

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2016/0345

BETWEEN:

RBC ROYAL BANK OF CANADA
formerly RBTT Bank Caribbean Limited

Claimant

and

[1] WENTWORTH PRINCE
[2] AMWAA PRINCE
[3] TARICK PRINCE

Defendants

Appearances:

Ms. C. Debra Burnette, Counsel for the Claimant
Ms. Joanne Massiah, Counsel for the Defendants

2022: October 4th
2023: January 27th

JUDGMENT

[1] **ROBERTSON, J.:** The Claimant initiated these proceedings seeking:

- a. A declaration that the Claimant is entitled to recover from the Defendants all expenses incurred and expenses which are incidental to the Claimant's efforts in exercising its rights pursuant to section 75 of the **Registered Land Act** Cap. 374 in respect of the property registered and recorded in the Land Registry as Registration Section: St. Phillips North; Block 25 2888A; Parcel 226.
- b. An order that the Defendants pay to the Claimant the sum of EC\$36,964.00 representing fees and expenses incurred by the Claimant in the exercise of its power of sale.
- c. The costs of and incidental to these proceedings.

[2] This Court has determined for the reasons set out hereunder that sums are due and payable to the Claimant by the Defendants.

An Overview

- [3] The Defendants were customers of the Claimant, and the Defendants borrowed the sum of EC\$371,000.00 on terms of interest of 8.5% per annum¹. The funds for the loan were to be used to assist with the purchase of a parcel of land, the registration of the land in the name of the First Defendant and for the construction of a house thereon.
- [4] The First Defendant became the registered proprietor of the parcel of land described as Registration Section: St. Phillips North, Block 25 2888A; Parcel 226. The First Defendant gave to the Claimant security for the loan by Charge over parcel 226. The Charge was duly registered on the Land Register. The loan was serviced through the loan account of the First Defendant. The Second and Third Defendants assigned their salaries to the Claimant and established standing orders so that funds were deducted from their respective accounts and credited to the account of the First Defendant from whom the loan deductions were to be made.
- [5] The loan went into default and on 27th May, 2015 the Claimant issued a Notice to Pay Off. No payments were forthcoming from the Defendants and the Claimant proceeded to advertise the property for sale by public auction. The Claimant indicated that, in pursuing public auction, it was exercising its right as a mortgagee. The attempts for sale by public auction were unsuccessful. The Claimant placed a block on the accounts of the Defendants which block, the Claimant contends, was provided for in the Loan Arrangement Cost Disclosure Statements. Subsequent to this, the account became up to date, and consequently, the loan was no longer in arrears save for outstanding legal fees and other expenses. The Defendants have defended the claim and issued a counterclaim. In the counterclaim the Defendants have alleged that the Claimant was negligent in its operations and the Defendants have sought orders that:
- a. The Claimant releases any holds that the Claimant has on the account of the Second Defendant.
 - b. An independent suitably qualified person be appointed to analyse the Defendants' accounts and the mortgage and that a report on the findings be filed.
 - c. The Claimant reverses all interest, penalties and other fees applied to the accounts of the Defendants from the date that the Claimant failed to debit and credit the accounts of the Second, Third and First Defendants in fulfilment of the loan agreement obligations between the Claimant and the Defendants.
- [6] It is to be noted that the holds on the account(s) were released subsequent to the issuing of the defence and the counterclaim and the statements on the accounts were disclosed during these proceedings.
- [7] The Defendants pleaded that:

¹ The loan agreement dated 24th September 2010 for a period of fifteen years with monthly instalments of EC\$3,653.00.

- a. The Defendants applied for a loan of EC\$371,000.00 but the full proceeds of the loan were not disbursed to the Defendants.
- b. The Claimant failed to act in accordance with the Claimant's responsibility since the Claimant failed to debit the accounts of the Second and Third Defendants and to credit the account of the First Defendant although funds were in the respective accounts of the Second and Third Defendants. Specific reference was made to the period 2012 or 2013 when the Defendants contend that the Claimant ceased debiting the accounts of the Second and Third Defendants in a timely manner and failed to credit the First Defendant's account. The inaction of the Claimant resulted in the mortgage payments being applied late resulting in the daily assessment of interest and late payment fees.

[8] The Defendants also pleaded that:

- a. It was the Claimant's responsibility to apply the monthly payments for the loan after the funds, EC\$3,653.00, were automatically deducted from the accounts of the Second and Third Defendants.
- b. Over the life of the loan the Claimant has debited more than the agreed number of payments from the Second and Third Defendant's accounts which resulted in numerous reverse transactions recorded on their accounts.
- c. The Claimant has deprived the Second and the Third Defendants of their property when the Claimant froze the accounts of these Defendants.

[9] In these proceedings the Claimant's evidence was given by Ira Charles, Manager of Credit Risk. The Defendants did not place any evidence before this Court.

Issues

[10] The issues for determination.

- a. Whether the Claimant is liable in negligence for not making timely deductions to the accounts of the Defendants in accordance with the standing order established by the Defendants.
- b. Whether the loan falling into arrears was as a result of the negligence of the Claimant.
- c. Whether the Claimant is entitled to recover the expenses incurred by Claimant in the exercise of its power of sale.

The Law, Evidence and the Finding of the Court

Was the Claimant Negligent?

- [11] It is settled law that at common law the remedy of tort can arise in a relationship governed in contract. This matter was authoritatively settled in the case of Henderson v Merritt Syndicates Ltd.² In the consideration of negligence, the Court must be satisfied that (i) there is reasonable foreseeability of damage; (ii) there is a relationship characterized by proximity between the wrongdoer and the person alleging loss; and (iii) it is fair, just, and reasonable to impose a duty of care³.
- [12] This Court notes that although there was a proximate relationship, and it was foreseeable that damages would arise if the deductions were not made from the account to satisfy the loan payments it cannot be said that in the circumstances of this case it is just and reasonable to impose a duty of care. This Court also notes that there are important and relevant distinctions to be made in the operation of standing orders, the mechanism for payment to a loan facility from the loan service account and the honouring of cheques on overdrawn facilities.
- [13] In the circumstance of a standing order a bank is being instructed by its customer to, on a specific date, make deductions from the customer's account for a particular purpose. In this regard the Court refers to the case of Whitehead v National Westminster Bank Ltd⁴ where Thompson, J noted in a discussion on standing orders that:
- “I reject the submission that the Bank was under the duty to keep the plaintiff's account under daily scrutiny so as to be able whenever there was enough in the account to pay the standing order. It was even argued that the duty was not confined to the month in which the instalment fell due but extended into the next month and maybe beyond and required the Bank so to manage the account as to wipe out arrears whenever the account was sufficiently in credit for that to be done. It was contended that, though on the due date in October and November there had not been sufficient funds to pay either instalment, by the 29th of November there was a credit big enough to have paid both and that that should have been done. No authority was cited for that submission, and it does not sound reasonable or practical or a duty which the Bank would be willing to undertake. The mandate of the standing order was a direction to the Bank to pay on the due date or the first banking day thereafter, ... The obligation of the Bank was, as is pleaded, to pay on the 5th, and that is subject to there being on that date sufficient funds to do so...”** (Emphasis Added)
- [14] In these proceedings the Defendants contend that salaries were often paid late and arrived at the Claimant after the date when the standing order was triggered and that this was one of the reasons that the loan account went into arrears. The Defendants also contend that the Claimant ought to have implemented a manual system to ensure that funds from the accounts of the Second and Third Defendants were transferred to the account of the First Defendant.

² [1995] 2 A.C. 145.

³ SVGCVAP2014/0016 Clement Lawrence and another v First St. Vincent Bank Limited.

⁴ (1982) Times, 9 June.

- [15] The evidence before this Court is that the Claimant did on occasions manually transfer funds from the accounts of the Second and Third Defendants to the account of the First Defendant from which the loan was to be serviced. However, in this Court's view it was the responsibility of the Defendants to ensure that when the standing order is triggered, automatically or manually, there are funds in the account to satisfy the particulars of the standing order. If the salaries are consistently delayed it would benefit the Defendants to approach the Claimant to vary the date of the standing order and if necessary, the date for payment of the loan.
- [16] On the matter of the payment on a loan facility this Court notes the learning from the Encyclopaedia of Banking Law, C(166) which states that "it is the duty of a debtor to seek out his creditor and tender the amount of this debt...".
- [17] On the matter of chequing accounts this Court notes that when cheques are issued on an overdrawn account in the absence of an overdraft facility the decision whether to honour the cheque rests with the bank. This point was noted in the case of **Barclays Bank Ltd. v. W. J. Simms Son & Cooke (Southern) Ltd.**⁵ where it was stated that:
- " If, however a customer draws a cheque on the bank without funds in his account or agreed overdraft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide overdraft facilities sufficient to meet the cheque. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. If, however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed overdraft facilities; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque. In other cases, however, a bank which pays a cheque drawn or purported to be drawn by its customer pays without mandate."
- [18] The evidence before this Court is that prior to the loan being approved each Defendant established an account with the Claimant for the purpose of facilitating the service of the loan. A personal chequing account was opened in the name of the First Defendant on 5th October, 2009. The Second Defendant maintained a deposit account at the Claimant's institution since 6th July, 2001 and the Third Defendant opened an account on 9th July, 2009. The First Defendant gave security for the loan by way of a Charge over the property and the Second and Third Defendants signed the loan as borrowers.
- [19] The personal chequing account opened in the name of the First Defendant, account number ending 24375, was the service account for the bridging loan and the final mortgage loan.

⁵ [1980] Q.B. 677, 699-700. See also Lloyd's Bank Plc v Independent Insurance Co Ltd. [2000] Q.B. 110.

- [20] It was the usual practice on the opening of a chequing account that the account holder would be given a cheque book containing up to 25 cheques or sheets. The evidence of the witness for the Claimant is that this was done with respect to the account which belonged to the First Defendant. The cheque book would have been issued prior to January 19, 2010, when the first drawdown was scheduled.
- [21] The witness for the Claimant provided a statement of the account for the period 4th January, 2010 to 27th January, 2010 a mortgage payment loan activity statement for 2010 to 2016 and the account statements for the Defendants.
- [22] The witness noted that before the first drawdown on the account or before the first credit was made available to the First Defendant, the First Defendant wrote a cheque dated 24th December, 2009 from the said chequing account in favour of the attorney providing legal services for the property transaction. The First Defendant did not have sufficient funds in the chequing account, but the issued cheque was honoured by the Claimant, and this caused the account to be overdrawn. The Claimant's witness indicated that the Claimant took the decision to honour the cheque although the First Defendant was personally responsible for the legal and other fees associated with the transaction because the Claimant expected the Defendants to honour their obligation to pay the legal and other fees and because the Claimant was aware that funds from the loan would be placed into the account. The witness for the Claimant maintained that it was always the responsibility of the First Defendant to credit the account with the sums taken to honour the first cheque issued since the Defendants were aware that it was the responsibility of the Defendants to pay the legal and other fees associated with the transactions.
- [23] A second cheque was issued by the First Defendant on 21st January, 2010 to the same legal representative and this cheque contributed to the chequing account being further overdrawn.
- [24] The witness for the Claimant, Ira Charles, indicated that the sum of \$121,339.00 which represented the balance of the purchase price of the land was credited to the account on 19th January, 2010. The first drawdown thereafter took place on 25th January, 2010 in the sum of \$70,000.00. On the application of the \$70,000.00, the account had a balance of \$27,366.85 as the account was overdrawn and previously had a negative balance of -\$42,633.15. This negative balance was due to the fact that the First Defendant wrote cheques on the account prior to the disbursement.
- [25] The witness indicated that the balance of the proceeds of the loan from the bridging loan facility were disbursed as:

January 25, 2010	\$70,000.00
February 4, 2010	\$70,000.00
April 16, 2010	\$60,000.00
May 14, 2010	\$20,000.00

- [26] The disbursements were evidenced by the promissory notes which were admitted into evidence. The witness indicated under cross-examination that in the absence of the bridging loan document the witness is unable to indicate the exact dates of the last two disbursements.
- [27] The evidence of the witness is that the First Defendant requested the 'next stage drawdown' in the sum of \$40,000.00, however, the Claimant took the decision to divide the disbursement into two payments of \$20,000.00. The intention was to release the first payment on 12th May, 2010 or thereabout and the second payment after a representative of the bank conducted a site visit.
- [28] A site visit was conducted, and the Claimant determined that it was not likely that the project would be completed on schedule and therefore the First Defendant was required to advance the building work further before the payment of \$20,000.00 would be released. The payment of \$20,000.00 was disbursed.
- [29] It was also indicated that at the time of the disbursement of \$20,000.00 from the bridging loan the account reflected a net credit of \$5,639.83 since the chequing account was overdrawn to the sum of \$14,360.17. This disbursement was evidenced by the promissory note dated 14th May, 2010.
- [30] During the cross-examination the witness indicated that the final sum of \$20,000.00 would have remained on the bridging loan and this sum would have been credited to the client's chequing account when the bridging loan was closed. The witness explained that normally construction should have substantially been completed to enable the Parties to covert from the bridging loan to the mortgage. However, the witness indicated that although construction was not completed the Claimant felt compelled at that juncture to convert the bridging loan to a mortgage. The final disbursement of \$20,000.00 was withheld and credited to the mortgage facility account. It is accepted by this Court that the Claimant has not produced a statement which supports that this, or any other sum was credited to the mortgage facility account.
- [31] The witness further stated that the Defendants would have received a little more than the loan of \$371,000.00 since at the time when the bridging loan was converted to a mortgage on 24th September, 2010 the chequing account reflected an overdraft of \$12,385.77. This, the witness indicated was, in part due, to the Defendants not honouring their obligations to settle the monthly interest charges that accrued on the bridging loan facility. The Claimant's evidence is that the Claimant took the decision to reverse the penalty interest charges of \$6,925.63 on the 29th September, 2010.
- [32] On 24th September, 2010 the Defendants, by signed agreement, undertook to repay the loan amount of \$371,000.00 plus interest within 15 years or by 1st October, 2025 by monthly instalments of \$3,653.00 commencing on the 1st November, 2010.
- [33] On conversion of the chequing account to the loan account the Defendants made their first payment on 20th December, 2010 and not 1st November, 2010 as was required by the agreement. The Second and Third Defendants completed the salary assignment forms on 19th January, 2010 and 6th November, 2009 respectively.

- [34] The automated standing order that would facilitate the transfer from the Second and Third Defendants' accounts to the service account could only be set for a specific date and if funds were not available on that date no funds would be pulled from the account. It is also noted that in circumstances where the loan is being serviced from a particular account the banking mechanisms would continuously attempt to pull funds to satisfy the instalment payment. However, in the circumstances of this case the funds for the loan account were to be received from the funds in the accounts of the Second and Third Defendants. Thus, once the standing orders were unable to source funds on the specific date there would be no funds available to transfer into the loan serving account.
- [35] The witness recounted that the loan went into arrears relatively early in the life of the loan. The witness indicated that this occurred because the Defendants failed to meet their obligations to satisfy the fees and charges for the loan, the bridging loan interests and fees were not satisfied and the late payment of the first and other loan instalments.
- [36] The witness also observed that in addition to the occasions when salaries would have been received late there was an additional issue in that the Second and Third Defendants would sometimes remove funds from the account so that there were insufficient sums in their accounts which could be accessed by the Claimant through the standing orders.
- [37] Once the loan fell into arrears certain measures were put in place by the Claimant's Recoveries Unit and the full sums required for monthly payments were deducted from the Defendants' accounts. The witness asserted that the Claimant was authorised through the Loan Arrangement Cost Disclosure Statement signed by the Defendants on 24th September, 2010 to combine or consolidate all the accounts of the Defendants to satisfy the Defendants' outstanding liabilities to the Bank.
- [38] The irregular payment of the required monthly instalments caused the Claimant to invite the Defendants to re-finance the facility and later, on 27th June, 2014 to issue a letter demanding payment of the outstanding sums on the loan plus legal fees. During cross-examination the Claimant admitted that one or all the Defendants did at some time when the account was in arrears visit the witness to discuss the loan facility but by this time the loan facility was in the hands of the Recoveries Unit and the Defendants were directed to that unit. There is no evidence before the Court on whether the Defendants approached the Recoveries Unit.
- [39] A Notice to Pay Off dated 27th May, 2015 and a letter dated 22nd June, 2015 were issued to the Defendants. Having not received the funds the Claimant proceeded to advertise the property for sale in accordance with its power of sale as a mortgagee and pursuant to the Charge that was executed by the Defendants on 19th January, 2010.
- [40] This Court is of the view that the responsibility to ensure that the loan is serviced rests with the Defendants. The onus of the management of the Defendants' accounts so that funds are in the accounts to honour the standing orders is the responsibility of the Defendants. There is no evidence

of peculiarities in this case which would require the Claimant to exercise a duty beyond that which is ordinarily owed between a banker and a customer.

The Claimant's Entitlement to Recover the Sums Expended to Recover the Debt

- [41] The mortgage facilities are governed by provisions within the **Registered Land Act**. Section 75 (1) provides that:

75. (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests 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 in at the auction and to resell by public auction without being answerable for any loss occasioned thereby.

- [42] The Charge Instrument dated 19th January, 2010 was executed by the Parties as security for the loan. Clauses 11, 12, 15 and 16 of the Charge Instrument indicates:

11. That if the monies hereby secured or any part thereof or any interest thereon shall not be paid as herein provided then so long as the default in payment shall continue for one month, at least, the Chargee shall have the right (in addition to all other statutory powers) at its option and upon giving the required statutory notice to either exercise its power of sale by auction by virtue of sections 72 and 75 of the above mentioned Act, or pursuant to an Order of Court to sell the land secured hereby by private treaty without being answerable for any loss on such sale. For the avoidance of doubt, it is agreed and understood that the power of sale pursuant to sections 72 and 75 of the above-mentioned Act may be exercised no less than Three (3) months after the date of service of the statutory notice issued by the Chargee to the Chargor

12. The Chargor, on payment of all money due and owing hereunder at the time of payment and on payment of any costs or expense properly incurred by the Chargee in exercising any powers conferred under section 72 of the Act, may redeem the charged land before it has been sold under section 75 of the Act.

15. That the Chargor will pay to the Chargee all the legal expenses and costs incurred by the Chargee in connection with the charge hereby created and all other cost charges expenses and commissions properly incurred or charged in connection with the preparation and perfecting of this charge.

16. That if the Chargor shall make default in the payment of the said principal sum or any balance due thereon upon demand being made by the Chargee, then all expenses incurred by the Chargee in the curing of such default and/or the realization of this security and/or

collection fees or commission made payable as a result (including Solicitor's collection fees of 10% of amount then due) shall be for the Chargor's account and shall be repaid to the Chargee by the Chargor and until such repayment shall bear interest at the same rate."

- [43] Additionally, the Loan Arrangement Costs Disclosure Statement dated the 24th September, 2010 and signed by the Defendants provided, among other things, that "In the event that the Bank hires an attorney at law or debt collection agency to collect any indebtedness for which the undersigned are liable to the Bank under this Agreement the undersigned will be liable for all the costs incurred by the Bank as a result of such hiring. This liability for costs is in addition to and without prejudice to any order for costs made against the borrower in favour of the Bank by a Court of competent jurisdiction in respect of a suit or action brought in such a court to recover the debt".
- [44] The evidence before this Court is that the Claimant provided the Defendants with an opportunity to re-finance the loan. Thereafter, the Defendants were issued with letters of demand on 27th June, 2014 and 22nd June, 2015. Notice to Pay Off was issued on 27th May, 2015. The Defendants not having arranged to liquidate the loan the Claimant, after the passage of the requisite time, was entitled to proceed to act in accordance with its powers as a mortgagee. This process required that there be a valuation and that the property be advertised for sale by public auction. The evidence of the costs of the valuation obtained from Associated Engineering Partnership is before the Court. The property was advertised in the Daily Observer Newspaper and the invoices for the advertisements are before the Court. Further, the receipts from the solicitor on auction and reduction of upset price are before the Court. These sums, as alleged to have been incurred by the Claimant, have generally not been challenged by the Counsel for the Defendants under cross-examination.
- [45] Finally, for completeness, this Court notes the matter raised by the Defendants regarding the hold placed by the Claimant on the accounts of certain Defendants. On this matter this Court notes that the Loan Arrangement Costs Disclosure Agreement Statement permits the Claimant where there is a default, to 'combine or consolidate all or any account' and to set off or transfer any sum or sums standing to the credit of any one or more account in or towards satisfaction of Defendants' liabilities to the Claimant.
- [46] As a consequence of the foregoing this Court has determined that the Counterclaim is to be dismissed and that the Defendants are liable to pay to the Claimant the expenses incurred in the Claimant's effort to exercise its right of sale as a mortgagee for the sale of the property registered as Registration Section: St. Phillips North, Block 25 2888A; Parcel 226. The sum in question being the costs of the valuation - \$1,250; Advertisement in the Daily Observer invoice dated 27th October, 2015- \$1,196.98; Advertisement in the Daily Observer invoice dated 18th January, 2016- \$1,197.00; Receipt from Attorney's Chambers dated 27/04/2018- \$3,436.48; Receipt from Attorney's Chambers dated 28/02/2017 - \$13,643.50; Receipt from Attorney's Chambers dated 18/07/2018- \$7,445.00; Receipt from Attorney's Chambers dated 15/07/2019 - \$5,827.50. The total amount is quantified in the sum of EC\$33,996.46.

[47] The Defendants are liable to pay the sum of EC\$33,996.46 and the prescribed costs of these proceedings.

Marissa Robertson
High Court Judge

By the Court

Registrar