ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2008/0558

BETWEEN

ANTIGUA AGGREGATES LIMITED

Applicant

AND

THE ATTORNEY GENERAL OF ANTIGUA & BARBUDA
ANTIGUA COMMERCIAL BANK

Respondents

Appearances:

Mr. Hugh Marshall Jr. for the Applicant
Ms. Karen DeFreitas-Rait, Deputy Solicitor General for the First Respondent
Sir Clare Roberts QC with Ms. Tracy Benn for the Second Respondent

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2008: December 17, 29
2009: January 21
February 5
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DECISION

[1] Blenman J: This is an application for an order directing the Registrar of Lands to remove the restriction that has been placed on land. There are also requests for orders to prevent the bank from selling the charged property, in addition to a request for a full accounting.

[2] Background

The Antigua Aggregates Limited (Antigua Aggregates) is a company which no longer conducts business. It is the registered proprietor of lands situated at Crabbs, Block 21692A Parcel 27 and 28. The main directors of the company are former Ministers of the Government, and the lands in question were bought from the Crown. Antigua Aggregates charged the lands to the Antigua Commercial Bank (the bank) as guarantor for loans obtained by Galeforce Windows. Antigua Aggregates was the majority shareholder of Galeforce Windows. It seems as though the amount secured by Antigua Aggregates is $2,200,000. The amount that the bank alleges to be due under the charges are EC $3,603,403.74. Antigua Aggregates has failed to service the loan. In addition, the bank has obtained a separate judgment for an unsecured substantial sum against Antigua Aggregates. The company defaulted on the payment of the loan since 2005 and has no means to repay the loan.

[3] Meanwhile, the Honourable Attorney General filed a claim against Antigua Aggregates and its directors, and alleged that their purchase of the lands were illegal. He seeks to have the Court rescind the agreement of sale. In that claim, the Attorney General contends that the Antigua Aggregates bought the lands from the Crown at a great under value. In anticipation of the filing of the claim, the Attorney General caused a restriction to be placed on the lands by the Registrar of Lands.

[4] On the 6th September, 2004 the bank caused Notices to Pay Off to be forwarded to Antigua Aggregates' registered office and again on 20th July, 2005. The bank, meanwhile, retained the services of an auctioneer with the intention of exercising its rights as chargee and advertised the sale of the lands.

[5] In an effort to liquidate its indebtedness to the bank, Antigua Aggregates entered into a private contract to sell the lands and seeks the Court's assistance in having the restriction that has been placed against the lands removed. It also seeks an order to prevent the bank from exercising its power of sale. Antigua Aggregates also seeks an accounting from the bank in relation to the monies that were paid towards the loan. Finally, it requests an order from the Court that will enable it to sell the lands by private treaty and have the monies paid into Court.

[6] The application is strenuously opposed by the bank and the Attorney General.

[7] Issues

Several issues have been identified, but I have sought to crystallise them. The issues that arise for the Court to resolve are as follows:

(a) Whether the Court should restrain the bank from selling the charged property;

(b) Whether the Court should order the Registrar of Land to remove the restriction placed on the register at the behest of the Attorney General; and

(c) Whether Antigua Aggregates should be permitted to sell the charged properties and pay the proceeds of sale into Court.

[8] Antigua Aggregates Limited's submissions

Restraining the bank

In support of Antigua Aggregates' contentions, learned Counsel Mr. Marshall Jr. submitted that Antigua Aggregates has no liability under the first charge in respect to any advances over $600,000.00. In support of his contention, he referred the Court to Paget's Law of Banking 1989 Tenth Edition page 597 it states;

> "A continuing guarantee is usually drawn up to apply to debts 'now or at any future time due or owing from' or, preferably, to moneys advanced and not repaid by the principal debtor".

[9] In Halsbury's Laws of England 3rd Edition Volume 2 paragraph 449 under the caption "Guarantee limited in amount" it reads;

> "When the guarantor's liability is limited to a specified sum it depends on the wording of the guarantee whether the surety for the whole debt with the specified limitation or this total liability, or whether he is surety for only part of the debt".

Applying these principles to the case at bar, Mr. Marshall Jr. said that in respect of the overdraft facility the applicant was not the principle borrower but a surety. As in the usual course of the business of a bank and its customer, a charge was issued by the surety to support its guarantee of $600,000 that the bank had or would advance to the customer. In the case at bar, the principle

debtor is Galeforce Windows and the surety is Antigua Aggregates. The language of the charge specifically limits the liability of the surety to a principle amount of $600,000.00 with interest and related costs. No further sums are secured by the charge. Thus, the payment of this sum under the charge is sufficient to discharge the surety.

[10] Next, Mr. Marshall Jr. submitted that the language of the second charge is clear in that the only sum secured was a single principle sum of $1,600,000.00 together with accrued interest. No further advances were secured under the Registered Land Act. It is the law that a charge may secure existing or future advances. This charge secured only the advance of $1,600,000.00, this particular sum was advanced in April 2002 at the time of the execution. According to the affidavit evidence of Mr. Simmons, this advance did not exist. In essence there being no advance in April 2002, there is no sum secured under this charge. Thus, the question cannot be as to the extent of the sums secured under this charge, but whether there is any sum so secured at all.

[11] Next, Mr. Marshall Jr. stated that the general principle is that the holder of a charge with the power of sale has an obligation to render accounts or an accounting of monies due under the charge. However, this is dependent on the chargor showing that the information is needed to enable it to exercise its residual and legitimate power. (Gomba Holdings UK Ltd and others v Homan and another [1986] 3 All ER 94). This principle must be examined in the context of section 70 of the Registered Land Act which confers on the chargor an unfettered right to redeem the charge. The right of Antigua Aggregates to redeem the charge is both based in common law and in statute. Halsbury's Laws of England 3rd Ed. Vol. 27 paragraph 412 states;

> "The mortgagor and all persons having any interest in the property subject to the mortgage or liable to pay the mortgage debt can redeem".

Mr. Marshall Jr. argued that by reason of section 70 of the Registered Land Act the chargee has no right to refuse payments of the amounts found due under the charge. Anything which amounts to a clog or a fetter on the right of the chargee to repay is unlawful.

[12] Finally, learned Counsel Mr. Marshall Jr. argued that the bank has refused to render a true accounting of monies due under the charge. It is not all monies advanced to the borrower,

Galeforce Windows that are secured under the charges. In particular the language of the charges sets the rates of interest to be based upon banks prime with a 1.5% spread.

[13] Removal of restriction

In relation to the restriction, Counsel said that the basis for the placement of a restriction is set out under section 132 of the Registered Land Act. Learned Counsel Mr. Marshall Jr. said that any person can apply to the Registrar of Lands to have a restriction placed on lands, in order to prevent any fraud, or improper dealings, or for any other sufficient reason, can seek the assistance of the Registrar to have the restriction placed on the lands. The Registrar may either with or without the application of any person interested in the land make an order prohibiting or restricting dealings with any particular land.

[14] Mr. Marshall Jr. stated that in the case at bar, the application was made by the Attorney General on the 31st August 2005. A Statutory Declaration in support thereof signed by the Attorney General supported the application. An examination of the Declaration and the application demonstrate two things. Firstly, the Attorney General is not seeking to prevent any fraud or any improper dealings but is in fact complaining of a possible fraud or wrong dealing which had already occurred, being the alleged sale of Crown lands at an undervalue. Secondly, the Attorney General does not assert a legal or equitable interest in the land as against the registered proprietor. The section requires that the restriction be placed to prevent fraud or improper dealing. This, Mr. Marshall Jr. submitted, requires little attention as the allegation of the Attorney General is that at the time of acquisition of the land it was acquired at an undervalue by reason of persons being in political office. The allegation is not against the registered proprietor. It is important to note that no allegation of impropriety is made against Antigua Aggregates but as against other persons who are not the registered proprietor of the lands.

[15] In the affidavit of Martin Camacho filed on the 18th November 2008, he asserts that the Attorney General claims a beneficial interest in the lands. The precise beneficial interest is not asserted and can only be gleaned from the proceedings ANUHCV 2005/0492 and the affidavit of Mr. Camacho. In Halsbury's Laws of England 3rd Edition Volume 32 paragraph 319 it states;

> "All estates, interest and charges in or over land other than those which can subsist at law, such as estates tail, life interest, and remainders, take effect as equitable interest".

[16] The general rule is that the land register is conclusive as to all interest in land noted on the Register (Frazer v Walker [1967] A.C. 569). This does not mean that personal claims cannot be brought against the registered proprietor in respect of the land in which he is registered as the absolute owner. In fact, such claims can challenge his registration. In the Privy Council decision of Creque v Penn No. 36 of 2005 Lord Wilberforce explained this exception to the general rule that the register is conclusive in the following way, "the position as against a third party would be quite different, because then it would be a matter of title, not personal obligation". Essentially, the register is conclusive to third parties but once a direct challenge is made to the registered proprietor by the predecessor, that they have failed to do something, that is a claim in persona.

[17] Learned Counsel Mr. Marshall Jr. said that paragraph 4 of Mr. Camacho's affidavit sets out the claim of the Attorney General. In summary, in the Claim is that the sale of lands to Antigua Aggregates was tainted with illegality and that the lands were sold at an under value to the knowledge and approbation of other persons, distinct from the claimant, and who were public servants at the time. There is no claim that Antigua Aggregates caused the lands or knowingly or unknowingly participated in any illegality of transfer itself. In other words, there is no personal obligation between Antigua Aggregates and the Crown which the Crown alleges is outstanding. Further, the exception to the rule of indefeasibility of title in Frazer v Walker does not arise as there is no claim by the Attorney General against the Antigua Aggregates. Thus, there is no interest equitable or otherwise that the Attorney General has in the lands and which he is seeking to enforce or protect. Accordingly, Mr. Marshall Jr. submitted that the restriction ought to be removed as it is not to prevent a fraud or improper dealing.

[18] Essentially, what the Attorney General seeks is security in the event of a judgment in his favour. Though the Attorney General acknowledges that by virtue of the charges his claim for recession is barred given the development in respect of the property, putting the parties back in the original position is no longer possible. His remedy, if any, is confined to damages whether based on rescission or otherwise.

[19] Antigua Aggregates right to sell

Mr. Marshall Jr. said that section 70 of the Registered Land Act imposes an obligation on the bank not to fetter the right of redemption of Antigua Aggregates. "All injunctions must be determined on a balance of probabilities". Antigua Aggregates seeks to redeem the charges by way of proceeds of sale. The details of the sale and the time of completion of the sale were set and communicated to the bank prior to it determining to exercise its power of sale. The refusal of the bank to communicate the exact sums due to it under the charge and to effect a discharge of the charge on the sums lawfully due under the charge are in effect preventing Antigua Aggregates from selling its property. This is a fetter on its rights of redemption. The Court should grant an order which enables Antigua Aggregates to sell the charged property and have the proceeds of sale paid into Court.

[20] The Attorney General's submissions

The learned Deputy Solicitor General Mrs. Karen DeFreitas-Rait submitted that the only means by which any person may properly seek to have a restriction removed is by way of the procedure prescribed in section 134 of the Registered Land Act. But for the commencement of this action, Antigua Aggregates has never made an application to the Registrar of Lands under section 134 or at all to have the restriction removed.

[21] It is noteworthy that Antigua Aggregates and the proposed purchaser entered into an agreement to sell, at a time when they had each had notice, or were deemed to have had notice of both the restriction and the unsatisfied charges in favour of the bank and notices to pay off debt. Both the restriction and the charges on the Land Register served as notice to the world. This begs the question, why didn't the Antigua Aggregates apply for removal of the restriction prior to signing the agreement for sale? Had Antigua Aggregates so applied to the Registrar under s.134 (1) of the Registered Land Act, the matter would have been fully ventilated in a hearing before the Registrar prior to Antigua Aggregates committing itself to the sale agreement. Further, the sale agreement itself fails to make any mention of the restriction. Learned Deputy Solicitor General Mrs. DeFreitas-Rait therefore submitted that in determining whether the restriction should be removed, the Court should give no consideration to the existence of the sale agreement, since the agreement was

entered into at a time when both the vendor and purchaser knew or ought to have known that there was a restriction on the property which would make the sale impossible if it were not removed.

[22] Further, section 134(2) of the Registered Land Act requires that the Registrar be notified of any application to remove a restriction. This notification is required in as much as a restriction on the Register of Lands is placed by the Registrar, at the Registrar's sole discretion. This is a statutory pre-requisite to an order for removal being made. Mrs. DeFreitas-Rait advocated that Antigua Aggregates' application is flawed and must fail in the absence of any evidence that the Registrar of Lands received notice of the same. Learned Deputy Solicitor General Mrs. Karen DeFreitas- Rait submitted that a restriction should properly be removed only if (a) it was not placed "For the prevention of any fraud or improper dealings or for any other sufficient cause", or (b) if such sufficient cause no longer exists. Further, it appears that "the power of the proprietor to deal with the land, lease or charge is restricted". If restriction was properly placed and if the facts which prompted the Registrar to place the restriction are unchanged then the restriction should be maintained, see Christopher and DeCastro (Executor for O. Flax) v Registrar of Lands and Attorney General, ECSC High Court Suit Number BIHCV 2002/0200.

[23] Mrs. DeFreitas-Rait further submitted that the Registrar properly placed the restriction in accordance with s.132 "for the prevention of any improper dealings or for any other sufficient cause". If the Attorney General were to be successful in that claim, then the effect would be restoration of the Crown's title to the lands. Yet, it is clear from Antigua Aggregates' position that if it is not restrained, it intends to sell the lands. Removal of the restriction and any subsequent sale would therefore unjustly and irreparably prejudice the Attorney General's claim to recover the lands. The restriction was placed for sufficient cause, namely to prevent improper dealings with the land and to prevent the sale, while the beneficial interest remains in question, and further to protect a fraud from being perpetrated on any unwitting purchaser who might become purchasers for value without notice in the absence of the restriction. Mrs. DeFreitas-Rait asked the Court to note that the contract of sale exhibited by Antigua Aggregates purports to have been signed on the 23rd June, 2008, almost three years after the restriction was placed. Further, the Attorney General first became aware of Antigua Aggregates' desire/intention to sell only after that sale agreement had been signed. Notwithstanding the date on Antigua Aggregates' exhibit, the Attorney General did

not receive that letter until 23rd June, 2008 when it was hand delivered from Antigua Aggregates' attorney, along with the fully executed sale/purchase agreement, also dated 23rd June, 2008.

[24] Learned Deputy Solicitor General Mrs. Karen DeFreitas- Rait further argued that based on Antigua Aggregates' exhibits, the Attorney General understood that there was an unresolved dispute between Antigua Aggregates and the bank regarding the amount secured by the registered charges. Antigua Aggregates was therefore proscribed by the bank's charges from selling the land privately without the written consent of the bank. Based upon the information contained in Mr. Geoffrey Simmons' affidavit, the bank had never granted any such consent. Rather the bank had sought to exercise its statutory right of sale as chargee. The restriction is therefore not a primary impediment to the Antigua Aggregates' proposed private sale of the lands. In any event, the question of beneficial ownership of the lands is critical to determining who has the right to sell the lands. That question can only be determined upon final hearing of Suit 2005/0492. In those circumstances, learned Deputy Solicitor General Mrs. Karen DeFreitas- Rait said that it would be improper for the Antigua Aggregates to sell the land before the Attorney General's interest is determined by a decision in Suit 2005/0492 or alternatively without the Attorney General's written consent.

[25] It is not true to say that the Attorney General's interest in the property is "confined to trace the purchase value allegedly not paid for by Antigua Aggregates at the time of purchase". In fact, the Attorney General has claimed, in Suit 2005/0492, a rescission of the contract of sale by which the Antigua Aggregates originally acquired the land. Thus, the Attorney General claims a beneficial interest in the lands and by extension in the proceeds of any sale of such lands, subject only to the bank's rights as chargee in the event of a forced sale. In the event of a private sale there is a real possibility that the Antigua Aggregates, unless restrained by the Court, will use or otherwise dispose of the proceeds of sale. In fact, the Antigua Aggregates has provided the Attorney General with a list of existing debts and anticipated expenses of the company, totaling $1,308,193.90, which the company has expressed a desire to deduct from the proceeds of any sale of the lands. Learned Deputy Solicitor General Mrs. DeFreitas-Rait therefore urged the Court not to order the removal of the restriction.

[26] Antigua Commercial Bank's submissions

Learned Queen's Counsel Sir Clare Roberts submitted that the Antigua Aggregates' application is in the nature of an interim injunction but it does not fit the general rules for granting mandatory or positive injunction or prohibitory or negative injunction. A mandatory injunction is seldom granted as an interim measure since the Court prefers to hear full evidence on both sides before attempting to compel positive action.

[27] David Bean in his text on Injunctions points out under the rubric "Requirement of a Substantive Claim" that there is "One overriding requirement: the applicant must have a cause of action entitling him to substantive relief. An injunction is not a cause of action (like a tort or a breach of contract) but a remedy (like damages)." As Lord Mustill stated in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, pp360-363, "the doctrine of the Siskina, put at its highest, is that the right to an interim injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action". An interim injunction must be ancillary to a substantive claim made in the action. This application is misguided in that there is no cause of action in respect of the injunction claimed.

[28] Arguing against the grant of the injunctive orders, Learned Queen's Counsel Sir Clare stated that the bank has done all that it is required to do under the Registered Land Act in enforcing its remedied under that Act. It has scrupulously followed the process set out in section 72 of the Act. The Antigua Aggregates has not complained about the bank's conduct in that respect. The complaint is a dispute over how much is owed. It is clear that the sale of the land has nothing to do with the amount that the bank should deduct for its loan after the sale. The dispute has to do with action after the sale and nothing whatsoever to do with the process leading up to the sale or the sale itself. It is necessary for the Antigua Aggregates to demonstrate, in itself, a specific legal right which is liable to be infringed by the proposed sale by the bank. Learned Queen's Counsel Sir Clare submitted that the Antigua Aggregates has not shown that it will suffer any damage by virtue of the exercise of the power of sale by the bank. The injunction is not sought to protect any right of the applicant.

[29] Learned Queen's Counsel Sir Clare stated that the bank is exercising its statutory power of sale under section 75 of the Registered Land Act. Antigua Aggregates is merely seeking to avoid having its property sold, when by its own admission, has failed to service its debts since 2005 and has no means of doing so. The purpose of the charge was precisely to allow the bank to sell the property in the event that Antigua Aggregates failed to repay the loan. Antigua Aggregates should not be allowed to defeat the bank's statutory and contractual right to sell by a whimsical claim for an account. It must be noted that section 76 of the Registered Land Act sets out how the proceeds of the sale should be applied. Antigua Aggregates' action, if any, should have been with respect to the application of purchase money and not the sale of property. Antigua Aggregates does not have a semblance of a right nor can it claim any injury in respect of the sale of the property pursuant to the chargee's statutory power of sale.

[30] Next, Learned Queen's Counsel Sir Clare said that Antigua Aggregates has grounded its claim for a mandatory injunction permitting it to sell the lands under an agreement that it exhibited. Antigua Aggregates has acted in breach of the expressed term of the charge and the implied term under section 67 of the Registered Land Act "not to transfer the land, lease or charge, charged or any part thereof without the previous written consent of the chargee which consent shall not be unreasonably withheld". There was no written consent by the chargee for the sale. Learned Queen's Counsel Sir Clare maintained that not only does the Antigua Aggregates not have a right to sell the charged property, but it would not be reasonable to expect the chargee to be part of a conspiracy involving the strange action of selling at an undervalue. Two property appraisals of EC$10,000,000 have been exhibited. Yet the Antigua Aggregates is seeking an interim order to in effect force the bank and other debtors and the persons with contingent interests to accept a sale at an undervalue. A sale at undervalue would be severely prejudicial to the bank which has an amount owing under the charge of EC$3,603,463.74 but it also has a judgment debt against the Antigua Aggregates amounting to EC$6,139,880 for a total of EC$9,743,283.74. Antigua Aggregates is trying to sell the property at less than it owes to the bank. This is unreasonable.

[31] Learned Queen's Counsel Sir Clare said that the bank ought to be allowed to apply for a charge in respect of the judgment debt to be put on the property of the Antigua Aggregates pursuant to the Judgment Act. The selling at an under value would therefore deprive the bank of assets that ought

to have been available. It is inexplicable why Antigua Aggregates is insisting on selling to this particular buyer at an under value, rather than allowing the bank to exercise its right to attempt to get the highest price at an auction. The Antigua Aggregates gives no explanation as to this peculiar conduct.

[32] Next, Sir Clare stated that it is the law that "a mandatory injunction is seldom granted as an interim measure". (See paragraph 1.02 and paragraph 3.44, Bean) – Meagarry J in Shepherd Homes v Sandham [1971] Ch.340. said that "the case has to be unusually strong and clear before a mandatory injunction will be granted even if it is sought to enforce a contractual obligation".

[33] On the one hand, Antigua Aggregates is seeking an injunction against the bank's exercising its lawful power so as to protect what it considers its right to an account from the bank. If the orders were to be granted, the bank would be restrained from exercising its statutory and contractual power of sale under a charge freely signed by Antigua Aggregates. The effect of the granting of the orders requested by Antigua Aggregates would be to unjustly enrich it and relieve it from satisfying its debts to the bank. The bank is not able to take advantage of the current market, putting it at risk of future market shifts.

[34] Sir Clare adverted the Court's attention to the statement of claim. A comparison of the prayer in the statement of claim and the application for interim injunctions will reveal that the remedies sought are the same. If the Court were to grant the injunctions for which Antigua Aggregates applied, it would have the effect of precluding the bank from disputing the Antigua Aggregates claim at trial. See Cayne v Global Natural Resources plc [1984] 1 All ER 223; see also Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523.

[35] In response to the Attorney General's arguments, learned Queen's Counsel Sir Clare maintained that no fetter should be put on the power of the chargee to sell the charged property of Antigua Aggregates, as suggested by the Attorney General in his legal submissions filed 26TH November 2008. Selling one parcel of land may not be attractive to the market and would delay the sale. There is no need for the Court to become involved in limiting the power of sale of the bank in any way. A charge is on both parcels of land and the bank has a statutory and contractual power to sell

both parcels of land, in the face of the default by Antigua Aggregates, in any event, there is no application by the Attorney General to that effect. The Court should therefore ignore the invitation by the Attorney General that it should interfere with the bank's power to sell both parcels of Antigua Aggregates' land.

[36] Next, learned Queen's Counsel Sir Clare submitted that Antigua Aggregates falls woefully short of justifying its application for the injunctive relief it seeks. Antigua Aggregates has not come to the Court with clean hands. It is a debtor in serious default of a large sum of money; it is attempting to sell the charged property at an undervalue and without the written permission of the chargee contrary to the law and the charge; it seeks to deny the chargee of its statutory and contractual power to sell; the application is not pegged to any right of Antigua Aggregates to be defended; four out of the six orders prayed for under the application are of a mandatory nature; the application will have the effect of disposing the case before the Court; the bank continues to suffer extreme hardship and prejudice as a result of Antigua Aggregates' actions. Under the circumstances, Sir Clare submitted that it would be unjust to grant any of the orders requested by Antigua Aggregates.

[37] Costs

Sir Clare said that if the application for the interim orders against the bank is refused, he asks the Court to exercise its discretion in making an order for the bank's costs in any event. Bean indicates that this order "could be made where a claimant had made a frivolous or clearly unmeritorious application of an injunction, such as where the Court had no jurisdiction to grant the injunction asked for". If the Court considers that the application to stop the bank from exercising its power of sale of the property, to give an accounting and an order for the Court to permit a particular sale to proceed were unmeritorious, Sir Clare submitted that it would be in order for the bank to have its costs on the hearing of the present application in any event.

[38] Court's analysis and conclusions

I have perused the several affidavits deposed to and have given deliberate consideration to the helpful submissions of all learned Counsel.

[39] Order restricting bank from selling

It seems to me that the main purpose of Antigua Aggregates' application is to be able to sell the properties held under the charge, without the express authority of the chargee. In effect, it wishes to restrain the bank from exercising its power of sale as chargee. I agree with the submissions of learned Queen's Counsel Sir Clare that in effect, what Antigua Aggregates is seeking, is to prevent the bank from exercising its right as chargee. This is foreshadowed in the claim and in the application and the supporting documents. I am equally satisfied that Antigua Aggregates seeks an interlocutory injunction, even though its application was not presented in that manner.

[40] The locus classicus on interlocutory injunction is American Cyanamid Co. v Ethicon Ltd [1975] 1 All ER 504, where it was held that:

> "The grant of interlocutory injunctions for infringement of patents was governed by the same principles as those in other actions. There was no rule of law that the court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trail of the action. All that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious, i.e. that there was a serious question to be tried".

[41] In Series 5 Software Ltd v Clarke [1996] C.L.C. 631, Laddie J quoted from Lord Denning's judgment in Hubbard v Vosper [1972] 2 QB 84, where he said:

> "In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules".

[42] In American Cyanamid ibid, Lord Diplock has quite adequately provided guidelines that should be utilised by the Court in determining whether injunctive relief should be granted. The principles that can be extracted from that case are as follows:

(a) The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.

(b) There are no fixed rules as to when an interlocutory injunction should or should not be granted. The relief must be kept flexible.

(c) The evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by cross-examination.

(d) It is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor decide difficult questions of law which will call for detailed and mature considerations. These are matters to be dealt with at the trial.

(e) The object of the interlocutory injunction is to protect the claimant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial; but the claimant's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

[43] Applying the principles above, I am satisfied that the application does not fit the general matrix for granting injunctions. In relation to the bank, as stated earlier, the order sought is to prevent the bank from exercising its right as chargee, irrespective of the nomenclature given to the application. It is clear that sections 72 and 75 of the Registered Land Act give the bank the power to sell the charged property if the chargee has defaulted in the repayment of the loan. Any order to prevent it from exercising this power has the effect of injuncting the bank.

[44] The guidelines that are laid down by Lord Diplock are regarded as the leading source of law on the subject. See David Bean Injunction 9th Edition page 37. The underlying basis of any injunction is that it is discretionary in nature. Applying the principles distilled from the case, it seems to me that the first issue that the Court should seek to resolve is whether there is a serious issue to be tried. Should the Court answer that question in the affirmative, the Court is then required to determine whether damages will be an adequate remedy. Where the Court is uncertain that damages would be an adequate remedy, the Court thereafter seeks to ascertain where the balance of convenience lies. Finally, if the Court determines the issue of the balance of convenience, it should go on to determine whether the status quo should be maintained.

[45] It is noteworthy that Antigua Aggregates, both in its affidavit in support of the application and written submissions did not appear to address its mind to the material that should be placed before the Court in order to obtain an interlocutory injunction. In fact, it was only in its further submissions, having received the submissions of Antigua Aggregates that it alluded to the principle of balance of convenience.

[46] Serious Issues to be tried

I have reviewed the evidence presented by all sides, together with the submissions and I am far from persuaded that there are serious issues to be tried. Whether or not Antigua Aggregates owes the bank $2,200,000 or a greater sum does not raise any issue that can give rise to a cause of action based on the bank's proposal to sell the charged property. The Court agrees entirely with Sir Clare that the fact remains that Antigua Aggregates has defaulted in repaying the loan since 2005 and has no means of doing so. Once the bank has complied with the statutory requirements, including giving the Notice to Pay, it is perfectly entitled to exercise its right under the charge. I am afraid that I am unable to see any serious issue to be tried.

[47] Antigua Aggregates has identified a number of issues for the Court to resolve including whether the bank is secured beyond $2,200,000 on the charge. It is no part of the Court's duty to determine the

facts of a matter during an application for injunctive relief. The Court at this stage is not concerned with the resolution of factual disputes.

[48] The undisputed facts are that Antigua Aggregates has failed to honour its obligations under the charges since 2005. In addition, it is not doing business and has no means of servicing the debt, having defaulted in payment for nearly four years. The bank was quite indulgent and now seeks to exercise its power of sale. Antigua Aggregates seeks to forestall the sale of the charged property. On this aspect, I accept the submissions of learned Queen's Counsel Sir Clare. The issue that the Antigua Aggregates is now raising in relation to what sum is outstanding has nothing to do with whether the bank should be permitted to exercise its power of sale. The Court is inclined to the view that Antigua Aggregates has no proper basis for requesting the Court to restrain the bank from selling the property in accordance with its clear statutory rights provided by section 75 of the Registered Land Act. Sir Clare Roberts' argument was very persuasive when he asserted that Antigua Aggregates is merely seeking to avoid having its property sold when by its own admission, it has failed to service its debts since 2005 and has no means of doing so.

[49] Adequacy of damages

Even if I am wrong in relation to the above head, I come now to address whether damages would be adequate. Lord Diplock in the seminal case American Cyanamid ibid helpfully stated:

> "If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted".

[50] In determining this issue, it is very useful to pay regard to the dicta of Sachs LJ in Evans Marshall & Co. Ltd. v Bertola SA [1973] 1 WLR 349 at 379:

> "The standard question in relation to the grant of an interlocutory injunction – 'Are damages an adequate remedy' – might perhaps, in the light of recent authorities of recent years, be rewritten- 'It is just, in all the circumstances, that a plaintiff should be confined to his remedy in damages'".

[51] Applying the above principles, I have no doubt that damages would be an adequate remedy to Antigua Aggregates. I note however that the bank has suffered severe hardship for several years by not receiving any payment from Antigua Aggregates. There is no doubt in my view, given the totality of the circumstances, that damages would not be an adequate remedy for the bank.

[52] Balance of convenience

There is no doubt that the balance of convenience favours lies in favour of the bank.

[53] Status quo

In view of the circumstances of the case, it is clear that the status quo must be maintained. There should be no fetter on the bank's ability to liquidate its rights as chargee.

[54] Removal of Restriction

Antigua Aggregates seeks a mandatory injunction to compel the Registrar to remove the restriction placed on the lands at the instance of the Honourable Attorney General. It is clear to me that in order to have the restriction placed by the Registrar of Lands removed, there ought to have been compliance with the relevant statutory provisions, namely section 134 of the Registered Land Act. It is the law that if the legislature has established a particular procedure and tribunal, in this case the Registrar, to address a specific situation, that tribunal is exclusively clothed with the authority to address that matter. There is no evidence that Antigua Aggregates requested the Registrar to remove the restriction and that there was a refusal. In addition, there is no basis for me concluding that the restriction was improperly placed.

[55] In any event, I agree with the submissions urged by the learned Deputy Solicitor General Mrs. DeFreitas-Rait that it was incumbent for Antigua Aggregates to first apply to the Registrar of Lands to have the restriction removed. I also find the decision of Rawlins J, as he then was, in Christopher and DeCastro (Executor for O. Flax) v Registrar of Lands and Attorney General ibid very persuasive and can do no more than apply the principles stated therein.

[56] Accordingly, I am of the respectful view that the procedure invoked by Antigua Aggregates is not appropriate in order to seek to have the Registrar remove the restriction that has been placed on

the register. Even if I am wrong, it is clear that Antigua Aggregates is seeking to obtain a mandatory injunction, namely an order to compel the Registrar to remove the restriction. I am of the considered view that it behoves the Court to determine the applicable principles in relation to the grant of mandatory injunctions.

[57] In determining whether to grant a mandatory injunction, the Court should not go into the merits of the matter. It is no part of the Court's function to determine the facts. In Zockoll Group Limited v Mercury Communications Ltd [1988] FSR 354 the test that should be applied is "what is the least risk of injustice". Lord Justice Phillips said that;

> "All the citation that should in future be necessary is found in the concise summary of the law given by Chadwick J in Nottingham Building Society v Eurodynamics Systems [1993] FSR 468. In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong. Secondly, in considering whether to grant a mandatory injunction, the Court must keep in mind that an order, which requires a party to take some positive steps at an interlocutory stage, may well carry a greater risk of injustice, if it turns out to have been wrong made than an order which merely prohibits act, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought to consider whether the Court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater will ultimately establish his right; the less will be the risk of injustice if the injunction is granted. But, finally, even where the Court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted".

[58] Applying the above principles that have been so clearly elucidated in Zockoll Group Limited v Mercury Communications Ltd ibid to the application at bar, I am not of the respectful view that this is an appropriate case to grant a mandatory injunction. The least risk of injustice in the particular circumstances favours the Court declining to order that the restriction be removed. This

conclusion is arrived at having examined the relative positions of the Antigua Aggregates and the Crown.

[59] Further, I emphasise that I am not of the view that there is any basis for the Court to order that the restriction placed on the lands by the Registrar be removed. Accordingly, I decline to so order.

[60] Application for an order enabling Antigua Aggregates to sell

Antigua Aggregates seeks an order to enable it to sell the charged property. The Court is of the view that it cannot properly lend its assistance to Antigua Aggregates for it to violate the statute. It is interesting that Antigua Aggregates would seek the Court's assistance to enable it to sell the charged lands, by private treaty, particularly since this would violate section 67(g) of the Registered Land Act. I am in agreement with Sir Clare that were Antigua Aggregates to sell the property it would by doing so act in clear breach of their statutory duty "not to transfer the lease or charge it without the written consent of the chargee". It simply has no right to sell the charged property and so fetter the chargee's rights.

[61] There is absolutely no basis for the Court to enable Antigua Aggregates to sell the charged property.

[62] Accounting

I digress to state that I am of the view that the matter of proper accounting is a matter that can be dealt with between the parties and need not engage the attention of the Court. Based on the undisputed evidence, it is clear that Antigua Aggregates has not paid any monies towards the loan since 2005. The bank has sent it a Notice to Pay Off. Antigua Aggregates has failed to do so and in those circumstances, it is entitled to sell the property. The bank has to ensure that it exercises due care in selling the charged property. I say no more on this issue.

[63] Conclusion

In view of the foregoing, in my judgment, it is not appropriate to grant the orders that Antigua Aggregates Limited seeks. Accordingly, I dismiss Antigua Aggregates Limited's application against

the Attorney General of Antigua and Barbuda and the Antigua Commercial Bank. The Attorney General is to have costs agreed in the sum of $1,500.00.

[64] The Antigua Commercial Bank is to have its costs agreed in the sum of $3,000.00.

[65] I must place on record my gratitude to all learned Counsel for their lucid submissions.

Louise Esther Blenman
High Court Judge