

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2005/0287

BETWEEN:

CHARLES JOSEPH

Claimant

AND

ANTIGUA COMMERCIAL BANK

Defendant

Before:

Master Cheryl Mathurin

Appearances:

Claimant Mr. Charles Joseph present

Ms Tracey Benn for the Defendant

2008: November 17th

RULING

- [1] **MATHURIN, M:** The Claimant (Mr Joseph) filed this action against the Bank seeking damages in respect of property and for loss of use of the property in question. Mr Joseph alleges that in 1985, he borrowed the sum of \$66,000.00 from the Antigua Commercial Bank (the Bank) which was secured by a charge on the property. The property was subsequently damaged by Hurricane Luis in 1995 and Mr Joseph is claiming that the Bank failed to repair the property in accordance with Section 72(3)(c)(2) of the Registered Land Act and that as a result is entitled to damages.
- [2] The Bank has applied to strike out the claim on the basis that it does not disclose or establish a cause of action and that it is statute barred.

No cause of action

- [3] The relevant section in the Registered Land Act states as follows;

“The chargee shall be entitled to sue for the money secured by the charge in the following cases only-

...

(c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor;

...

Provided that –

...

(ii) *the Court may, at its discretion, stay a suit... notwithstanding any agreement to the contrary, until the charge has exhausted all his other remedies against the charged property.*

[4] Mr. Joseph further elaborates that it was the duty of the Bank to repair the property in order to exhaust all his other remedies against the charged property. It appears therefore that Mr. Joseph is equating the repair of the property to a remedy by the Bank and the failure to repair the property as a wrongful act by the Bank in exhausting its remedies.

[5] There are several flaws in this interpretation of the law. Firstly, section 72 of the Registered Land Act refers to the Chargee's (the Bank) remedies. Secondly, the specific section upon which Mr. Joseph relies refers to the discretion the Court where the Bank sues the Chargor (Mr. Joseph) for the money secured by the charge. Thirdly and most importantly, the question of whether the failure to repair the property by the Bank amounts to a wrongful act on its part, is one that has been determined previously in the Bank's favor.

[6] In another case, **Suit 309 of 1999**, Mr. Joseph alleged that the Bank was obliged to insure the property if he failed to do so. Olivetti-Joseph J referred to the chargor's covenants to insure which is implied in a charge by section 67(d) and (j) of the Registered Land Act. Sections 67(d) and (j) of the Act states as follows;

"It shall be an implied covenant in every charge on the part of the chargor –

...

(d) to insure and keep insured all buildings upon the charged land ...

...

(j) where the chargor fails to comply with any of the agreements implied by paragraphs (b), (c), (d),(e),(g) and (h) that the charge may spend such money as is necessary to remedy the breach, and may add the amount so spent to the principal money, and that

thereupon the amount shall be deemed for all purposes to be part of the principal money secured by the charge.”

- [7] In deciding whether or not the Bank was obliged to insure Olivetti-Joseph referred to the Interpretation Act Cap 224 which reads;

*“In an enactment the expression “**shall**” shall be construed as imperative and the expression “**may**” is permissive and empowering”*

Olivetti-Joseph J concluded *“Having regard to the foregoing and to the ordinary meaning of the words “may” and “shall”, I hold that the Bank had an option or permission to insure the Property if it saw fit on the Claimant’s failure, but no legal obligation.”* This determination was upheld by Redhead JA on appeal.

- [8] It is therefore clear then that the Bank had an option not a legal obligation to repair the property if it so desired and was not obliged to do so by law and as such failure by the bank to repair can not be considered a wrongful act on its part and as such the claim is struck out as disclosing no cause of action.

Limitation

- [9] Section 7 of the Limitation Act of 1997 states

“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.”

Mr. Joseph alleges that the damage to his property occurred in 1995 during the passage of Hurricane Luis and as such was obliged to bring this cause of action no later than 6 years after the damage accrued. As such the claim is struck out as being statute barred in accordance with section 7 of the Limitation Act of 1997.

Conclusion

[10] In light of the foregoing, the claim is struck out with costs to be assessed if not agreed.

CHERYL MATHURIN
MASTER