringing of such an action shall include a reference to the making of such an entry or distress.”*** This is relevant insofar as it relates to the various methods of enforcement of a mortgage debt and is an issue to which I will return later on in this decision.

The Registered Land Act (RLA)

- [9] Insofar as it relates to the statutory power of sale the relevant provisions of the **RLA** are sections 72 and 75. Section 72 states as follows:

(1) If default is made in payment of the principal sum or of any interest or any other periodic payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for 1 month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within 3 months of the date of service, with a notice served on him under subsection (1), the chargee may—

- (a) appoint a receiver of the income of the charged property; or***
- (b) sell the charged property;***

but a chargee who has appointed a receiver may not exercise the power of sale unless the charger fails to comply, within 3 months of the date of service, with a further notice served on him under that subsection.

[10] Subsections 1 and 2 of section 72 outline the statutory power of sale and the circumstances under which it may be exercised. It is clear from the sections that no court action is required in order to proceed with the sale of property for default on the part of the chargor. There is also no requirement for the mortgagee to take possession of the property in order to invoke the power of sale. Subsection (3) of section 72 also gives a separate right to the chargee to sue in court for the recovery of the debt. That is another remedy available for breach. However, it appears that such an approach is not recommended as a first option as the subsection goes on to state that ***“the Court may, at its discretion, stay a suit brought under paragraph (a) or (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property.”***

[11] Section 75 of the RLA makes more specific provision for the statutory power of sale. The section states that:

- (1) A chargee exercising his power of sale shall act in good faith and have regard to the interest of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy at the auction and to resell by public auction without being answerable for any loss occasioned thereby.***
- (2) Where the chargor is in possession of the charged land or the land comprised in the charged lease, the chargee shall become entitled to recover possession of the land upon a bid being accepted at the auction sale.***
- (3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.***
- (4) Upon registration of a transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the***

charge, or on account of any other encumbrance to which the charge has priority (other than a lease, easement, conservation easement, restrictive agreement, environmental restrictive agreement or profit subsisting at the time the charge was effected or to which the chargee has consented in writing).

(5) A chargee, in exercising his power of sale, shall have the same powers and rights in regard to easements and restrictive agreements as are conferred upon a proprietor by sections 93 and 96.

[12] One observation to be made here is that sections 72 and 75 of the **RLA** do not give the chargee a right of possession of the premises upon default of payment. Subsection 2 of section 75 states that the right to take possession of the premises accrues ***upon a bid being accepted at the auction sale***. The statutory right of sale is therefore not to be misconstrued with the right to enter into possession of the property.

Submissions and Findings

[13] Mr. Bin Nassir submits that the limitation begins to run from the date of the last payment of the debt and as such a foreclosure is statute barred if 12 years have passed since the last payment date. As I have noted earlier, there is a dispute as to the date of last payment. If CCB succeeds in proving that the debt was last paid in 2016 and last acknowledged in 2017, then there can be no argument that the limitation will apply.

[14] CCB acknowledges that a limitation period will generally apply against actions to recover debts secured via mortgage. The court was referred to the case of ***FCIB v. TC Enterprises Limited et al***³ in which it was found that a 12 year limitation existed in circumstances where there was a shortfall in the balance of the debt due after the mortgaged property had been sold. Indeed, if CCB was seeking to enforce this debt by way of court action there would be no doubt that a limitation would apply if the date of last payment or acknowledgement of the debt had exceeded 12 years. A similar situation would have arisen if CCB was seeking to take possession of the premises. It is clear that section 5(3) of the **Limitation Act** would prohibit CCB from doing so. Further authority for that proposition can be

³ High Court Civil Claim No. 422 of 2009

found in the case of **National Westminster Bank PLC v. Robin Ashe**⁴ where Lord Justice Mummery noted the following at paragraphs 87 and 88 of his judgment:

“In summary, the Bank had a right of action. More than 12 years passed since it accrued afresh. Mr & Mrs Babai’s continued possession of the Property with the apparent leave and licence of the Bank did not prevent them from being persons against whom the Bank’s right of action to recover the Property arose on the granting of the legal charge, which right is treated as having accrued afresh when a payment in respect of it was made. Nor did it prevent Mr & Mrs Babai from being persons in whose favour time can run under the 1980 Act. According to the ruling in Pye their possession was “adverse possession” within paragraph 8.

The question of a mortgagee’s right to possession of the mortgaged land vis-a vis the mortgagor and the impact of the 1980 Act did not arise for consideration in Pye, but the meaning given to “adverse possession” in Pye is of general application to actions for the recovery of land, even though it may come as an unpleasant surprise to the Bank and other mortgagees that their mortgagors are in adverse possession of the mortgaged property.”

[15] The court there determined that the bank accrues a right to take possession of the mortgaged premises upon default of payment of a monthly instalment. If there is a part payment or an acknowledgment of the debt in keeping with the provisions of the **Limitation Act**, time begins to run afresh. If not, the chargor remains in adverse possession of the property and the provisions of the **Limitation Act** therefore apply.

[16] Whilst the provisions of the **Limitation Act** under consideration by Lord Justice Mummery are the same as contained in the legislation in Anguilla, there is one important distinction to be drawn here. The court was there dealing with a right to enter into possession of the premises. That right clearly falls within the definition contained in section 1(5) of the **Limitation Act** here in Anguilla. However, in Anguilla sections 72 and 75 of the **RLA** deal specifically with a statutory power to sell. That does

⁴[2008] 1 WLR 710

not fall within the definition outlined in section 1(5) of the **Limitation Act** and takes the actions of the bank outside of the scope of sections 17 and 5 of that very Act. In light of that, counsel for CCB refers the court to the case of **Dagor Limited v. MSB Limited et al**⁵, emanating out of the High Court in Jamaica. The following was noted at paragraph 11 of that judgment:

“There is, it appears, no time limit on the exercise of the statutory power of sale contained in the Registration of Titles Act. The mortgage is a charge on the land. This is notified to the entire world. At any time at which the premises are sold the mortgagee is entitled to be discharged in priority to all others even the mortgagor. It would be odd indeed if in such circumstances a mortgagee could lose its right to be paid merely because he elected to rely on the security of a registered interest (or charge) rather than pursue litigation or force a sale of the premises. There may after all be many good reasons why the sale is postponed: market conditions, sympathy with the mortgagor or satisfaction with the security held. I agree with learned queen’s counsel that the authority relied upon by Claimant’s counsel concerned a conveyance and hence a mortgage on common law title. No statutory power of sale was considered. Furthermore the appellant who claimed the possessory (or adverse) title, was the mortgagor’s brother. The court was therefore correct to hold that neither the mortgagee or its successor in title could defeat the third party’s possessory title.”

[17] In that case it was recognized that a right to enter into possession or to commence court action was potentially statute barred. However, the learned judge there went on to note that “... **the Limitation of Actions Act does not apply to the exercise of the mortgagee’s statutory power of sale.**”⁶ Having taken the time to carefully consider this issue, I agree with that sentiment. There is nothing in the **RLA** which places a limitation on the power of sale and the specific wording of the **Limitation Act** does not cater for such a limitation to apply to the exercise of such a power.

[18] I make just one final point at this stage. At the hearing of the application, I enquired of counsel for CCB as to whether the natural effect of the **RLA** is to create a perpetual right on the part of the

⁵[2015] JMSC CIV 242

⁶I note here that the Court of Appeal of Jamaica declined to interfere with, or affirm, this decision of Batts J when it was raised in an interlocutory appeal in the case of **Nunes v. Jamaica Redevelopment Foundation** [2019] JMCA Civ 20. Insofar as I have been able to ascertain, this decision in **Dagor Limited** has therefore not been the subject of appellate review.

chargee to sell the premises regardless of the period of default on the part of the chargor. Perhaps it is important to give some consideration to the public interest element which is inherent in the enactment of the **Limitation Act**. In the case of *National Westminster Bank PLC v. Robin Ashe*, Lord Justice Mummery noted that “... ***the aim of the statutes of limitation is to prevent citizens from being oppressed by stale claims, to protect settled interests from being disturbed, to bring certainty and finality to disputes and so on. These are important aspects of the public interest.***” However, the learned judge went on to note that “***the real public concern in this appeal, which I would agree is of considerable interest to mortgagees and mortgagors in general, is in this court determining the private property rights of the parties in accordance with law, as enacted in the 1980 Act, rather than by reference to the possible consequences of the decision and other public interest factors.***”

Conclusion

[19] In light of this it appears to me that the **Limitation Act** does not contemplate, nor does it make provision for, a limitation to be placed on the statutory power of sale which has been vested in the chargee by virtue of the **RLA**. The **RLA** itself does not prescribe an actual limitation period. What it does, however, is to mandate that a ***chargee exercising his power of sale shall act in good faith and have regard to the interest of the chargor.*** It may be that a circumstance may arise where an equitable estoppel may be argued and applied. However, I have concluded that the statutory power to sell as contained in the **RLA** is not fettered by the **Limitation Act**.

[20] In the circumstances of this case the application to strike out the claim has already been dismissed as there are triable issues to be considered. In light of this finding the court will proceed to hear the Claimant’s case as to whether it is entitled to the orders which it seeks in the claim form and statement of claim.

Ermin Moise
High Court Judge



BY THE COURT

REGISTRAR