

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2019/0452

BETWEEN:

ACB BANK LIMITED formerly RBC ROYAL BANK

Claimant

And

KENYATTA THOMAS

Defendant

Appearances:

Benjamin Drakes of counsel for the Claimant

Stacy Ann Saunders Osbourne of counsel for the Defendant

2022: June 7th

2023: April 12th

JUDGEMENT

- [1] **Drysdale, J:** This matter concerns a claim for monies received pursuant to a loan facility granted to the Defendant by the Claimant of which loan the Defendant defaulted in repayment.

THE FACTS

- [2] The facts relating to these proceedings are largely unchallenged. In or around March 2012 the Defendant obtained a loan in the amount of \$88,300.00 from the Claimant

to purchase a used 2004 Infinity FX45 motor vehicle. A Promissory Note was executed on 25th March 2010 and the Defendant agreed to repay the said principal sum together with interest at the rate of 12.93% per annum. It was also a term of the agreement that an interest rate of 14.45% per annum would apply on any defaulted payment from the date of the default until payment.

- [3] The Defendant also executed a Bill of Sale on 25th March 2010 as a means of security for the loan facility. The Bill of Sale was duly registered on the 1st April 2010. However the Bill of Sale was not renewed within 5 years of registration.
- [4] The Defendant eventually defaulted on his loan payments and fell into significant arrears. The Claimant repossessed the vehicle and eventually on or about 19th October 2016 sold the same. The proceeds realized from the sale of the motor vehicle were \$10,000.00. From this sale the Claimant paid the auctioneer's commission fee of 10% which amounted to \$1,000.00. Thus, the sum of \$9,000.00 was applied to the outstanding debt. However, the expenses incurred by the Claimant in the repossession and sale of the said motor vehicle amounted to \$13,099.46.
- [5] As at 19th October 2016, the outstanding principal due and owing stood at \$74,709.06 with the total interest accrued as at the said date being \$49,154.34 which together totaled \$123,863.40.
- [6] The Defendant was notified of the outstanding sums due and owing to the Claimant but failed or refused to repay the balance due and owing. A demand letter was issued but yielded no results. Accordingly, the Claimant initiated these proceedings and claimed the following reliefs:

- i. \$65,709.06 being the principal outstanding as at the 22nd of August 2019.

- ii. \$76,132.44 being the interest outstanding from the 31st day of March 2012 to the 22nd of August 2019.
- iii. Interest accruing on the principal s Sum of \$65,709.06 at the rate of 14.45% per annum or daily rate of \$26.02 from the 23rd of August 2019 until judgment.
- iv. Expenses associated with the repossession and sale of the motor vehicle to the tune of \$13,099.46.
- v. Interest pursuant to the Judgments Act, Cap. 227.
- vi. Costs.
- vii. Such further or other relief as this Honourable Court deems just.

THE EVIDENCE

The Claimant

- [7] Mr. Ira Charles gave evidence on behalf of the Claimant. He testified that he became familiar with the Defendant and the Claimant's loan to the Defendant when the Defendant sought vehicle financing on or about 5th March 2010. He relied on the Promissory Note and Bill of Sale of the 25th March, 2010 as evidence of the loan and its terms.
- [8] He averred that the Defendant defaulted on the loan on or about 31st January, 2012 and so the Defendant's motor vehicle was seized on the 9th June, 2013. He further averred that a formal demand letter dated 12th September, 2013 was issued to the Defendant and the motor vehicle was sold at public auction for the sum of EC\$10,000.00 on the 9th October, 2016.
- [9] He confirmed under cross-examination that the Bill of Sale was not renewed after five (5) years. He also gave further evidence about the steps which were taken by the Claimant to advertise and sell the motor vehicle after it had been repossessed.

The Defendant

- [10] The Defendant concedes that he took a loan from the Claimant in the sum of EC\$88,300.00 with interest at the rate of 12.93% per annum. The Defendant further conceded that he defaulted on his monthly instalments of EC\$1,603.00 and the motor vehicle was seized and sold by the Claimant.
- [11] The Defendant however contended that he is not liable to the Claimant on the claim herein on the basis that the Bill of Sale became void when it was not registered after five (5) years. The Defendant also contends that the Claimant's claim is statute barred.

THE LEGAL SUBMISSIONS

The Claimant

- [12] The Claimant's argues that the nature of a bill of sale it being security for a loan, renders it subject to section 22 of the Limitation Act and not section 7 as alleged by the Claimant. Section 22 provides a timeframe of 12 years to commence such proceedings. The Claimant relied on decision of **First Caribbean International Bank Limited v T.C. Enterprises Limited et al**¹ to support this contention. Thus, the Claimant argues that the parties having agreed that the Claimant's right to initiate proceedings accrued on 1st June 2012 and the Mortgage Bill of Sale being a security, the Defendant must also accept that the limitation period for this suit expires on 1st June 2024. Thus, the Claimant submits that the seizure and sale took place within the relevant limitation period.
- [13] The Claimant also argues that the purpose of the Bill of Sale registered is to give the holder or grantor under an instrument the power to seize or take possession of the personal chattel as security for a debt. That seizure and possession of the mortgaged motor vehicle was taken by the Claimant during the subsisting registration of the Bill of Sale. Thus, the subsequent disposal of the motor vehicle for satisfaction of the debt, was not impugned by the later expiration of the Bill of

¹ SLUHCV 2015/0860

Sale, since a mortgagee already in possession of the motor vehicle before expiration of the Bill of Sale, retains the benefit of its possession, including the right to sell and the Defendant's obligation to reimburse all expenses incurred.

- [14] The Claimant further submits that pursuant to the decision in **Sagicor Finance v Glenis Remis**² that it is permitted to recover the balance owing on the principal in the sum of EC\$80,300 as well as the interest that has accrued and continues to accrue at the rate of 14.45% and any other associated costs of the sale of the vehicle.

The Defendant

- [15] The Defendant argues that pursuant to section 9(1) of the Bill of Sale Act, that a bill of sale will have no effect and enforceability if registration and renewal of registration is not complied with. The Defendant relied on the case of **Donald Archibald v Andrew Hubley**³ in support of this contention.
- [16] The Defendant argues that although the seizure took place when the Bill of Sale was valid that any action that took place after 2nd April 2015, cannot be considered valid based on the strict application of the Bills of Sale Act. That the Claimant is precluded from relying on a void Bill of Sale to sell the vehicle and in fact the subsequent sale of the vehicle was itself unlawful.
- [17] The Claimant only has the power to sell the motor vehicle and to enforce any of the terms outlined in the Bill of Sale by relying on the Bill of Sale. The Bill of Sale expired on the 2nd April, 2015 and was not renewed in accordance with the relevant statute. The effect of this is that the Claimant's Bill of Sale is void and unenforceable as against the Defendant. Therefore, the Claimant's sale of the motor vehicle on the 19th October, 2016 was unlawful.

² SLUHCV2015/0860 paragraph 21

³ 18 SCR 116

[18] Furthermore, the invalid nature of the Bill of Sale means that the Claimant cannot avail itself of Section 22 of the Limitation Act which applies to money secured by a mortgage or charge. As of 2nd April, 2015, the money loaned to the Defendant could no longer be considered as money secured by a mortgage or charge. Thus the Defendant posits that the Claimant can only rely on the Promissory Note. That being the case, section 7 of the Limitation Act applies. It provides that actions for breach of contract must be brought within 6 years of the date of the cause of action. The cause of action under the Promissory Note would have accrued when the Defendant failed to pay an instalment, which was the 31st January, 2012 or at the latest the date of the last payment made by the Defendant, the 1st June, 2012. This means that the Claimant's cause of action against the Defendant became statute barred at the latest 1st June, 2018. The Claimant filed its claim after this date and therefore its claim against the Defendant must fail.

[19] In the alternative the Defendant argues that in accordance with 22(5) of the Act, arrears of interest are not recoverable after six years from the date on which the interest became due. Reliance was placed on the authority of **West Bromwich Building Society v Wilkinson and another**.⁴ In that case the House of Lords observed that a clause in the mortgage deed gave the lender the right to demand payment at any time after one month from the date of the mortgage and therefore found that the money became receivable as from that date. That accordingly Claimant would have been entitled to receive the money, that is the principal sum and arrears in interest, when the Defendant defaulted on the loan on or about the 31st January, 2012. Using this date means that any accrued interest is still statute barred.

[20] Further that the expenses for the repossession and sale of the motor vehicle in the sum of \$13,099.46 is not provided for under section 22 of the Act and therefore cannot be considered for the purposes of those amounts claimed.

⁴ [2005] UKHL 44

THE ISSUES

- [21] The issues for consideration are twofold being:
- i. Whether the claim is statute barred
 - ii. Whether non-renewal of the bill of sale extinguished the Claimants right to sell the vehicle and recover any amounts due to the Claimant after sale

ANALYSIS AND THE LAW

Whether the Claim is statute barred

- [22] The relevant legislative provisions concerning limitation relative to this issue are found at paragraphs 7 and 22 of the Limitation Act. They state as follows:

7. 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.

22. (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;
after the expiration of twelve years from the date on which the right to receive the money accrued.

....

(5) Subject to subsections (6) and (7), 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 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.'

- [23] The Defendant has posited three arguments against the non-applicability of section 22 of the Limitation Act being, that firstly personal property does not include chattel property, secondly that this is a claim in simple contract as the bill of sale had expired prior to the date of sale and thirdly and in the alternative that the rate of interest pursuant to section 22(6) is subject to a limitation period of 6 years.
- [24] The thrust of the Defendant's first argument appears to be that a motor vehicle is excluded from the scope and operation of section 22 of the Limitation Act, since section 2(1) of the Limitation Act excludes personal estate and or personal property from being included as "chattels real."
- [25] However, a vehicle though a chattel is not a "chattel real". Section 3 of the Bills of Sale Act defines "personal chattel" as 'goods, furniture and other articles capable of complete transfer by delivery.' Chattel real refers to interests in land. The learned authors of **Halsbury's Laws of England**⁵ defines "chattels real" in the following way:
- 'Chattels real are interests concerning or savouring of realty, such as a term of years in land, an annuity issuing out of a term of years, or the next presentation to a church, which have the quality of immobility which makes them akin to realty, but lack indeterminate duration. In some respects they are subject, like other chattels, to the law of personal property, but in others are subject to the law of real property.'
- [26] Thus, a motor vehicle is not a chattel real. A motor vehicle is personal property which can be valid security under a mortgage on personal property. The argument that the motor vehicle does not fall within the ambit of section 22 of the Limitation Act therefore fails.

⁵ Personal Property (Volume 80 (2020), paragraph 804

[27] The Defendant next argues that the appropriate provision to determine limitation is section 7 dealing with simple contracts. However, this matter concerns the right to recover money under a mortgage. Whilst section 7 of the Limitation Act deals with contracts generally, section 22 is specific to mortgages. Thus section 22 of the Act applies. Thom J expressed a similar view in the case of **First Caribbean International Bank Limited v T.C. Enterprises Limited et al**⁶ and stated:

‘The loan being a loan that was secured by a mortgage, Section 22 of the Limitations Act is the applicable section and not Section 7 as submitted by the Defendants. Provisions similar to Sections 7 and 22 were considered in the case of Bristol and West pic referred to by the Claimant. In Bristol and West PIC the UK Court of Appeal considered the issue whether a claim for the remainder of a loan secured by a mortgage after the sale of the mortgaged property is subject to a limitation period of 12 years as provided in Section 20 of the UK Limitation Act or the limitation period of six years applicable to simple contract debts pursuant to Section 5 of the UK Act. The Court of appeal in finding that Section 20 applied even after sale of the mortgaged property concluded that what is critical is that the mortgage must exist on the date on which the right to recover accrued.’

[28] The parties have agreed that the default of the mortgage occurred on 31st January 2012 and the last payment was made on 1st June 2012. The part payment on 1st June 2012, triggered a fresh accrual of the time to initiate proceedings. This is in keeping with sections 29 (1) and (3) of the Limitation Act 1997, which states:

29. (1) Subsection (2) and (3) apply where any right of action
(including a foreclosure action) to recover land or any right of

⁶ Svghcv2009/0422

a mortgage or personal property to bring a foreclosure action in respect of the property has accrued.

...

(3) In the case of a foreclosure or other action by a mortgagee, if the person in possession of the land or personal property in question or the person liable for the mortgage debt makes any payment in respect of the debt (whether of principal or interest) the right shall be deemed to have accrued on and not before the date of payment.'

[29] Thus, these proceedings having commenced on 23rd April 2018 fell within the 12-year period of time to commence such actions.

[30] However, although the period for recovery of the principal sum is 12 years from default, section 22(5) applies a different regime to claims for interest. Section 22(5) of the Limitation Act reads as follows:

'(5) Subject to subsections (6) and (7), 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 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.**' (emphasis mine)

[31] The Limitation Act specifies that where mortgage interest is owed, the cause of action arises when the interest becomes due for payment. The parties have admitted that the last payment and by extension the default occurred on 1st June 2012. This acceptance means that by extension any arrears for interest became due for payment at that time. This therefore puts the claim for arrears of interest outside the 6-year limitation regard given to when the proceedings were filed. As

limitation is a statutory defence which bars the remedy, the Claimant having run afoul of the allotted time for exercising his right to this claim is effectively barred from recovering any interest claimed.

Whether non-renewal of the bill of sale extinguished the Claimants right to sell the vehicle and recover any amounts due to the Claimant after sale?

- [32] The Defendant accepts that the vehicle was seized pursuant to the Bill of Sale before the registration expired. It is settled law that under such circumstances, the title to the mortgaged property is perfected by the seizure and there is no need for further registration. In addressing the question of the effect of expiry of a bill of sale on the grantee's right, Halsbury's Laws of England is instructive. The authors though accepting that the registration of a bill of sale must be effected every five years and a bill of sale without such registration renders it void went onto observe that this was subject to whether the grantee had perfected his rights. At paragraph 527⁷ they state:

'Expiry of the bill will not affect the grantee's rights if he has perfected his title by taking possession of the chattels under the bill before expiry of the registration: *Re Tooth, Trustee v Tooth* [1934] Ch. 616. However, if the registration expires before possession has been taken, the consequential avoidance of the security extinguishes the efficacy of the bill as a licence to seize, and the grantee will not be able to perfect his title by seizure except pursuant to some subsequent valid agreement.'

- [33] In ***Re Tooth, Trustee v Tooth***⁸ the trustee claimed the furniture held by the respondent and the proceeds of sale of the furniture sold by him on the ground that

⁷ Financial Instrument and transactions Vol 49 (2021) 3 Bills of Sale

⁸ [1934] Ch. 616

the bill of sale was not reregistered as required by the Bills of Sale Act. The court held at page 619 that:

“The answer to the question whether re-registration was necessary or not depends in my judgment on what happened in April, 1927. Did the respondent in fact take possession of the goods under the bill of sale or not? If he did then his legal right to possession of the chattels was complete and was good against the world, although as between himself and his father, the relationship of mortgagor and mortgagee still subsisted. If the respondent obtained the legal title to possession such legal title as from the time when it was obtained no longer depended on the bill of sale and it became immaterial whether it was re-registered or not.

...

I hold that the respondent obtained the legal title to the chattels in April, 1927, and no re-registration of the bill of sale was necessary.”

[34] Therefore, I agree with counsel for the Claimant that the Defendant’s contention that the sale of the vehicle was invalid because of the expiry of the registration of the Bill of Sale is without merit.

[35] It is without question that the vehicle was sold, and that the sale resulted in a shortfall. There are no pleadings that suggest that the Claimant did not take all reasonable precautions to secure the market value of the property. Thus, any evidence solicited on cross examination as it relates to the number of advertisements prior to the sale is of no moment.

[36] Where the proceeds of the sale are insufficient to satisfy the outstanding balance due on the loan, the Defendant remains personally obligated to satisfy the shortfall.

The book **Chitty on Contracts**⁹ dealing with the issue of secured loans which undoubtedly a bill of sale is, expresses the law as it relates thereto in the following manner:

'Secured Loans: A loan may, and in practice commonly will, be secured in one of a number of different ways. But the existence of security does not mean that the lender is bound to look only to the security for repayment of the debt. *Prima facie* the borrower's personal obligation remains unaffected by the security, and the lender may either disregard the security and sue the borrower on the loan, or he may realize the security, and if it proves insufficient, sue for the balance.....It is also possible that the lender may agree to look only to the security for repayment, thereby leaving the borrower free of any personal obligation, so that the borrower will not be liable even if the security is insufficient: whether this is so in any particular case depends on the intention of the parties and the construction of any written agreement between them. But in the absence of special circumstances a court is unlikely to infer that the borrower is under no personal liability. Indeed, even in the absence of an express promise to repay the loan, a personal liability may be inferred despite the existence of some security.'

[37] I have also taken cognizance of the case of **Sagicor Finance Inc. v Glenis Remi**¹⁰ also endorses the view that a mortgagee remains liable for any deficiency after the sale of a vehicle. The dicta which is instructive is repeated hereunder:

'[21] Under the Bill of Sale, the chattels in this case (the vehicles), did not change hands and the defendants were able to

⁹ 27th edition paragraph 36-218

¹⁰ SLUHCV2015/0860

continue to use the vehicles, but the claimant as lender and 'owner', has personal rights of seizure. On default on repayments, the claimant who is the owner can take possession of the chattels (vehicles), sell them and still pursue the defendants for any shortfall on the loan agreement. The claimant/lender/owner retains the right to recover from the defendants until the total amounts inclusive of interest have been paid.

[22] It is not unusual for interest charges on a Bill of Sale to be significantly higher than those offered under other forms of conditional sale and in the event of default it may increase the defendants' indebtedness to the claimant. The security may be insufficient to cover the principal sum, interest and costs due under the mortgage Bill of Sale. The defendant in such circumstances will become liable to an amount in excess of the contractual sum stipulated in the Bill of Sale.

[23] The defendants' argument that the proceeds of the sale and/or the destruction of the vehicle put an end to the loan agreement is without merit. I am of the view that the defendants' liability did not end with seizure and sale of the vehicles. Bills of Sale loans are sometimes made without reference to the value of the underlying security or its likely depreciation. It is common knowledge that vehicles depreciate over time. The vehicles as the security may well not have been sufficient to cover the outstanding balance. **The amount due and owing may increase particularly under circumstances where the customer becomes liable for interest and other late charges and expenses**

incurred in the repossession and sale of the vehicles.

(Emphasis mine)

...

[26] As stated before the act of seizure and sale does not put an end to the claimant's right to seek to recover the insufficiency of the security or the shortfall of the proceeds of sale. **The option is always open to the lender to pursue the defendants for any shortfall and interest under the loan agreement.**' (Emphasis mine)

[38] The Claimant as lender is entitled to be put back in a position as far as can be done legally for the breach of contract. This therefore enables the Claimant to not just simply sell the vehicle and receive any monies therefore but to recover from the Defendant for the value of the loan and any expenses associated in the repossession and or sale of the vehicle.

[39] It is accepted that a valid bill of sale existed at the date cause of action accrued being 1st June 2012. As such the Claimant is well within its remit to collect monies for the outstanding principle of the debt. However, a different regime in terms of the limitation period exists for the interest which sets a limitation period of 6 years for recovery of any such debt. I accept that the Sagikor case quoted above which spoke blanketly to the ability to recover all monies including any shortfall and any other outstanding sums owed, did not deal with the issue of there being two different regimes of limitation for principal and interest as in fact the issue of limitation did not arise. Thus, as it relates to the arrears of interest, the Claim not being brought within 6 years and there being no application to enlarge the time for limitation of the interest has resulted in the Claimant losing its right to claim for the same.

ORDER

[40] In light of the foregoing, it is hereby ordered as follows:

- a. The Claimant is awarded the sum of \$65,709.06 being the principal outstanding as at the 22nd of August 2019.
- b. The Claimant is awarded expenses associated with the repossession and sale of the motor vehicle in the sum of \$13,099.46.
- c. The interest on the loan is statute barred.
- d. Prescribed Costs in accordance with CPR 65.11.
- e. Interest

Jan Drysdale

High Court Judge

By The Court

Registrar