

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

SUIT NO. ANUHCV 2004/0315

BETWEEN:

ADONIS SWIFT

Claimant

And

ANTIGUA COMMERCIAL BANK LIMITED

Respondent

**Appearances:**

Mr. Craig Christopher for the Claimant

Mrs. Neleen Rogers-Murdoch for the Respondent

.....  
2005: October 24<sup>th</sup>

2006: February 21<sup>st</sup>  
.....

**JUDGMENT**

[1] **Blenman, J:** This is a claim by Mr. Adonis Swift (Mr. Swift) for a declaration that his equitable lien ranks in priority to the charge held by the Antigua Commercial Bank (the bank). Mr. Swift seeks several other declarations.

**Background**

[2] Mr. Swift owned land registered in Registry as Registration Section: **McKinnons, Block: 43 B 1595B Parcel: 3** (the property).

[3] He obtained several loans from the bank, which were secured by charges on the property. The bank also granted Mr. Swift an overdraft facility. Mr. Swift was unable to service the loans in accordance with the agreements he entered into with the bank and his payments fell into arrears. After he fell into financial difficulties he sought to sell the property in an effort to liquidate his indebtedness to the bank. The bank formally demanded that he make

good his indebtedness to it but Mr. Swift was unable to do so. The bank caused to be issued to Mr. Swift a Notice to Pay off Debt; he was still unable to do so. Sometime elapsed and he was still unable to clear off the arrears of the installments, which by now had grown substantially.

[4] By this time, the bank was indicating in no uncertain terms its intention to exercise its options under the charges that attached to Mr. Swift's property.

[5] In an effort to stave off the bank selling of his property, Mr. Swift set about selling the property by private treaty to Mc Don Enterprises (the company) which was represented at all material times by Mr. Mc Andrew Mc Donald (Mr. Mc Donald). Mr. Swift was required to clear off the bank charges on the property before selling. The company did not have the money to purchase the property so it sought to borrow money from the bank. Negotiations ensued between Mr. Swift and (Mr. Mc Donald) acting on behalf of the company.

[6] Subsequently, Mr. Swift entered into an agreement for sale with the company in relation to property (which was charged).

[7] Pursuant to the agreement for sale, the bank was requested to give a loan of US\$1,500,000.00 to the company to purchase the property based on terms stated to have been agreed between Mr. Swift and the company as follows.

Purchase Price –	US\$1,625,000.00
Bank's payment to vendor	US\$1,000,000.00
Notice to be held by vendor from purchase	US\$ 375,000.00
Value of condominium to be retained by vendor	US\$ 250,000.00

[8] The company obtained financing from the bank in order to purchase the property and to renovate it. The bank loaned the company \$4,050,000.00 Mr. Swift received \$2,700,000.00 out of this sum which represented US\$1,000,000.00 of the purchase price as indicated in the agreement for sale. Mr. Swift simultaneously applied the moneys he

- received to liquidate his indebtedness to the bank and the bank caused the charges on the property to be discharged.
- [9] Mr. Swift also signed a transfer of land of the charged property to Mc Don Enterprises.
- [10] Having loaned the company the sum of \$4,050,000.00 the bank registered a charge over the property to secure the loan. The bank also gave the company other credit facilities, which were secured by other charges over the property.
- [11] The company defaulted in its loan repayment, as a result, the bank issued a Notice to Pay off Debt. The company failed to make good its indebtedness and the bank caused a portion of the property to be sold at auction for the sum of \$1,400,000.00
- [12] The company also owes Mr. Swift the sum of US\$375,000.00. Mr Swift sued the company for the sum and obtained judgment. He has been unable to recover his judgment from the company. Mr. Swift did not register a charge over the property for the outstanding sum he is owed by the company.
- [13] Mr. Swift filed this claim seeking to obtain the following reliefs *that his equitable charge ranks in priority over the legal charges in favour of the bank.*
- (a) A declaration that the Claimant's equitable charge ranks in priority over the legal charges in favour of the bank.
  - (b) An injunction to restrain the Second Defendant from exercising in priority to the Claimant's equitable charge, its rights, powers and privileges contained in or vested by the charges more particularly described in the encumbrances section of the Land Register as entries Nos. 11,12,13 and 14; and
  - (c) The appointment of a receiver and manager of the aforementioned property, or alternatively, an order that the Second Defendant do all acts necessary to enable the Claimant to redeem his equitable charge.

- [14] In its defence filed on 28<sup>th</sup> October 2005, the bank originally denied that Mr. Swift had an equitable charge over the property. The bank said that it had registered several charges over the property and denied that its charges rank lower in priority to Mr. Swift equitable charge, if it exists at all.
- [15] By the time the matter came on for trial, even though the bank did not file an amended defence there appears to be no dispute as to the fact that Mr. Swift was an unpaid vendor at the time the transaction arose and that as an unpaid vendor, Mr. Swift would be entitled to a lien on the property. In fact, in its skeletal arguments filed on February 21<sup>st</sup> 2005, the bank conceded this point.
- [16] There is also no dispute that pursuant to section 28(2)(e) of the Registered Land Act, Cap 374 Revised Laws of Antigua and Barbuda, Mr. Swift's lien would normally be an overriding interest and that pursuant to section 28, the bank's charges would normally be subject to Mr. Swift's overriding interest.
- [17] The bank contends however, that in the circumstances of the transaction Mr. Swift was not entitled to have the lien treated as an overriding interest since Mr. Swift knowingly and with legal advice waived his right to have that interest rank higher in priority to the bank's charges. In addition, Mr. Swift failed to register his charge and by his conduct led the bank to believe that he was abandoning his equitable rights. Accordingly, the court should not grant Mr. Swift the declarations he seeks.

#### **Issue**

- [18] Whether Mr. Swift equitable lien should be treated as an overriding interest, which ranks in priority to the bank charges, in view of the circumstances of the transactions.

#### **Evidence**

- [19] Mr. Swift filed a witness statement and was cross-examined.

[20] The bank caused witness statements to be filed by Ms Arlene Joseph and Mr. Colin Maynard who are its employees. Ms Nicolette Doherty, Attorney-at-Law also testified on behalf of the bank.

[21] The court also referred to the bundle of documents filed and relied on by the parties.

### **Mr. Swift's Evidence**

[22] Mr. Swift said that he agreed to sell the property to the company at a price for US\$1,625,000.00 (one million six hundred and twenty five thousand United States Dollars). The sale agreement between himself and the company was completed by the law firm of Hill and Hill and the Deed of Transfer was prepared by his lawyer Mr. Dane Hamilton Snr. While the bank was involved it had nothing to do with the discussions between himself and Mr. McDonald in relation to the purchase price. He said that the bank agreed to lend the company the sum of US\$1,000,000.00 and that he agreed to be paid the balance of the purchase price namely the US\$375,000.000 over a period of 5 years. He said that "the bank had nothing to do with the formulation of the agreement and after it was completed we did not go into the bank together."

[23] After he had entered into an agreement with the company, Mr. Mc Donald took a copy of it into the bank.

[24] Later in his witness statement he said that the bank was always aware of the negotiations and the finalized agreement, as they were the ones who loaned Mc Donald the money to purchase the property.

[25] A few days after the agreement was drawn up and signed and Mr. McDonald had taken his copy to the bank, he (Swift) received a telephone call from Mr. Roger Charles of ACB who asked him to come into the bank to see him. When he got to the bank Mr. Charles told him that they could move on with arrangements for the purchase. They discussed the purchase price of which he was already aware. He then set out to do the breakdown of the disbursement, which was as follows: -

Cheque	EC\$2,700,000.00
Less Stamp duty	75,000.00
Loan payoff	1,346,057.06
Loan payoff	174,524.90
Net proceeds to a Swift	1,104,400.04

- [26] Before the cash was disbursed to him, he was sent to the Legal Department of the bank to Mr. Greaux, the bank's lawyer, to sign the transfer of title that had been prepared by his lawyer, Dane Hamilton Snr Esq. After this was done, he went back to Mr. Charles who asked him to sign the funds disbursement form which he duly signed.
- [27] During his negotiations with Mr. McDonald, they discussed the question to security for the unpaid balance. His lawyer Dane Hamilton Snr., Esq. vetted the sale agreement but did not advise him on the question of a legal charge being placed on the property in his favour to secure the unpaid balance.
- [28] He said at all material times the bank was fully aware of the fact that he "carried a part of the purchase price of the property, that is US\$375,000.00 to be exact."
- [29] He also said in his evidence that during the negotiations with Mr. McDonald he discussed the issue of security for the outstanding money the company owed him. He also held several discussions with Mr. Dane Hamilton Snr and received letters from Mr. McDonald in relation to the security for the outstanding moneys the company would have owed him. Mr. Hamilton was his lawyer and that he (Swift) instructed him to prepare the transfer. He said while he could not remember specifically about the agreement of sale he was sure that Mr. Hamilton was involved and it is possible that he may even have prepared it. However Mr. Hamilton did not go through the documents with him that is the sale agreement and the transfer. Neither did he discuss with Mr. Hamilton the possibility of obtaining security for the outstanding balance that the company owed him.

- [30] During cross-examination by learned counsel Mrs. Rogers-Murdoch he said that Mr. Hamilton advised him and that he trusted him.
- [31] He admitted that he was a long-standing customer of the bank. Previously he sold other property and took steps to secure the outstanding money the purchaser owed him.
- [32] While initially he said that he had no discussion with Mr. McDonald in relation to his placing a charge on the property. Under vigorous cross-examination he accepted a document, which was shown and referred to the possibility of him putting a second charge on the property.
- [33] He said that he had discussions with Mr. McDonald and Mr. Roger Charles (a bank employee) about securing his interest in the property. Mr. Swift denied that the bank ever advised him to obtain independent legal advice and said that he had never seen a similar letter to the one sent by the bank to Mr. McDonald recommending that he obtained independent legal advice. Later he said that he trusted Mr. Hamilton and expected that Mr. Hamilton would have given him proper advice.
- [34] He admitted that while he sold the property for US\$1,625,000.00 the transfer stated that the property was sold for EC\$1,000,000.00. Mr. Hamilton witnessed the Agreement for sale and the transfer. He was not aware that it is stated in the transfer that the property was transferred at a lesser sum than the actual price at which it was sold it would mean that he would have paid less stamp duty to the state. He accepted that the letter written by Mr. McDonald on 16<sup>th</sup> December 1996, which he was shown by counsel, reflects the agreement he entered into with the company.
- [35] He accepted that while he consulted various lawyers in relation to his claim against the bank it took him 6 years to file a suit against the bank even though he was aware of the fact that the bank had sold a portion of the property based on the charge it had over the property.

[36] On re-examination he denied agreeing with Mr. McDonald not to take security for the outstanding sum of money but believed that he discussed with Mr. Hamilton about the taking of security on the property. He later said that at the time of signing the transfer "he left the issue of security to be addressed by Mr. Hamilton and hoped that all of those matters were dealt with."

**Ms Arlene Joseph's evidence**

[37] Ms Arlene Joseph filed a witness statement and stated the bank had loaned Mr. Swift various sums of money and took charges on his property. He defaulted in the payment of his loans and the bank formally demanded that he settle his arrears. He was unable to do so. He entered into discussion with Mr. McDonald on behalf of the company to sell his property.

[38] The company applied to the bank for a loan to purchase the property. The loan application was accompanied by the agreement for sale between Mr. Swift and the company. Pursuant to the said agreement for sale, the bank was requested to give a loan of US\$1,500,000.00 to the company to purchase the charged property, based on the terms between the vendor and the purchaser for the sale as follows:

Purchase Price	US\$1,625,000.00
Bank's payment to vendor	1,000,000.00
Note to be held by vendor from purchaser	375,000.00
Value of condominium to be retained	
By vendor	250,000.00

Based on the agreement for sale Mr. Swift was to hold a note in the amount of US\$375,000.00 from the purchaser for 5 years.

[39] Mr. McDonald also produced correspondence to the bank, which indicated that Mr. Swift and the company had discussed the abovementioned financial arrangement. The bank records indicate that Mr. Swift and the company discussed the bank obtaining a first charge on the property to secure the loan it was about to grant the company, Mr. Swift would have registered a charge to rank second in priority to the bank for the outstanding



- sum. The bank granted the company a loan in the sum of \$4,050,000.00 and took charges over (the property).
- [40] Mr. Swift sold the property to the company and executed a transfer, Mr. Swift's attorney Mr. Hamilton witnessed the execution of both the agreement of sale and the transfer.
- [41] Subsequent to the execution of the sale agreement and transfer of land, the bank on February 12<sup>th</sup> 1997 disbursed the loan sum, which was approved for the company. The disbursement included an amount of \$2,700,000.00, which was paid to Mr. Swift by draft No.86083. This payment of \$2,700,000.00 represented the amount of US\$1,000,000.00 of the purchase price of the property pursuant to the agreement dated 9<sup>th</sup> December 1996 between the company and Mr. Swift which the company had presented to the bank with the application for the loan dated 16<sup>th</sup> December 1996.
- [42] Mr. Swift applied the said sum of \$2,700,000.00, which was received from the bank in respect of the purchase price, to liquidate the debts, which were due to the bank under the several charges registered on the property, and the said charges were discharged. The total sum used to repay the loans on the charged property was \$1,520,599.96. Mr. Swift from this sum also received the sum of \$1,104,400.04 in respect of the total disbursement, and this amount was deposited by the bank to his account No.100000686.
- [43] The Agreement for Sale dated 4<sup>th</sup> February 1997 contained the same terms and conditions of sale that were contained in the letter of agreement dated 9<sup>th</sup> December 1996 signed between Mr. Swift and the Company for the sale of the charged property, which had been submitted to the bank by Mr. McDonald on behalf of the company in support of its loan application dated 16<sup>th</sup> December, 1996.
- [44] The bank granted the company several other loans, which were secured by charges on the property. The company defaulted in its service of the loan and the bank exercised its rights under the charges and sold some of the property. It has also leased other portions of the property.

[45] During cross-examination by learned counsel Mr. Craig Christopher, Ms Joseph said that while the agreement for sale spoke to Mr. Swift discharging the previous charges on the property, the agreement did not discuss the securing of Mr. Swift's outstanding balance. She admitted that the bank was at all times aware that the company owed an outstanding balance to Mr. Swift but added that the bank was aware that Mr. Swift and the company had arranged on a method of liquidating the balance. She agreed that the letters on file indicate that there were discussions between Mr. Swift and the company but that they do not indicate any finalized position. The letters were all written by Mr. McDonald and spoke to discussions he had with Mr. Swift in terms that were similar to the agreement for sale.

**Mr. Colin Maynard's evidence**

[46] Mr. Colin Maynard said that he worked in the loans department and was privy to the transaction and had knowledge of the discussions. He is also aware of the matter from the bank's records. He knows that Mr. Swift and the company had discussed the issue for the outstanding balance of the purchase price being secured by a legal charge to rank second in priority to the bank's.

[47] The company intimated to the bank prior to obtaining the financing that the loan the bank would grant to the company would be secured by a first charge and Mr. Swift would register a charge to rank second in priority to the bank.

[48] During cross-examination by learned counsel Mr. Craig Christopher, Mr. Maynard said that he was the primary custodian of the bank's security. He had access to all security/documents and was aware of the transaction even though he did not attend any meetings between the bank, Mr. Swift and Mr. McDonald. When the bank grants a loan, his functions, then, included perusing documents in order to ensure that there was compliance. He was involved in the transaction from a compliance point of view.

[49] He recalls that Mr. Dane Hamilton Snr Attorney-at-Law was involved in the matter.

### **Ms Nicolette Doherty's evidence**

- [50] Ms Nicolette Doherty, Attorney-at-Law said that at the relevant time she practised with a firm of Hill and Hill (the firm) and was contracted by the company based on instructions by Mr. McDonald. She had conduct of the transaction. She said that Mr. McDonald instructed the firm to prepare an agreement for sale of the property, which she did in accordance with his instructions. On completion, she submitted the draft agreement to Mr. Dane Hamilton Snr for vetting. Both Mr. Swift and Mr. McDonald had advised her that Mr. Hamilton was acting on behalf of Mr. Swift.
- [51] Mr. Hamilton suggested amendments to the agreement., one of the suggestions he recommended was the insertion of the clause that the purchaser's solicitor should prepare the transfer. Mr. Hamilton also made other suggestions for amendments agreement for sale, which were incorporated, in the final document. The agreement for sale was executed by Mr. Swift and the company acting through Mr. McDonald (at her chambers).
- [52] Mr. Swift and Mr. McDonald told her that the firm was not instructed to prepare the transfer and Mr. Hamilton Snr confirmed this to her in a conversation.
- [53] During cross-examination by learned counsel Mr. Craig Christopher, Ms Doherty stated that she did not raise the issue of security for the unpaid balance of the purchase price. She said that she was simply given to prepare the agreement of sale in terms of the instructions she received and this she did.
- [54] In re-examination she said that she was of the view that Mr. Dane Hamilton Snr was representing Mr. Swift. She did not prepare or see the transfer.

### **Facts**

- [55] I have had the opportunity to listen carefully and to observe the witnesses as they testified. I was provided with very useful evidence, during the cross examination of the witnesses, which sought to test their credibility and hence the reliability of the evidence each witness provided. The agreed bundle of documents also proved very helpful to me. This is a

rather unfortunate case, but let me say straight away that having heard the witnesses I am convinced that the witnesses who testified on behalf of the bank were more candid with the court than Mr. Swift. In many instances, I found Mr. Swift to be prevaricating in the answers he provided. His credibility in this matter was seriously and successfully challenged. Accordingly, where there is conflict between his evidence and that provided by the witnesses who provided evidence on behalf of the bank, I am of the respectful view that the bank witnesses are more reliable than Mr. Swift.

[56] I have reviewed the evidence and the following represents my findings of fact: Mr. Swift over a period of time borrowed money from the bank and the bank took several charges over his property to secure the loans. Mr. Swift having fallen into arrears in the payment of his loan set about to sell his property in an effort to stave off the bank's sale of his property. He was a man of considerable business experience and was at all relevant times advised by Mr. Dane Hamilton Snr, an Attorney-at-Law of considerable experience. Mr. Hamilton sought to advise him given the difficult circumstances he (Swift) found himself in.

[57] He entered into the discussion with the company to sell his property to the company for US\$1,625,500.00 and received legal advice in this regard from Mr. Hamilton, which Mr. Swift acted upon. Mr. Swift and the company agreed on a proposed method of payment since the company though desirous of purchasing the property did not have the financial means, the bank was not a party to their discussions/agreement.

[58] Mr. Swift was required to liquidate the charges the bank had on the property in an effort to sell it. The company utilized the proposal agreed to with Mr. Swift as one of the bases for obtaining a loan from the bank to purchase the property. The bank was prepared to lend the company only a part of the purchase price. Mr. Swift agreed to take a note for the unpaid balance of the purchase price in the sum of US\$375,000.00. I have absolutely no doubt that Mr. Swift an experienced man discussed securing his interest for the unpaid balance with Mr. McDonald.

- [59] I do not believe that he did not discuss the securing of his interest with his lawyer. In fact, I am satisfied that he did that and when he said that he believed he spoke with Mr. Hamilton about the security for the unpaid balance, I believe that he did speak to the lawyer about a security for the unpaid balance but that was in relation to a second charge to the bank's charge. I am sure that Mr. Hamilton was aware and told him that the bank would take the first charge over the property.
- [60] I do not for one minute believe that Mr. Swift thought or expected that the bank was prepared to disburse substantial funds to the company and intended to accept a second charge that ranked after one that the company was to give to Mr. Swift. To the contrary, the discussions that Mr. Swift had with Mr. McDonald and the information communicated the bank was that he (Mr. Swift) was to take a charge, which ranked second in priority to the bank. I am of the firm view that Mr. Swift agreed to that arrangement. This is the proposal/arrangement that the bank acted upon.
- [61] With respect, I have no doubt that Mr. Swift obtained the relevant legal advice but that he was aware of the fact that in order for the bank to lend the company its money the bank required the first charge on the property. He had no alternative but to accept that arrangement particularly since it was clear to him that the bank was going to sell his property if he did not liquidate his arrears. I do not believe as Mr. Swift would have me accept that he relied on his lawyer to advise him on these matters and simply left it to his lawyer to take the necessary steps. I am convinced that he received appropriate and proper advice and that at the time he was in difficult financial circumstances and adopted that particular method of sale and manner of payment in an effort to stave off the sale of his property from the bank as stated earlier.
- [62] In passing, I note with particular interest that the purchase price of the property was US\$1,625,000.00 yet the transfer states that it was EC\$1,000,000.00. Mr. Swift sought to persuade me that he did not know that if the purchase price for the property was under reflected that it would have meant that he would have paid stamp duty to the state. I am far from persuaded as to his truthfulness.

[63] Be that as it may, with the instructions of Mr. Swift, Mr. Hamilton vetted the Agreement of sale and prepared the transfer of title. The transfer did not reflect the usual words but rather incorporated the following word:

"I Adonis Swift in consideration of the sum of \$1,000,000.00 paid to me by Mc Don hereby transfer to the said Mc Don all the land comprised in the above mentioned title **absolutely free from all interest, rights, titles, claims, demand and trust subsisting in law and equity.**"

[64] It is my considered view that Mr. Swift specifically instructed Mr. Hamilton to prepare the transfer in the above terms with the clear intention of having the bank act upon it in granting the company the loan.

[65] I am satisfied that Mr. Swift did not intend to rely on his interest in the property for the unpaid balance of the purchase price. He well knew that the bank would not have agreed to disburse or would not have disbursed its funds to the company in order for the company, if the property was encumbered. Mr. Swift did nothing to indicate to the bank that he was asserting his interest in the property. In fact, by his conduct and the documentation presented to the bank it was clearly indicated to the bank that he was not insisting that his rights in the property should take precedence over the bank's interest. I am also satisfied that the bank acted in reliance of the documents including the transfer that was prepared by Mr. Swift's lawyer. The transfer, as stated earlier reflected that the property was unencumbered. In addition, Mr. Swift by his conduct clearly signaled to the bank that he would not rely on his equitable interest in the property being treated as first in time. This in no small measure contributed to the bank granting the company the loan

### **Law**

[66] Section 28(1) of the Registered Land Act Cap 374 Laws of Antigua and Barbuda provides as follows:

"28 Unless the contrary is expressed all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without them being noted on the register.

28(e) any unpaid moneys, which without reference to registration under this Act, are expressly declared by any law to be a charge upon land."

[67] I have no doubt that Mr. Swift consciously/intentionally did not cause his equitable interest to be registered so as to facilitate the company obtaining the loan from the bank. Mr. Swift concurred by his conduct in having the company obtaining the loan, with the understanding that his equitable lien would rank second to the bank's charge.

### Submissions

[68] Craig Christopher learned counsel relied on a number of authorities including **Kettlewell v. Watson (1984) CH. D 501**, **Coptic Ltd v. Bailey (1976) WLR 1648** and **London and Cheshire Insurance Co Ltd v. La Peagreme Property (1971) 1 ALL ER 766**. He placed heavy reliance on **Barclays Bank v. State Commercial Limited [1997] 1 WIR 415 at p 419** where Millet L J said:

"As soon as a binding contract for sale of land is entered into the vendor has a lien on the property for the purchase price until payment is made. The lien does not arise on completion but on exchange of contracts. It is discharged on completion to the extent that the purchase price is paid."

[69] Further, Millet LJ stated further that the lien "does not depend in any way upon the parties subjective intentions. It is excluded where its retention would be inconsistent with the provisions of the contract for sale or with the true nature of the transactions as disclosed by the documents." The learned Lord Justice referred to the author of *Williams on Vendor and Purchase* 4<sup>th</sup> edition (1936) Vol 2 who said that "where such waiver or abandonment is sought to be implied the onus lies on those who deny the existence of the lien, which arises by the rule of equity in the absence of stipulation to the contrary ... the test is whether they have in effect agreed that the vendor shall have some other security or mode of payment in substitution for lien."

[70] Counsel also referred the court to the pronouncement of Millet LJ in which he quoted Lord Lyndhurst LC in **Winter v. Lord Ansen (1827) 3 Russ 488** who held that to affect the lien the circumstances of the case must:

"Afford such clear and convincing evidence of the intention of the vendor to rely not on the security of the estate, but solely upon the personal credit of the vendee, as would be necessary in order to get rid of the lien."

[71] Mr. Christopher submitted that from the evidence presented to the court there is no clear and manifest inference that can be drawn from the documents and the circumstances that the parties to the transaction, that is Mr. Swift and Mc Don Enterprises intended to exclude Mr. Swift's equitable right to a lien over the property to secure the unpaid balance of the purchase price nor can it be inferred from the documents and circumstances that Mr. Swift intended to rely on nothing more than the personal credit of Mc Donald of Mc Don Enterprises Ltd.

[72] Mrs. Rogers-Murdoch learned counsel relied on the following cases: **Bank of Africa v. Salisbury Gold Mining Co [1892] AC 281**; **Smith v Evans (1860) 28 Bean 59**; **Cood v. Cood and Pollard (1821) 9 Price 544** and **Bond v. Kent (1692) 2 Vern 281**.

[73] Counsel advocated that an equitable lien may be abandoned if the person entitled to the lien so intends and the intention to abandon may be inferred from his conduct and the surrounding circumstances.

[74] The abandonment of an equitable lien arises in most cases from the taking of other security for the debt by the person claiming the lien. Unless an agreement to the contrary is shown, the taking of security is usually taken as evidence that the lien has been held lost where the vendor concerned in a mortgage by the purchases of the property to a person who lent part of the purchase price.

[75] She urged the court to find that in the circumstances of the transaction Mr. Swift waived or abandoned his right to have his interest rank in propriety to the bank's charge.

### **Court's Analysis**

[76] Based on my findings of fact and applying the relevant legal principles, I am satisfied that it is clear that Mr. Swift intended to rely on the security, that is the note for the sum of US\$375,000.00. This in my view is evidence that he did not intend to rely on the lien. I have no doubt that he did not intend to insist on his equitable right in the property ranking



in priority to the bank's charge and by his conduct and the transactions he clearly communicated this to Mr. McDonald and the bank.

[77] In the circumstances, I am of the respectful view that the cases relied upon by learned counsel appearing on behalf of Mr. Swift, though very useful, cannot assist him.

[78] Based on my findings of fact Mr. Swift never intended to insist on his equitable rights/interests in the property but rather sought to rely on the personal credit of Mr. McDonald applying the principles stated in Barclays *ibid*. I am therefore of the considered opinion that in the circumstances that obtain Mr. Swift waived or abandoned his right to rely on the equitable lien. The retention of Mr. Swift of his equitable lien is, in my view clearly, inconsistent with the provision of both the agreement for sale and also with the true nature of the transactions as evidenced by the agreement for sale, the transfer and the bundle of agreed documents. See: **Cood v. Cood** *ibid*.

[79] By way of emphasis, I have no doubt that, applying the test as stated in Barclays Bank *ibid*, that Mr. Swift with the benefit of proper legal advice agreed to take the note as securely instead of insisting on his equitable lien ranking in priority to the bank's charge. He communicated this to Mr. McDonald and he bank through his conduct.

### **Equitable Reliefs**

[80] In passing, I say that since Mr. Swift is seeking to assert in this court his equitable right to the property and is seeking a number of equitable reliefs, all of the equitable principles that are applicable must be considered.

[81] The maxims that readily comes to my mind include those "that he who wants equity must do equity" and secondly that "he who comes to equity must come with clean hands" and finally "delay defeat equity."

[82] When a party seeks relief in a court of equity that party must be able to persuade the court that he is worthy of the court's intervention on equitable grounds. The party who is seeking

the court's assistance must be in a position to show that his past record in the transaction is clear. I say no more than the conduct of Mr. Swift in so far as there was a significant misrepresentation of the purchase price of the property in the transfer leaves much to be desired. Even if the court were inclined to exercise its discretion in favour of Mr. Swift, and the court is not so disposed, this factor alone would have been sufficient to preclude the court from doing so. The court cannot properly allow its equitable jurisdiction to be used in a manner that would in effect assist a fraud.

### **Laches**

[83] Finally Mr. Swift admitted in evidence that while he was aware of his rights against the banks he waited for 6 years to file his claim.

[84] The court has always refused to lend its assistance where the claimant has delayed in the presentation of his claim. Indeed, it is the law that delay or laches is a successful bar to the court granting a claimant equitable relief. Alternatively and on this ground also the court would not exercise its discretion in favour of Mr. Swift to grant the equitable reliefs that he seeks since he admitted that he was not diligent at all in presenting his claim against the bank even though he was aware of the bank's position 6 years before.

### **Pleadings**

[85] Before concluding, Mr. Craig Christopher leaned counsel for Mr. Swift submitted that the bank had not pleaded that Mr. Swift abandoned or waived his equitable right. He advocated that the bank should therefore be prevented from relying on allegations or facts led in evidence at trial, which tends to assert that Mr. Swift waived his right to an equitable lien in his favour for the unpaid purchase price. He submitted that the bank in its pleadings merely denied that Mr. Swift had an equitable lien without giving any reasons for the denial or without offering an explanation as to why its legal charges rank in priority to Mr. Swift's interest.

[86] Mr. Christopher further submitted that the evidence led by the bank both by way of witness statement of Ms Arlene Joseph, Mr. Colin Maynard and Ms Nicolette Doherty merely raise

the issue of waiver or abandonment by reference to the two letters that speak to discussions held by the parties on the question of security for the unpaid balance. He said that there is no evidence before the court, which indicated that the parties agreed on that issue.

[87] Mr. Christopher relied on CPR 2000 Part 10.7, which states as follows:

“(1) The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission.”

[88] Mrs. Rogers-Murdoch submitted that while the bank did not specifically use the word waiver the issue of the altered waiver of Mr. Swift’s lien could be inferred from paragraphs 6 – 8 of the defence. Counsel further submitted that the bank’s failure to use the word waiver in the defence is not fatal to the bank’s case since pursuant to CPR Part 10.7 the issue of Mr. Swift’s alleged waiver was raised in the skeletal arguments filed by the bank on 2<sup>nd</sup> February 2005 (several months before the trial). Mr. Swift also replied to the issue of waiver or abandonment in his skeletal arguments filed on March 14<sup>th</sup> 2005 (before the trial).

[89] Counsel further urged the court not to refuse to allow the bank to rely on the issue of Mr. Swift’s waiver or abandonment since the purpose of pleadings is to ensure that the parties are given fair notice of the issues on which the court will have to adjudicate. She said Mr. Swift had express notice for a very long time before the trial of the bank’s intention to rely on Mr. Swift’s alleged waiver or abandonment of the lien and that no prejudice was caused by Mr. Swift as a consequence.

### **Court’s Analysis**

[90] The overriding objectives CPR 2000 Part 1.1 states that the overriding objective of these Rules is to enable the court to deal with cases justly. Brian Alleyne JA in **St Kitts Development Ltd v. Golfview Development Ltd and Michael Simanic Civil Appeal No 24 of 2003** at **paragraph 18** where he stated as follows: -

“It is the duty of the court in exercising any discretion or applying any rule to give effect to the overriding objective of the Rules, which is not, as

Counsel for the Respondent has urged to comply with the rules, but rather to deal with cases justly."

[91] I am guided by that pronouncement. I am therefore of the view that while the bank did not specifically use the word "waiver" or "abandonment" in its pleadings I am satisfied that both Mr. Swift and the bank were aware of the case that was before the court dealt with whether or not, in the issue of whether in the circumstances of the transactions Mr. Swift's equitable interest ranked in priority to the bank's. The circumstances of the transactions were sufficiently stated in the pleadings to put Mr. Swift on notice as to the fact that the bank was asserting that his rights were not to be given priority to those of the bank's even though the word "waiver" was not used. The bank asserted at all times that Mr. Swift's lawyer was integrally involved in the manner and by Mr. Swift's conduct he should not be allowed to insist on his equitable right.

[92] In addition, by the time the skeletal arguments were filed in March 2004, I have no doubt that both parties were aware of the fact that that issue for determination by the court is whether or not Mr. Swift waived or abandoned his right to have his equitable lien rank in priority to the bank's charge. I have no doubt that the matter was litigated on this basis and evidence was led both on behalf of Mr. Swift and the bank on this issue. Both counsel's closing submissions also dealt with the issue of whether in the circumstances of the transaction Mr. Swift's waived or abandoned his right to have his interest in the property rank in priority to the bank's charge.

[93] Accordingly, I am not of the view that the justice of this case entails that the court preventing the bank from ventilating the issue of whether the Mr. Swift's waiver or abandonment of his right to have his equitable lien rank in priority to the defence. To do otherwise, would be to do an injustice by preventing the bank from relying on the defence, which clearly arises on its pleadings, in its skeletal arguments and the evidence before the court.

[94] In addition, I am of the considered view that Mr. Swift has not been prejudiced in the circumstances since he was aware of this issue which he had to meet several months

before the trial and in fact did meet that defence through his skeletal arguments, evidence, and his counsel's examination of the bank's witnesses and his closing address all of which dealt with the issue of abandonment or waiver.

### **Conclusion**

[95] In conclusion and for the above reasons, I am of the view that Mr. Swift's claims against the Antigua Commercial Bank fails. He is not entitled to any of the reliefs claimed.

[96] Accordingly, I dismiss his claim against the Antigua Commercial Bank and enter judgment for the bank. I order Mr. Swift to pay the bank prescribed costs unless otherwise agreed.

[103] I gratefully acknowledge the assistance of both counsel.

Louise Esther Blenman  
**High Court Judge**