

**In the Supreme Court of Belize A.D. 2009**

**Claim No. 869 of 2009**

**BETWEEN FIRST CARIBBEAN INTERNATIONAL BANK  
(BARBADOS) LIMITED Claimant**

**And**

**GILDARDO CARDONA  
SANDRA ROCIO CARDONA Defendants**

Before: Hon. Justice Minnet Hafiz-Bertram

Appearances: Ms. Naima Barrow for the Claimant

Mr. Michel Chebat S.C. for the Defendants

**J U D G M E N T**

**Introduction**

1. This is a claim for the payment of the sum of \$276,010.24, inclusive of interest, bank charges, attorney-at-law collection charges, being the sum due as of the 19<sup>th</sup> day of January, 2009 in respect of two loans and a credit card facility made by the Claimant to the Defendants pursuant to agreements made between the parties on or about 18<sup>th</sup> October, 1999, 28<sup>th</sup> January, 2000 and 13<sup>th</sup> March, 2001.
2. The Defendants say that the claim for interest and other charges claimed in relation to the first loan are barred by virtue of **section 24(3)** of the **Limitation Act, Chapter 170**. Further, that the principal, interest and other charges now due on the second loan and the credit card facility are barred by **section 4(a)** of the **Limitation Act**. The Defendants also allege that sometime in 2001 the Claimant took possession of the

property which was at the time generating rental income. Further, that the Claimants sold the property below the market value.

3. The defendants counterclaim for an account of proceeds of the sale, account of rental income and damages for loss of market value of the property.
4. The Claimant, First Caribbean International Bank (Barbados) Limited (“the Bank”), is a commercial bank conducting banking business in Belize principally from 21 Albert Street, Belize City, Belize. On the 14<sup>th</sup> September, 2002 the Bank was by virtue of Bank Undertaking (Barclays Bank PLC Belize Operations) Vesting Act, 2002 assigned the assets, liabilities, rights, obligations, property, files and documentation of banking business of Barclays Bank PLC (“Barclays”) carried on in Belize.
5. The Defendants, Gildardo Cardona and Sandra Rocio Cardona were customers of Barclays Bank PLC which carried on business in Belize at 21 Albert Street, Belize City, Belize.
6. The witness for the Claimant is Amy Annaurora Forte and the witness for the Defendants is Gildaro Cardona. Both witnesses were cross-examined.
7. **Chronology of events**
  - 7.1 I am grateful to both Learned Senior Counsel Mr. Chebat and Learned Counsel Ms. Barrow who provided in their written submissions a chronology of events in relation to the transactions between the Claimant and the Defendants.

- 7.2 By a charge dated the 16th July, 1999 Gildardo Cardona charged his property located at San Pedro Registration Section, Block 7, Parcel 1286 (“the Property”) to Barclays to secure the advance to him of \$180,000.00. The only party to this mortgage was the Bank and the first Defendant, Mr. Gildardo Cardona. (See Tab 1 of the Claimant’s List of Documents)
- 7.3 By the terms of a written facility letter dated the 18th October, 1999, from the Bank addressed to both Defendants, the Bank confirmed an agreement on the terms and conditions set out in that letter. The loan amount stated in that letter was \$300,000.00 to be repaid by monthly installments of \$4,935.00 per month including interest. The security for the loan being Parcel 1286. Both Defendants accepted the offer on the terms and conditions stated in the letter on 19th October, 1999. (See Tab 3 of the Claimant’s List of Documents)
- 7.4 On the 13th December, 1999, pursuant to the terms of the agreement as shown in the facility letter, the charge over the Property was varied to increase the sums secured by \$120,000.00 to \$300,000.00. (See Tab 4 of the Claimant’s List of Documents)
- 7.5 On or about the 28th January, 2000 Barclays provided to the Cardonas by way of another Loan, the further sum of \$15,000.00 (“the Second Loan”). By the terms of a written facility letter dated the 28th January, 2000, signed by the Cardonas, they promised to repay the Second Loan to Barclays in 24 equal monthly installments of \$782.00 per month including interest at the rate of 17 per cent per annum before as well as after judgment or immediately on demand.
- 7.6 Gildardo Cardona commissioned Southwind Properties to do an appraisal of the Property and by appraisal dated the 8th February, 2000 Claudio

- Azueta valued the Property at \$348,907.00. (See Tab 5 of the Claimant's List of Documents).
- 7.7 In October, 2000 the Cardonas defaulted in their payment of the First Loan and the Second Loan.
- 7.8 On or about the 18th October, 2000 Gildardo Cardona wrote a letter to the Manager of Barclays requesting a break until January, 2001 in meeting the payments on the existing liabilities and additional funds of \$35,000.00 (See Tab 7 of the Claimant's List of Documents).
- 7.9 By letter dated 3rd January, 2001 Barclays wrote the Cardonas informing them that given their failure to update their arrears by November 2000 they were being asked to update the bank on their position. (See Tab 8 of the Claimant's List of Documents).
- 7.10 On the 8th March, 2001 Barclays demanded that the Cardonas repay their two loans and credit cards immediately. (See Tab 9 of the Claimant's List of Documents).
- 7.11 The last payment made by the Cardonas was on 8th March, 2001 to Account No. 1091893, the Mortgage Loan, in the sum of \$3,898.04.
- 7.12 On or about the 13th March, 2001 Barclays provided to the Cardonas a Credit Card Facility with a credit limit of \$4,203.36 ("the Credit Card Facility"). By a Credit Card Agreement dated the 13th March, 2001, Barclays made available to the Cardonas and the Cardonas agreed to repay to Barclays on demand the total amount of any and all amounts charged to the Facility together with interest thereon at the rate of 21.60 per cent per annum or on demand in event of failure to pay any amount as therein agreed.

- 7.13 By letter dated 9th May, 2001 the Cardonas wrote Barclays acknowledging their debt and requesting that their liabilities be restructured and refinanced. (See Tab 12 of the Claimant's List of Documents).
- 7.14 On the 25th April, 2002 the Bank received a valuation from George Moody of Mitchell-Moody & Associates appraising the value of the Property at \$202,500.00. (See Tab 13 of the Claimant's List of Documents).
- 7.15 By letter dated 12th November 2002 the Bank instructed its attorneys to arrange an auction of the Property to recover the amount due to the Bank. (See Tab 14 of the Claimant's List of Documents).
- 7.16 An auction was held on the 23rd December, 2002 and while one bid of \$100,000.00 was received it could not be accepted because it was well below the reserve price of \$348,907.00. (See Tab 15 of the Claimant's List of Documents).
- 7.17 A second auction was held on the 29th May, 2003 and though two bids were received the highest bid of \$110,000.00 could not be accepted because it was well below the reserve price of \$348,907.00. (See Tab 16 of the Claimant's List of Documents).
- 7.18 On the 28th April, 2004 a third public auction was held of the Property and though the reserve price was reduced to \$252,930.00 the Property attracted no interested bidders. (See Tab 17 of the Claimant's List of Documents).

- 7.19 Another auction was held on the 16th February, 2005 and though four bids were received the highest bid of \$125,000.00 was well below the reserve price of \$252,930.00 and could not be accepted.
- 7.20 The auctioneer in his report to the Bank's attorneys after the February 2005 auction reported that the property was abandoned and was being vandalized and that grass and trees were growing and making the property unsightly. (See Tab 18 of the Claimant's List of Documents).
- 7.21 On the 21st February, 2006 a sixth auction of the property was held and though two bids of \$50,000.00 and \$150,000.00 were received the property was not sold because the reserve price was \$227,000.00.
- 7.22 After the sixth auction, the auctioneer reported that not only was the property abandoned and vandalized there were cracks in the beam and a considerable amount of garbage in front and on the sides of the lot. (See Tab 20 of the Claimant's List of Documents).
- 7.23 In March 2006, George Moody of Mitchell-Moody & Associates appraised the value of the Property at \$176,200.00(See Tab 19 of the Claimant's List of Documents).
- 7.24 A seventh auction was held on the 6th February, 2007 but the bid of \$165,000.00 was below the reserve price of \$176,200.00 and could not be accepted. (See Tab 24 of the Claimant's List of Documents).
- 7.25 On the 5th May, 2007 the Bank held an eighth auction of the Property but the bid of \$150,000.00 was below the reserve price of \$176,200.00 and could not be accepted. (See Tab 27 of the Claimant's List of Documents).

- 7.26 An acceptable bid for the Property was received at the ninth auction held on the 18th August, 2007. The Property was sold for \$183,000.00 and after the auctioneer was paid the Bank received \$172,925.00 in September 2007. (See Tab 28 of the Claimant's List of Documents).
- 7.27 On the 24th September 2007, the Bank applied the amount received to the balance outstanding on the First Loan.
- 7.28 The Bank instituted this claim against the Cardonas by claim form dated and filed the 21st October, 2009.

8. **Issues for determination**

The agreed issues between the parties which arise from the pleadings are:

1. Whether all the sums due from the Defendants were secured by a charge on their property located at San Pedro Registration Section, Block 7, Parcel 1286 dated the 16<sup>th</sup> July, 1999.
2. Whether the principal, interest and other charges due on the First Loan to the Defendants are barred by s. 24(3) of the Limitation Act.
3. Whether the principal, interest and other charges due on the second loan and the Credit Card Facility extended to the Defendants are barred by s. 4(a) of the Limitation Act.
4. Whether the Claimant, through its agent, took possession of San Pedro Registration Section, Block 7, Parcel 1286 in 2001.
5. Whether the Claimant had a duty to maintain San Pedro Registration

Section, Block 7, Parcel 1286 in a proper state of repair.

6. Whether the Claimant has a duty to account for rental income that would have been generated from San Pedro Registration Section, Block 7, Parcel 1286.
7. Whether the Claimant earned income from San Pedro Registration Section, Block 7, Parcel 1286.
8. Whether San Pedro Registration Section, Block 7, Parcel 1286 was sold at an undervalue.

**Issue 1**

***Whether all the sums due from the Defendants were secured by a charge on their property located at San Pedro Registration Section, Block 7, Parcel 1286 dated the 16<sup>th</sup> July, 1999.***

9. Amy Forte, Credit Counselor for the Bank in her witness statement at paragraph 5 stated that by a legal charge dated the 16<sup>th</sup> day of July, 1999 made between the first Defendant and the Bank's predecessor, Barclays Bank, the freehold property located at San Pedro Registration Section, Block 7, Parcel 1286 was charged by the first Defendant by way of a legal mortgage in favour of Barclays to secure the repayment to the Bank of the principal sum of \$180,000.00 with interest at the rate of sixteen and one-half per centum per annum or such rate or rates as the Bank charges from time to time.



*Submissions by Mr. Chebat SC for the Defendants*

10. Learned Senior Counsel, Mr. Chebat submitted that the Charge and the Memorandum accompanying the charge were made between the Claimant and the first Defendant only. As such, the charge binds only the first Defendant and only to the extent of the amount for which the Charge was impressed with stamp duties, that is, \$180,000.00. Learned Senior Counsel referred the court to Clauses 1 and 3 of the Memorandum of Charge. He also referred the court to **sections 59(4) and 59(5)** of the **Stamp Duties Act, Chapter 64**. Learned Senior Counsel contended that the remaining balance which is unsecured falls within the simple contract, established by the loan facility letter dated the 18<sup>th</sup> October, 1999. Further, the sum of \$120,000. is barred by **section 4** of the **Limitation Act** and that the entire sum of \$300,000. is barred as against the second Defendant who was not a party to the Charge.

*Submissions by Ms. Barrow for the Bank*

11. Ms. Barrow submitted that in deciding whether or not the sums due from the Defendants were secured by a charge on property located at San Pedro Registration Section, Block 7, Parcel 1286 dated the 16<sup>th</sup> July, 1999, the Court must have regard to the terms of the security documents and in particular the Memorandum Accompanying the Charge. Learned Counsel referred the court to Clause 3 of the Charge and contended that by the very terms of the charge the security given by the First Defendant to the Claimant was to secure **“all sums”** for which he became liable to the Bank be it as the principal, guarantor or surety on an account. Further, given that the First Defendant is, together with the Second Defendant, liable for the sums the Claimant is now seeking to recover, the facilities under which those sums were loaned were all secured by the Charge given by the First Defendant.

## Determination

12. There are several questions raised under this issue by Mr. Chebat. These include: (1) Did the Charge bind only the first Defendant? (2) If so, is it to the extent of \$180,000.00 or all the sums due to the Bank? In answering these questions the court has to look at the terms of the security documents and in particular the Memorandum Accompanying Charge.
13. I am in agreement with Learned Senior Counsel, Mr. Chebat that the Charge bound only the first Defendant. The Charge and the Memorandum Accompanying Charge dated 16<sup>th</sup> July, 1999, which is at Tab 1 of the Claimant's List of Documents, show that the first Defendant, Gildardo Cardona was the Chargor. The second Defendant was not a party to the charge. As such, the Charge did not bind her for the sums due to the Bank.
14. As to whether the Charge bound the first Defendant, Mr. Cardona to the extent of \$180,000. the court has to look at the terms of the Charge and the Memorandum accompanying the Charge and also the Variation of the Charge dated 13<sup>th</sup> December, 1999 to see whether the Charge is a continuing security. The Memorandum accompanying the Charge provides at paragraph (1) as follows:

### WHEREAS

*(1) Barclays Bank PLC a Banking Corporation ... (Hereinafter called "the Bank") at the request of GILDARDO CARDONA .... (hereinafter referred to as "the Chargor") **may from time to time hereafter in its absolute discretion make advances to the Chargor** or give him accommodation or grant accommodation in any account in which the Chargor is guarantor or surety and **the Chargor has agreed to create a***

**charge by way of legal mortgage** (being the Charge contained in the instrument to which this Memorandum is annexed which instrument is hereinafter referred to as “the Charge”) upon the land comprised in the title hereinafter mentioned **as security for the repayment of all monies now owing or which shall hereafter become owing on general balance of account of the Chargor** or otherwise from the Chargor to the Bank or on any account for which the Chargor is guarantor or surety in manner hereinafter appearing; (emphasis added).

Clause 3 of the Memorandum provides as follows:

*The Charge shall be impressed with stamp duty to cover an aggregate liability whether as principal guarantor or surety of One hundred and Eighty thousand Dollars (\$180,000.00) but the Bank shall be at liberty and is hereby empowered at any time or times hereafter (without any further licence or consent on the part of the Chargor) to execute any instrument of variation and to impress additional stamp duty upon the Charge and so to vary the same to cover any sum or sums by which the total liability of the Chargor to the Bank may exceed the said sum of One hundred and Eighty thousand Dollars (\$180,000.00) **it being the intent hereof that the Charge shall cover all sums to any aggregate for which the Chargor may be liable to the Bank as principal guarantor or as surety at any time.** (emphasis added).*

15. I agree with Learned Counsel, Ms. Barrow that Clause 3 shows that the security given to the Bank was to secure “all sums” for which Mr. Cardona

became liable to the Bank. It can be seen by the preamble of the memorandum also that the Charge was *security for the repayment of all monies now owing or which shall hereafter become owing on general balance of account of the Chargor*. In my respectful view, this Charge is a continuing security and consent was obtained to vary this charge as shown by Tab 4 of the Claimant's List of Documents. The 'Variation of the Charge' dated the 13<sup>th</sup> December, 1999 over the property was varied to increase the sums secured by \$120,000.00 to \$300,000.00. pursuant to **section 72** of the **Registered Land Act, Chapter 194** which provides:

*The amount secured, the method of repayment, the rate of interest or the term of the charge may be varied by the registration of an instrument of variation executed by the parties to the charge but no such variation shall affect the rights of the proprietor of any subsequent charge unless he has consented to the variation in writing on the instrument of variation.*

16. This Variation of Charge was executed by Gildaro Cardona thus satisfying **section 72** of the **Registered Land Act**. The Charge was upstamped by the Variation of Charge from \$120,000. to \$300,000. on 13<sup>th</sup> December, 1999. As such, the court respectfully disagrees with Learned Senior Counsel, Mr. Chebat that the Charge bound the first Defendant only to the extent of \$180,000.00. The evidence shows that this Charge bound the first Defendant, Mr. Cardona to the extent of \$300,000.00. It follows that the Charge did not bind the Defendants for all the sums due to the Bank.

17. The court finds that charge on the property located at San Pedro Registration Section, Block 7, Parcel 1286 dated the 16<sup>th</sup> July, 1999 and which was varied on 13<sup>th</sup> December, 1999, bound the first Defendant to the extent of \$300,000.00. As a consequence, the Bank is entitled to the principal due on the first loan in the sum of \$172,513.88 from the first Defendant.

**Issue 2: Whether the principal, interest and other charges due on the First Loan by the Defendants are barred by s. 24(3) of the Limitation Act.**

18. This issue for sake of clarity can be broken down into two parts. The first being whether the interest and other charges due on the first Loan by the First Defendant is barred by **section 24(3)** of the **Limitation Act**. The second being, whether the Second Defendant is liable to the Bank for the principal, interest and other charges on the First Loan of \$300,000.

*Whether the interest and other charges due on the first Loan by the First Defendant is barred by s. 24(3) of the Limitation Act.*

19. The defendants in their amended defence alleged that by virtue of **section 24(3) of the Limitation Act**, the Bank cannot claim for interest and other charges claimed in relation to the First Loan. It has been determined above that the Charge binds the first Defendant to the extent of \$300,000.00. so there is no necessity to discuss the issue of the principal in relation to the first Defendant.
20. Mr. Chebat submitted that with regards to the Charge of \$300,000. in relation to the first Defendant, by virtue of **section 24(3)** of the **Limitation Act**, the Bank is barred from recovering arrears of interest as the action

dated 21<sup>st</sup> October, 2009 is after the expiration of six years from the date on which the interest or other sums became due.

*Submissions by Ms. Barrow*

21. Learned Counsel, Ms. Barrow submits that the Bank accepts that **section 24(3)** of the **Limitation Act** prohibits action being brought to recover arrears of interest in respect of any sum of money payable under any mortgage six years after the date on which the interest became due. However, the Bank states that section 24(3) is not applicable in the instant case because it has not been six years since the sums being claimed as interest on the First Loan have become due. Ms. Barrow submitted that the evidence is that in September 2007 the Bank applied the sums received from the sale of the Property to the interest due on the First Loan and as such the interest being claimed is interest which has accrued since October 2007.

**Determination**

22. The court respectfully disagrees with Learned Senior Counsel, Mr. Chebat that the Bank, by virtue of **section 24(3)** of the **Limitation Act**, is barred from recovering arrears of interest, in relation to the Charge of \$300,000. to the first Defendant as the action dated 21<sup>st</sup> October, 2009 is after the expiration of six years from the date on which the interest or other sums became due. It is not disputed that six years is the limitation period as shown by **Section 24 (3)** of the **Limitation Act** which provides as follows:

*No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or to recover damages in respect of such arrears or to recover any other sum of money in the nature of interest*

*payable under any mortgage shall be brought after the **expiration of six years** from the date on which the interest or other sum became due. (emphasis added).*

23. It is shown by the evidence of the Bank that the interest claimed is not for over six years but two years. Ms. Forte's evidence at paragraph 37 of her witness statement is that the charged property was sold on 12<sup>th</sup> July, 2007 for \$183,000.00. At paragraph 38, she stated that out of the said amount, there were late fees and other charges amounting to \$16,726.81 that had to be paid before the net proceeds of \$172,925.00 was applied to the first loan on 24<sup>th</sup> September, 2007. As shown by the evidence the loan includes principal, interest and other charges. The proceeds of the sale was applied to the loan on 24<sup>th</sup> September, 2007. As such, interest can be claimed from 24<sup>th</sup> October, 2007 on the balance owing to the Bank, which is, \$172,513.88. The interest being claimed in relation to the \$172,513.88. by the Bank is interest that has accrued in the two years before the institution of these proceedings which is within the six year limitation period as provided for under **section 24(3)** of the **Limitation Act**. Accordingly, the court finds that the interest and the other charges due on the first loan by the first Defendant is not barred by **section 24(3)** of the **Limitation Act**. As a consequence, the Bank is entitled to the interest being claimed on the principal due, being \$172,513.88, from the first Defendant.

*Whether the Second Defendant is liable to the Bank for the Principal, interest and other charges due on the First Loan of \$300,000.*

24. Learned Senior Counsel, Mr. Chebat submitted that the loan by the Bank to the second Defendant was by way of a signed contract, the facility letter dated the 18<sup>th</sup> October, 1999. He further contended that pursuant to

**section 4(a)** of the **Limitation Act**, the second Defendant is not liable for the principal, interest or other charges due under the claim, on the basis that the loan to her was on a simple contract and not on the basis of a charge. **Section 4 (a)** of the **Limitation Act** provides :

*The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued-  
actions founded on **simple contract** or on tort;.....*

25. When the loan of \$180,000.00 was increased to \$300,000.00. it was firstly done by a written facility letter dated the 18th October, 1999, from the Bank addressed to both Defendants. The Bank confirmed an agreement on the terms and conditions set out in that letter. The loan amount stated in that letter was \$300,000.00 to be repaid by monthly installments of \$4,935.00 per month including interest. (The security for the loan being Parcel 1286 and this security was given only by the first Defendant by way of the Charge). Both Defendants accepted the offer on the terms and conditions stated in the letter on 19th October, 1999. (See Tab 3 of the Claimant's List of Documents). However, the loan to the second Defendant was not secured by any Charge. As such, I am in agreement with Learned Senior Counsel, Mr. Chebat that the second Defendant is not liable for the principal, or interest or other charges due under the claim as the basis of the loan to her was under a simple contract and not the basis of a charge. The cause of action in relation to the agreement accrued on the 8<sup>th</sup> March, 2001 when the loan was demanded. The claim commenced on 21<sup>st</sup> October, 2009. As such, pursuant to **section 4(a)** of the **Limitation Act**, no action can be brought against the second Defendant as more than six years had expired. Accordingly, the court finds that the second Defendant is not liable to the Bank for the principal or interest or other charges on the First Loan for \$300,000.00.



**Issue 3: Whether the principal, interest and other charges due under the second loan and the Credit Card Facility extended to the Defendants are barred by s. 4(a) of the Limitation Act.**

26. The Defendants at paragraph 5 of their Defence alleged that by virtue of **section 4(a)** of the **Limitation Act** the Bank cannot claim for sums due under the Second Loan and the Credit Card Facility because the sums being claimed were loaned pursuant to a simple contract.

*Submissions by Mr. Chebat*

27. Learned Senior Counsel, Mr. Chebat submitted that a credit card facility is in the nature of a loan contract and in Belize is governed by common law principles. He relied on **Halsbury's Laws of England Vol. 9(1) 4<sup>th</sup> Edition Reissue** at paragraph 16 page 17.
28. Mr. Chebat says that it can be seen from paragraph 8 of the Amended Statement of Claim that the credit card agreement was not an agreement made under deed nor by way of a mortgage and therefore, it amounts to a simple contract and it is barred by **section 4(a)** of the **Limitation Act**.
29. Further, that section 4(2) of the Limitation Act will also apply to the loan of \$15,000. which was given by way of a written facility letter dated the 28<sup>th</sup> January, 2000, not under deed and thus barred.
30. Learned Senior Counsel relied on (1) **First Caribbean International Bank (Barbados) Ltd. v Timothy St. John, Eastern Caribbean Supreme Court Claim No. 423 of 2009.** (2) **Bristol and West Plc and Bartlett and another (2003) 1 WLR 284.**

*Submissions by Ms. Barrow*

31. Ms. Barrow submitted that the Bank accepts that **section 4(a)** of the **Limitation Act** limits the right to sue on any contract to six years from the date on which the cause of action accrued. However, the Bank contended that all monies loaned to Gildardo Cardona was secured by the charge on the Property and as such section 4(a) does not apply. Further, that the charge on the Property states that interest in the Property is charged to secure the payment to the Bank *“of all monies agreed to be paid”*. Further, the Memorandum Accompanying the Charge on the Property states in its first paragraph that Gildardo Cardona charged the Property for *“the repayment of all moneys now owing or which shall hereafter become owing on general balance of account of the Chargor or otherwise from the Chargor to the Bank or on any account for which the Chargor is guarantor or surety ...”*
  
32. Learned Counsel further stated that it is stated at clause 3 of the Memorandum Accompanying Charge that the intent of the Charge is *“that the Charge shall cover all sums to any aggregate for which the Chargor may be liable to the Bank as principal guarantor or as surety at any time.”*
  
33. Therefore, Learned Counsel contended that while the Second Loan and the Credit Card Facility were extended to the Defendants after the date of the Charge, given Gildardo Cardonas’ involvement in the facilities, secured by the Charge on the Property, **section 4 (a)** of the **Limitation Act** does not apply to bar the Bank’s claim.

34. Learned Counsel, Ms. Barrow further submitted that by virtue of **section 24(1)** of the **Limitation Act** it has twelve (12) years from the date when the right to receive the principal sum of money accrued to bring action for the principal sum due and as such these proceedings were instituted within the permitted time to recover the principal sum due on the Second Loan and the Credit Card Facility. However, the Bank recognizes that **section 24(3)** of the **Limitation Act** limits the right to bring action to recover arrears of interest payable in respect of the Second Loan and the Credit Facility to six years from the date on which the interest became due and as such the Bank accepts that it cannot by proceedings instituted on the 21<sup>st</sup> October, 2009 claim interest which became due before the 21<sup>st</sup> October, 2003. Learned Counsel contended that the Bank did not claim interest on the Credit Card Facility and the interest claimed on the Second Loan did not include interest that had become due before the 21<sup>st</sup> October, 2003.

### **Determination**

#### *Credit Card Facility*

35. The Bank, at paragraph 8 of its Amended Statement of claim pleaded that by a Credit Card Agreement dated the 13th March, 2001, they made available to the Defendants who agreed to repay to them on demand the total amount of any and all amounts charged to the facility together with interest thereon at the rate of 21.60 per cent per annum or on demand in event of failure to pay any amount as agreed. I am in agreement with Learned Senior Counsel, Mr. Chebat that it can be seen from the pleading of the Bank that the credit card agreement was not an agreement made under deed nor by way of a mortgage and thus, it amounts to a simple contract and it is barred by **section 4(a)** of the **Limitation Act**. Although the Charge is a continuing security which can cover all sums borrowed by the Chargor, the Charge was not varied and upstamped pursuant to **section 72** of the **Registered Land Act**.

*Second Loan*

36. I am also in agreement with Learned Senior Counsel, Mr. Chebat that the second loan given by way of the written facility letter dated 28<sup>th</sup> January, 2000 is also a simple contract and barred by section **4(a)** of the **Limitation Act**.
37. As submitted by Learned Senior Counsel, Mr. Chebat, actions founded on simple contracts, pursuant to **section 4(a)** of the **Limitation Act** cannot be brought after the expiration of six years from the date when the cause of action accrued.
38. The cause of action for the credit card facility and the second loan accrued on 8<sup>th</sup> March, 2001. At Tab 9 of the Claimants bundle is the letter dated 8<sup>th</sup> March, 2001 which shows that the Bank demanded from the Cardonas payments of Account No. 1091893 (Mortgage Loan), Account No. 1092059 (Vehicle Loan) and the Credit Card Facility. This claim was issued in October of 2009 which is more than six years after the cause of action accrued.
39. The court respectfully disagrees with Learned Counsel, Ms. Barrow that although the Second Loan and the Credit Card Facility were extended to the Defendants after the date of the Charge, given Gildardo Cardonas' involvement in the facilities, secured by the Charge on the Property, **section 4 (a)** of the Limitations Act does not apply to bar the Bank's claim. The Bank and Mr. Cardona did not vary the Charge pursuant to **section 72** of the **Registered Land Act**. In other words, the Charge was not varied and upstamped to include the second loan and the credit card facility. As such, although the Memorandum accompanying the Charge on the Property provides for all sums now owing or which shall become

owing, the Charge has to be varied by consent of the Chargor and signed by him to include the additional sums borrowed. Since this was not done, the second loan and the credit card facility offered to the Defendants are simple contracts. The court finds that pursuant to **section 4(a)** of the **Limitation Act**, the Bank is barred from claiming the principal, interest and other charges due under the second loan and the Credit Card Facility extended to the Defendants.

**Issue 4: Whether the Claimant, through its agent, took possession of San Pedro Registration Section, Block 7, Parcel 1286 in 2001.**

40. The Defendants at paragraphs 8 and 9 of their defence say that the Claimant, through its agent Kevin Castillo took possession of the property held as security for loan No. 1091893 in 2001 which at the time was generating income from rental. The Defendants say that Mr. Castillo went to the second Defendant's place of work and demanded the keys to the premises. The Claimant in reply says that it did not take possession of the property held as security for the loan in 2001 and only took possession of the property after the 18<sup>th</sup> August, 2007 when the property was sold by public auction.
41. Mr. Cardona at paragraph 28 of his witness statement stated that Mr. Castillo demanded the keys to the house which included all units and remained in possession of the keys, stating that he was taking over the property with his instructions to auction thus, leaving them without any access or custody to the property. He further stated that they later tried accessing the house with duplicate keys but it seemed that the locks had been changed by someone.
42. Ms. Forte for the Claimant in her witness statement at paragraphs 31 and 34 stated that when the fifth auction was held, the auctioneer

informed the Bank that the property was abandoned and being vandalized and in need of cleaning. Also, that the property was in a deplorable condition. Ms. Forte adduced two letters from Kevin Castillo dated 11<sup>th</sup> March, 2005 (Tab 18) and 16<sup>th</sup> March, 2006 (Tab 20) in which he reported that the property was “abandoned and being vandalized” and that “apart from being abandoned and vandalized, the property is now in a deplorable condition...” The letter of 16<sup>th</sup> March, 2006 shows that there were cracks in the beam of the property.

*Submission by Mr. Chebat*

43. Learned Senior Counsel, Mr. Chebat submitted that in cross-examination, Ms. Forte, admitted that at the material time she was not handling the account of the Defendants and thus she did not know whether, Castillo, the auctioneer had taken the Defendants out of possession of their property. Further, Learned Senior Counsel contended that the evidence of the first Defendant is that the keys, either by himself or by the second Defendant, were delivered to Kevin Castillo, the auctioneer and there was no evidence by the Claimant disputing this.
44. Mr. Chebat further submitted that there is evidence that the locks to the Defendants’ property were changed, and not by them. As such, they were excluded from possession either directly by the Claimant or through its agent, Kevin Castillo. Further, they were not given keys to the property after Kevin Castillo took them.

*Submission by Ms. Barrow*

45. Learned Counsel, Ms. Barrow submitted that the Defendants have failed to adduce any satisfactory evidence in support of its allegation that the Claimant took possession of San Pedro Registration Section, Block 7, Parcel 1286 in 2001. Further, the only evidence adduced by the Defendants in support of its contention is the testimony by the First

Defendant which proved to be inconsistent with the allegations made in the defence.

46. Ms. Barrow contended that the Claimant has asserted and maintains that it did not take possession of the property in 2001 and the evidence of its witness in support of that assertion remained consistent. Further, the fact that Defendants' witness gave contradicting accounts of what transpired results in a qualitative factor which is that the quality of the Defendants' evidence cannot match the quality of the Claimant's evidence which is consistent. Given the manifest dishonesty of the First Defendant, the Claimant's consistent evidence remains beyond challenge by the evidence of the Defendants.

#### **Determination**

47. The evidence of the Bank is consistent that they did not take possession of the property in 2001 from the Defendants. Ms. Forte, who I find to be a credible witness, in cross-examination maintained that the Bank did not take possession of the property and that the Defendants had abandoned the property. She said that the Bank's instructions to their attorneys were for the property to be auctioned. There is no evidence showing that the Bank gave instructions to their attorneys to take possession of the property or gave instructions to Mr. Castillo to take possession of the property. Ms. Forte's evidence in cross-examination is that normally when the Bank auctions a house the occupants of the property are told to leave after it is sold.

48. The evidence of the first Defendant, as submitted by Learned Counsel Ms. Barrow, is inconsistent with his defence. The Defendants allege at

paragraph 9 of their defence that sometime in 2001 Kevin Castillo on behalf of the Claimant “*appeared at the 2<sup>nd</sup> Defendants place of work and demanded that she turned over the keys to the premises to him. That the 2<sup>nd</sup> Defendant had to leave her work to retrieve the keys and sent them to Kevin Castillo who had gone to the property.*” In cross-examination, Mr. Castillo said that Mr. Castillo got the keys from him at his job. In further cross-examination he stated that Mr. Castillo visited his family home to pick up the keys for the first auction. He said that he told him that he had tenants so although he had a copy of the keys he did not give it to him. He later said that it was at the second auction when the tenants were not there that they delivered the keys to Mr. Castillo. He said that he personally gave the keys to Mr. Castillo. Later, he stated that he was with his wife when the keys were delivered to Mr. Castillo.

49. It has been proven by the evidence of the Bank that the Defendants abandoned the property and the Defendants were aware that the house had been vandalized and vagrants had been living in the house. In cross-examination, Mr. Cardona was asked whether he was aware that people were occupying the house between 2002 to 2007 and he stated that he did not know who lived in the house. Then he said that the house was unoccupied because the tenants had left. Later, he stated that the house had been vandalized and “*it had been some kind of I don’t know, vagrants or whoever were living in the house.*” He further stated that the vagrants lived in the house when it became dilapidated.
50. I did not find Mr. Cardona to be a credible witness and I did not believe his evidence that Mr. Castillo took the keys to the property and remained in possession of same, stating that he was taking over the property. Further, I find Mr. Cardona was being untruthful when he said that they tried accessing the house with duplicate keys but it seemed that the locks had been changed by someone. If this was so, Mr. Cardona could have



approached the bank to enquire why the locks to the house were changed. Accordingly, the court finds that the Claimant did not take possession of the San Pedro Registration Section, Block 7, Parcel 1286 in 2001, through its agent.

**Issue 5 : Whether the Claimant had a duty to maintain San Pedro Registration Section, Block 7, Parcel 1286 in a proper state of repair.**

51. The Defendants at paragraph 11 of their Amended Defence alleged that the Bank was negligent in its duty to them because it allowed the property to become dilapidated. The Bank in answer to this allegation stated that it was the duty of the Defendants and in particular, the first Defendant, Gildardo Cardona to keep the property in a good and substantial state of repair.
52. Learned Counsel, Ms. Barrow in her written submissions referred the court to Clause 5(1) of the Memorandum Accompanying Charge executed by Gildardo Cardona whereby Mr. Cardona covenanted and agreed with the Bank that *“he will during the security constituted by the Charge keep all buildings and other property of an insurable nature which are or which may from time to time hereafter be erected or brought upon the land hereinbefore mentioned in a good and substantial state of repair...”*.
53. As such, learned Counsel contended that by the terms of the agreement between Gildardo Cardona and the Bank, contained in the Memorandum Accompanying Charge which Mr. Cardona signed, he promised and agreed that he would keep the property in a good and substantial state of repair as long as the Bank held the charge over the property.

54. Learned Senior Counsel, Mr. Chebat in his written submissions stated that the Defendants allege that the Claimants took possession of the property through its agent, Kevin Castillo. Learned Counsel relied on **Fisher and Lightwood's, Law of Mortgages** at paragraph 19.74 which states that the duty of the mortgagee in possession to take reasonable care of the property includes a duty to carry out reasonable repairs.
55. It has been proven by the Bank that they did not take possession of the property. As such, the Bank did not have a duty to take care of the property and make reasonable repairs. The court agrees with Ms. Barrow that pursuant to Clause 5(1) of the Memorandum Accompanying Charge executed by Gildardo Cardona and the Bank, he agreed that he would keep the Property in a good and substantial state of repair as long as the Bank held the charge over the Property. As such, the court finds that the Claimant, Bank did not have a duty to maintain the San Pedro Registration Section, Block 7, Parcel 1286 in a proper state of repair.

**Issue 6 : Whether the Claimant has a duty to account for rental income that would have been generated from San Pedro Registration Section, Block 7, Parcel 1286.**

56. The Defendants alleged in their Counterclaim that the Bank evicted the tenants from the property and caused them to lose rental income from the said property and as such the Bank has a duty to account for rental income that would have been generated. The Bank in answer to this allegation contended that it did not take possession of the property until after the property was sold and as such never rented the property nor had any obligation to rent the property.

57. Learned Counsel, Ms. Barrow relying on **Halsbury's Laws of England, Fourth Edition Reissue, Vol. 16(2) para. 451** contended that the duty to provide an account to the Defendants for rental income that would have been generated only arises if the Bank was in possession of the property and committed an act of willful default by failing to rent the property.
58. Learned Senior Counsel, Mr. Chebat submitted that the Defendants allege that the Claimants took possession of the property and at the material time, the property was being rented and generating income. Learned Counsel relying on the case of **Noyes v. Pollock (1886) L.R. 32 Ch. D. 53** submitted that, "*The question as to whether the mortgagee is in possession depends upon whether they have taken out of the hands of the mortgagor the power and duty of managing the estate and dealing with the tenants.*"
59. It has been proven that the Bank did not take possession of the property. As such, the Bank owes no duty to account for monies that may have been earned from the Property. The court agrees with the submission of Learned Counsel, Ms. Barrow that the duty to provide an account to the Defendants for rental income that would have been generated only arises if the Bank was in possession of the property and committed an act of willful default by failing to rent the property. **Halsbury's Laws of England, Fourth Edition Reissue, Vol. 16(2) para. 451** applied. As such, the court finds that the Claimant did not have a duty to account for rental income that would have been generated from San Pedro Registration Section, Block 7, Parcel 1286.

**Issue 7: Whether the Claimant earned income from San Pedro Registration Section, Block 7, Parcel 1286.**

60. The defendants in their counterclaim seeks an accounting of income earned by the Claimant from the property from the time they took possession to the date of sale.
  
61. Learned Senior Counsel, Mr. Chebat submitted that the Defendants evidence is that at the time, Kevin Castillo, auctioneer for and on behalf of the Claimant, took possession of their property, it was being rented. Further, that Defendants do not have any documentary evidence or otherwise to determine for how long or if the Claimant continued renting the premises, and if so how long and at what rate.
  
62. Learned Counsel, Ms. Barrow submitted that the question of whether or not the Claimant earned income from San Pedro Registration Section, Block 7, Parcel 1286 is linked to the issue of possession, and the Court is in agreement with this submission. Further, as submitted by Learned Counsel, Ms. Barrow, the evidence adduced by the Defendants themselves at paragraph 31 of the witness statement of the First Defendant is that the Defendants "*started seeing the house deteriorate, become dilapidated and later noticed it inhabited by delinquents*" supports the position of the Claimant that they did not take possession of the property and were not receiving any income from the property. Accordingly, since it has been proven that the Claimant did not take possession of the property they could not have earned any income from 2001 until the sale of the property. As such, the court finds that the Claimant did not earn any income from San Pedro Registration Section, Block 7, Parcel 1286.

**Issue : 8 Whether San Pedro Registration Section, Block 7, Parcel 1286 was sold at an undervalue.**

63. The Defendants in their counterclaim claims damages for loss in the market value of the property as a result of the negligence of the Claimants who, as mortgagee in possession, has a duty to maintain the property of the defendants, in a proper state of repair.
64. Mr. Cardona at paragraph 9 of his witness statement stated that the valuation of the property was \$413,040.00 pursuant to an appraisal report from Southwinds Properties exhibited as **"G.C. 7"**.
65. Learned Senior Counsel, Mr. Chebat submitted that the Defendants have provided, two distinct valuations on the subject property, one in 1999 showing the value of the property to be \$249,907.00 and another in 2001 showing the value to be \$413,040.00. Further, that the Claimant's valuation in 2006 stated that the property was dilapidated and that the building was in poor condition.
66. Mr. Chebat contended that the evidence of the Defendants is that they were disposed of the property by the Bank's auctioneer, Kevin Castillo. As such, the condition of the property is as a result of the Claimant who had become a mortgagee in possession and who had through their negligence allowed the property to deteriorate and become dilapidated. He further, submitted that notwithstanding the provisions of the Memorandum of Charge, the Defendants had no access to the property and thus were prevented by the Claimant from fulfilling that obligation.
67. The court agrees with Learned Counsel, Ms. Barrow that the Defendants' contention that the property was sold at an undervalue is based on the allegation that in 1999 the property was valued at \$249,907.00 and in 2001 it was valued at \$413,040.00. Mr. Cardona under cross-examination, as pointed out by Ms. Barrow, accepted that the property was sold six years after the most recent valuation relied on

by the Defendants. He also accepted under cross-examination that the Claimant had secured a valuation in March 2006 which valued the house at \$183,800.00. This Valuation is exhibited at **Tab 19** of the Claimant's list of documents. The court further agrees with Learned Counsel, Ms. Barrow that the valuation secured by the Bank in 2006 stated that the property was overgrown, unkept and that the building was in poor condition. Further, Mr. Cardona in his witness statement at paragraph 31 stated that the house deteriorated and became dilapidated in the time between the Defendants' last valuation and the sale of the property. As such, the court agrees with Learned Counsel, Ms. Barrow that the property was not sold at an undervalue. The court finds that the San Pedro Registration Section, Block 7, Parcel 1286 was not sold at an undervalue.

## 68. **Quantum of Special Damages**

### 68.1 Principal due

The Claimant claims \$172,513.88 as the principal due on the first loan. This has been proven to be the balance on the loan of \$300,000.00. after payment of the proceeds from the sale of the property. The court grants the claim for \$172,513.88 as principal due under the first loan for \$300,000.00.

### 68.2 Interest due under the first Loan

The Claimant claims \$19,560.42 as interest under the First Loan. The agreed rate of interest on this loan is 15.5% per annum. The balance owing is \$172,513.88. 15.5 % per annum of \$172,513.88 is \$26,739.65. At the time, the claim was filed, the claimants claimed for 267 days of interest. The interest will therefore, continue to accrue up to the date of judgment. The daily rate of interest being \$73.26 ( $\$26,739.65 \div 365 = \$73.65$ ). The Bank is therefore entitled to \$19,560.42 as interest

due as of the date of the claim, plus interest that continue to accrue at the daily rate of \$73.65 and is so awarded.

68.3 Late and other Charges

The Claimant claims \$16,726.81 as late and other charges. There is no challenge to these charges. The Bank is therefore entitled to \$16,726.81 as late and other charges and is so awarded.

68.4 Attorney- at-law charges

The Claimant claims \$45,936.24 as Attorney-at-law charges to which there was no challenge. The Bank is entitled to \$45,936.24 as Attorney-at-law charges and is so awarded.

68.5 Summary of special damages due and awarded to the Bank

Principal due .....	\$172,513.88
Interest due .....	\$ 19,560.42
Late and other charges .....	\$ 16,726.81
Attorney-at-law charges .....	<u>\$ 45,936.24</u>
Total	<u>\$ 254,737.35</u>

**Summary of findings**

69. The court finds as follows:

69.1 The charge on the property located at San Pedro Registration Section, Block 7, Parcel 1286 dated the 16<sup>th</sup> July, 1999 and which was varied on 13<sup>th</sup> December, 1999, bound the first Defendant, Gildardo Cardona to the extent of \$300,000.00. As a consequence, the Bank is entitled to the principal due on the first loan in the sum of \$172,513.88 from the first Defendant, Mr. Gildardo Cardona.

- 69.2 The Bank is entitled to the interest claimed on the principal due, being \$172,513.88, on the first loan, from the first Defendant, Mr. Gildardo Cardona. The Bank is also entitled to the other charges on the said loan from the first Defendant.
- 69.3 The second Defendant is not liable to the Bank for the principal or interest or other charges on the First Loan for \$300,000.
- 69.4 That pursuant to **section 4(a)** of the **Limitation Act**, the Bank is barred from claiming the principal, interest and other charges due under the second loan and the Credit Card Facility extended to the Defendants.
- 69.5 The Claimant, Bank did not take possession of the San Pedro Registration Section, Block 7, Parcel 1286 in 2001, through its agent and they did not have a duty to maintain the said property.
- 69.6 The Claimant did not earn any income from San Pedro Registration Section, Block 7, Parcel 1286 and did not have a duty to account for rental income that would have been generated from the said property.
- 69.7 The San Pedro Registration Section, Block 7, Parcel 1286 was not sold at an undervalue.
- 69.8 The Claimant is entitled to the sum of \$254,737.35 as special damages, to be paid by the First Defendant, Mr. Gildardo Cardona.



70. Accordingly, the order of the court is:

**ORDER**

The First Defendant, Mr. Gildardo Cardona is ordered to pay to the Claimant, Bank the sum of \$254,737.35 being:

Principal due .....	\$172,513.88
Interest due .....	\$ 19,560.42
Late and other charges .....	\$ 16,726.81
Attorney-at-law charges .....	<u>\$ 45,936.24</u>
Total	<u>\$ 254,737.35</u>

Dated this 6<sup>th</sup> day of February, 2013.

.....  
Minnet Hafiz-Bertram  
Supreme Court Judge