ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2006/0018

BETWEEN:

BANK OF ANTIGUA

Claimant

And

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendant

Appearances:

Mr. John Carrington and Ms. Stacy Richards-Anjo for the Claimant
Attorney General Mr. Justin Simon QC with Ms. Karen De Freitas-Rait Deputy Solicitor General for the Defendant

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2008: November 11
December 15
2009: January 7, 21
April 30
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JUDGMENT

[1] **Blenman J:** This is a claim by Bank of Antigua Ltd (BoA) for declarations and orders, in relation to two agreements for sale, against the Government of Antigua and Barbuda (GoAB).

[2] Background

In his submissions, learned Counsel Mr. John Carrington has quite helpfully set out the background. I propose, as far as possible to utilise the history that he has chronicled. BoA is a bank incorporated and licensed in the State of Antigua and Barbuda, and is a member

of the Stanford Financial Group of Companies (SFGC). The Attorney General is sued as the representative of the GoAB. BoA seeks a number of declarations and reliefs, including that it has the beneficial interest in the land. It also seeks declarations that it is entitled to be registered as the owner of land. In the alternative, it seeks damages against the GoAB.

[3] BoA had previously lent GoAB the sum of US$31,000,000. Subsequently, SFGC lent the GoAB US$40,000.00 (the loan) on 30 August, 2001. SFGC is an associate of BoA and the latter was the agent of SFGC for the loan. BoA created a loan account numbered 702536 in respect of this loan. By a series of correspondence made between 2001 and 2002, the GoAB requested, and BoA, on behalf of the SFGC, made advance on the loan to or on behalf of the GoAB. BoA contends that the GoAB made no direct payments in reduction of the loan. On 8th March 2004, BoA and the GoAB entered into agreements whereby the GoAB agreed to sell and BoA to acquire certain parcels of land in Antigua owned by the Crown, namely Parcels 20, 21, 22, 34, 37 and 39 Block 21 2692A Crabbs Peninsular and Neighbouring Islands, Registration Section comprising approximately 235 acres (the land) for the total sum of US $43,516,302.36 (purchase price). The agreements were executed by the then Prime Minister Mr. Lester Bird on behalf of the GoAB.

[4] BoA says that the agreements for sale were on terms that the purchase would be by BoA and applied towards the reduction of the debt owed by the GoAB to BoA or any of its affiliated companies. They also contained specific terms whereby the GoAB acknowledged that BoA would sell and transfer the land in order to liquidate them into cash proceeds for BoA.

[5] In addition, BoA contends that the loan activity statement for the SFGC loan evidences that, BoA credited that loan with the payment of the purchase price with a value date 4th March 2004 and that sum was applied to interest outstanding on the loan.

[6] By Instruments of Transfer dated 8th March 2004 and executed on behalf of the Crown by the then Governor General of Antigua and Barbuda, the Crown attempted to transfer the title to the land to BoA. However, the GoAB has failed to complete the registration of the

transfers in order to convey the title to the land to BoA due to the fact that the Registrar of Land has refused to register the Instruments of Transfer on the grounds that they were in breach of the provisions of the Banking Act Cap 40 section 16(1) (h) and that further, parcels 37 and 39 were not demarcated in accordance with the Registered Land Act Cap 374 section 14(1).

[7] It is against that background that BoA filed the claim against the Attorney General. The GoAB strongly contests the claim.

[8] The GoAB contends that the agreements for sale are illegal and unenforceable. It contends that the two agreements for sale, each dated March 4th 2004, made between the GoAB of the one part and BoA of the other part in which the GoAB, as vendor, purports to agree to transfer to BoA as purchaser in the aggregate six parcels of Crown land noted in the Land Registry as Parcels; 20, 21, 22, 34, 37 and 39 of Block 21 2692 A in Registration Section: Crabbs Peninsular & Neighbouring Islands. The purchase price for parcels 20, 21, 22, 34 which parcels were demarcated was stated to be EC$1, 245, 075.00 which said aggregate sum was further stated to have "been paid by the purchaser to vendor and applied, as indicated by the vendor in writing, towards the reduction of debt(s) owed by the vendor to the purchaser the Bank of Antigua Limited or any other affiliated company of the purchaser." The purchase price for parcels 37 and 39 which said parcels were and remain un-demarcated was stated to be EC$ 4,961,250.00 which said aggregate sum was further stated to have "been paid by the purchaser to the vendor and applied, as indicated by vendor in writing, towards the reduction of debt(s) owed by the vendor to the purchaser, the Bank of Antigua Limited, or any other affiliated company of the purchaser."

[9] The GoAB argues that the Registrar of Land has acted lawfully in refusing to register the Instruments of Transfer. The executed Instruments of Transfer recite a monetary consideration in respect of each parcel, with an acknowledgement of the receipt of the respective sums which the bank alleges were paid, and which it further alleges consequently obligated the Crown to complete the purchases by the registration of the Instruments at the Land Registry. The GoAB puts the bank to prove that the aggregate

consideration for the transfer of the land was paid on the execution of the Transfer Instruments as alleged, and prays in its defence that BoA could not lawfully acquire title to the land in contravention of section 16(1) (h) of the Banking Act, which provides a regulatory framework for financial institutions.

[10] Further, the GoAB states that legal ownership of land, pursuant to the Registered Land Act Cap. 374, is not effected until and unless the Instrument of Transfer is registered by the Registrar of Land and the required entry is made on the relevant Land Register.

[11] The GoAB denies that BoA has a beneficial interest in the land and further denies that BoA is entitled to any of reliefs sought.

[12] Issues

The issues that arise for the Court to resolve are as follows:

(a) Whether the agreements for sale are admissible;

(b) Whether the Cabinet Note and the Debt Service Reporting Forms are admissible;

(c) Whether the agreements for sale are lawful;

(d) Whether the Registrar lawfully refused to register the Instruments of Transfer;

(e) Whether BoA is entitled to the declarations and reliefs sought;

(f) Costs

[13] Mr. John Carrington's submissions

Admissibility of agreements for sale

Learned Counsel Mr. Carrington submitted that the agreements for sale are admissible. He said that there is no legal requirement that the agreement for the sale of land be registered in the Records Office. The agreements refer to proposed sale and transfer of registered land. The Registered Land Act Cap 374 Laws of Antigua and Barbuda, section 3(1) provides: "Except as provided in the Registered Land Act no other law and no practice and procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with the provisions of this Act."

[14] Mr. Carrington learned Counsel stated that the Registered Land Act provides for the creation of a land registry (section 4), and further provides that "to register" means to make an entry in that registry (section 1). While transfers have to be registered in order to be effective (section 83), the definition of a transfer specifically excludes an agreement to transfer (section 1), and such an agreement is enforceable once it is in writing and signed by the party to be charged (section 37(2)). Section 38 provides that no person dealing with land for valuable consideration is required to search the register under the Registration and Records Act.

[15] The Registered Land Act therefore creates its own system for the administration of matters in relation to land registered under that Act. It is inconsistent with that system that an agreement for sale, which is not required to be registered under that Act, should be required to be registered under the Registration and Records Act especially where a purchaser of registered land is not required to search the register under the latter Act.

[16] Learned Counsel Mr. Carrington said that in the alternative, even if the agreements were not to be admitted into evidence, there is no basis for disregarding the evidence of their terms. The provisions of the Registration and Records Act and Stamps Act that have been cited by the Attorney General prohibit only the admission of documentary evidence. The passage of the judgment of the Court of Appeal in Sengupta v Woods Development Ltd. CA 2003/20 also makes this clear. There is no prohibition against the use of oral testimony to establish the terms of the agreements as failure to register or stamp an agreement does not render such agreement void. Oral evidence was given of the essential terms of such agreements, such as the parties to the agreement, the identification of the properties were being transferred by the witnesses on behalf of BoA. The GoAB also agreed to the production of the executed Instruments of Transfer.

[17] Mr. Carrington learned Counsel further submitted that there was no requirement for the agreements for sale to be stamped under the Stamps Act Cap 410. Section 21, which is cited by Mr. Simon QC, must be read in conjunction with section 9 which describes the

instruments that are required to be stamped as being those set out in the Schedule to the Act. The Schedule provides that stamp duty is payable on agreements save where made by a public officer. The Schedule also provides a general exemption from stamp duty for all instruments made by the GoAB for the sale of lands vested in the Government.

[18] In the case at bar, the agreements for sale were executed by the then Hon. Prime Minister on behalf of the GoAB and were in respect of lands vested in the GoAB. In the circumstances, there was no requirement that stamp duty be paid on the agreements for sale and so the alternative submission by Mr. Simon QC should be dismissed. Mr. Carrington therefore urged the Court to admit the agreements for sale into evidence.

[19] Admissibility of Cabinet Note

Learned Counsel Mr. Carrington objected to the Cabinet Note being admitted into evidence. Counsel said that if the Court rules the Note to be admissible, it does not appear to have any connection with the subject of the proceedings, namely the enforcement of the agreements for sale.

[20] Admissibility of Debt Service Reporting Form

Mr. Carrington learned Counsel objected to the Debt Service Reporting Form being admitted into evidence. He urged the Court to find that the existence of and reporting of other loans is not an issue in these proceedings; therefore these documents are not relevant to the issues that have been joined between the parties.

[21] Legality of agreements for sale

Learned Counsel Mr. Carrington said that the onus of proof is on the party alleging the illegality. In the case at bar, Mr. Simon QC alleges the illegality of the agreements so it is his responsibility to prove that is so. Where an allegation of illegality is made, the onus of proof is on the party alleging the illegality to prove that the contracts are illegal: see Archbolds (Freightage) Ltd v S. Spanglett Ltd [1961] 1 QB 364. The effect of illegality is not that the contract is void but that it is unenforceable: see Chitty op cit at paragraph 16-007.

[22] The Banking Act does not prohibit the execution by a financial institution of an agreement to purchase property. What is prohibited, if the exceptions within the Banking Act section 16 do not apply, is the acquisition of immoveable property. Under the Registered Land Act Cap 374, such property can only be acquired by an Instrument of Transfer. The Banking Act section 16 does not make a contract for the acquisition of property illegal at all. It only goes so far as to prohibit the acquisition of real property save under certain circumstances. Because there is no absolute prohibition against such acquisition, a general statement that such acquisition (or contract for such acquisition) is illegal at the time of its negotiation and execution is incorrect.

[23] With respect to Birkett v Acorn Business Machines [1999] EWCA Civ 1866, this case illustrates an agreement of which both parties were aware of the illegality of its performance. The authorities show that the consequence of such an agreement is different from that where only one part is aware of the illegality of the performance. In such a case, the contract remains enforceable at the request of the innocent party: see Archbolds (Freightage) Ltd v S. Spanglett Ltd ibid. The effect of the Banking Act section 16 is not to create an agreement that is illegal on its face as there is no absolute prohibition against the acquisition of real property by a financial institution.

[24] Learned Counsel Mr. Carrington reminded the Court to the need to address the interpretation of the Banking Act Cap 40 section 16(1) (h), the relevant part of which reads as follows: "16(1) A financial institution shall not directly or indirectly, except with the approval of and subject to terms and conditions as the Minister, after consultation with the Central Bank, may by Order prescribe-

(h) purchase, acquire or lease real or immovable property except as may be necessary for the purpose of conducting its business as a financial institution including provision or future expansion and housing its officers and employees".

[25] Mr. Carrington learned Counsel stated that there is no dispute that the opening words of section 16(1) require the Minister either to approve the acquisition or, if his approval is subject to conditions, to issue an order prescribing such terms and conditions.

[26] The issue therefore is whether the word 'including' in subparagraph (h) should be read as limiting the foregoing words conduct of its business as a "financial institution" or whether it should be read as expanding those words to encompass the provision for future expansion, housing etc. In Dilworth v Commr of Stamps [1899] AC 99, 105-106, Lord Watson, delivering the judgment of the Privy Council, opined as follows:- "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also things which the interpretation clause declares that they shall include. But the word 'include' is susceptible to another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning which, for the purpose of the Act, must invariably be attached to these words or expressions".

[27] Learned Counsel Mr. Carrington said that it is clear therefore, that the primary use of the word 'includes' must be expansionary and so in interpreting the section, the Court should look firstly at the natural meaning of the phrase "conduct of business of a financial institution" and determine the meaning of that phrase without consideration of the expansionary words concerning future expansion and the provision of housing. It is also clear from the dicta above that in order for the Court to interpret the word 'includes' in a limiting manner, i.e. as the equivalent of 'means and includes', this must be demanded by the context of the legislation. There is nothing in the context of the Banking Act that requires such an interpretation.

[28] The Banking Act is a regulatory Act, the long title of which states that its purpose is to regulate banking business and to make provision for matters connected therewith. While the term 'banking business' is defined at section 2, the Act specifically does not define what amounts to the "business of a financial institution" leaving this to be determined on a case by case basis by the Courts.

[29] Learned Counsel Mr. Carrington asserted that the uncontested evidence in the case at bar is that the land was being acquired by BoA in the course of its activities as agent of the SFGC in order to assist that company in having its loan from the GoAB repaid and that the rendering of such assistance, forms part of the normal business of a financial institution. There is no incongruity with the scheme of the legislation if a financial institution were to acquire real property under such circumstances.

[30] Learned Counsel Mr. Carrington therefore submitted that the proper interpretation of section 16(1) (h) appears to be that the words following 'includes' do not limit the preceding words so that a financial institution can legitimately acquire real property for the conduct of its business as a financial institution, including the conduct of its activities as agent for lending institutions, otherwise than for provision for future expansion or housing for its employees.

[31] Mr. Carrington said that in the case at bar, the agreements were for the sale of (Crown) land to BoA. It is within the power of GoAB to agree to sell Crown lands. It is also within the power of BoA to agree to acquire land in accordance with, rather than contrary to the statute, namely:

(a) When the Minister of Finance so approves and prescribes;

(b) Where necessary for the purpose of conducting its business as a financial institution;

(c) For the purpose of securing a debt;

(d) Where there is a default of repayment of a debt for resale as soon as possible thereafter.

It is therefore possible to perform the agreements for sale in accordance with the Banking Act.

[32] In any event, the Banking Act section 16(1) (h) does no more than regulate the purchase or acquisition of immovable property. It does not purport to deal with or regulate agreements to purchase or acquire such property. Mr. Carrington therefore maintained that as a result, Mr. Simon QC is unable to discharge the burden of proving that the agreements for sale are illegal in their formation. Learned Counsel Mr. Carrington insisted that the agreements for sale were lawful and are enforceable. In addition, he said that BoA has acquired beneficial interests in the land. The Court should therefore grant the declarations that BoA seeks.

[33] Registrar's refusal

Learned Counsel Mr. Carrington said that the Registrar of Land's power under section 6(a) has to be read together with that under section 6(c). The Registrar of Land, Mrs. Hill may only refuse to register a transfer on account of the absence of a plan if she had required the person seeking the registration to produce a plan. Mrs. Hill does not state that she required BoA to produce a plan. She merely states that she, incorrectly and contrary to the extent of her powers under section 6, determined that she would not register the instruments because there was no plan. Learned Counsel Mr. Carrington also maintained that the Registrar of Land improperly refused to register the Instruments of Transfer on the basis that the agreements for sale violated the Banking Act.

[34] Accordingly, learned Counsel Mr. Carrington further said that the agreements for sale were lawfully executed and in no way in breach of section 16(1) (h) of the Banking Act and should have been registered.

[35] Attorney General Mr. Justin Simon QC's submissions

Admissibility of agreements for sale

The GoAB took a preliminary objection to the production by BoA of the agreements for sale together with another agreement identified by the Court as "A" (at pages 1 to 13 in

section 1 of Trial Bundle III). The learned Attorney General maintained his objection on the following grounds:

(a) That the agreements as documents in writing relating to land, the document must have been duly registered before it can be received in evidence in accordance with section 4 of the Registration and Records Act, Cap 375;

(b) Any document which is liable to stamp duty must be duly stamped before it can be admitted in evidence in accordance with section 21 of the Stamp Act, Cap 410.

[36] The learned Attorney General advocated that the agreements for sale which form part of "A" fall foul of both pieces of legislation and accordingly, the Court can take no notice of them; see the judgment of OECS Civil Appeal No.20 of 2003 Soumitra Sengupta v Woods Development Limited, delivered September 20, 2004. Gordon JA who delivered the judgment of the Court of Appeal stated:

> "Let it be said that the law is clear that even where parties choose not to take the point of inadmissibility of an unstamped document that requires stamping, there is a duty on the Court not to admit such a document. Undoubtedly, the thinking behind such a rule is that the Court should not lend itself to be a part of an action that is a fraud on the revenue of the State".

[37] The learned Attorney General Mr. Simon QC urged the Court to rule that the agreements for sale are inadmissible, and accordingly there is no evidence of the terms and conditions of the alleged sale of any of the land. For this very reason, the GoAB limited its cross-examination on the contents of the documents, as they are a nullity before the Court. Further, on this basis, the learned Attorney General Mr. Simon QC submitted that the testimony of BoA's witnesses, in so far as it was founded upon those agreements for sale, must be disregarded in its entirety by the Court.

[38] The GoAB withdrew its objection to Loan Activity Statement Account # 702536; the document identified as "B"; and also in respect of BoA's documents marked "C" for

identification and tendered at the trial. The former which bears date "9/26/06" as the date the document was generated, is confirmatory of the evidence of Mr. Antonio that a credit transaction in the aggregate sum of US $3,516,302.36 was posted to account # 702536 and backdated as at 3/04/04. The latter documents simply speak to use the US $40Million loan from SFGC and evidences correspondence of the requests and draw-downs, none of which the GoAB denies, but which are irrelevant to the issues joined between the parties.

[39] Admissibility of Cabinet Note

The learned Attorney General Mr. Simon QC stated that BoA can have no valid objection to the production in evidence of the documents identified as "D" which were disclosed by the Attorney General. Page 1 is a Cabinet Decision certified by the Secretary to the Cabinet and evidenced the fact that parcel 20 ought not to have been transferred to BoA as the same had been leased to Antigua Brewery Limited. Cabinet is the central decision making body of Government and under whose direction that Ministers of Government must act. The Cabinet Decision additionally indicates that the agreements for sale of the land at Crabbs were linked to Mr. Allen Stanford's "take over of the Asian Village Island Project", and not as Mr. Mauricio Alvarado suggests "as a means of paying down the debt" to SFGC.

[40] Admissibility of Debt Service Reporting Forms

Pages 10 to 21 are in truth and fact, documents produced by BoA and forwarded to the Ministry of Finance monthly. This fact is confirmed by the cross-examination of Mr. Antonio who said "Yes, there are other loans (in addition to the US $40M). We do report to the Government of Antigua and Barbuda; the reports are sent regularly to the Ministry of Finance. I see page 2 (Trial Bundle III Part B shown to witness) headed 'Bank of Antigua Debt Service Payments Reporting Form'; pages 6 to 21 contain similar documents; pages 2 and 3 reflect the indebtedness of the Government to BoA as at March 31 2004, these matters are reflected in Reports." The learned Attorney General Mr. Simon QC said that what these documents reveal is that until January 2006, Loan Account # 702536 was never reflected in these reports, a matter to which Mr. Antonio stated: "I cannot speak to the reason for the exception", while earlier admitting that GoAB was not involved in the

crediting of its loan account by BoA and that having posted the credit of US $3,516,302.36, he "did not advise the Government of that credit". The learned Attorney General Mr. Simon QC maintained that the documents speak volumes to the issue of the 'consideration' mentioned in the Instruments of Transfer and do little for BoA's cause; "hence its objection, and our strenuous objection to its objection".

[41] Legality of the Agreements for Sale

The learned Attorney General Mr. Simon QC said that section 16 of the Banking Act restricts certain activities of licensed financial institutions by providing a number of activities that such institutions could not engage without the approval of the Minister of Finance who may, by order, prescribe terms and conditions after consultation with the Central Bank. One such proscribed activity as declared in subsection (1) (h) is to "purchase, acquire or lease real or immovable property except as may be necessary for the purpose of conducting its business as a financial institution including provision for future expansion and housing its officers and employees; provided that it may secure a debt on any property immovable or movable and in default of repayment may acquire such property for resale as soon as possible thereafter". BoA, which has the burden of proof, has not produced any approval given or Order made by the Minister of Finance. Further, it is clear that the parcels of land were not encumbered by any charge to secure any debt of the GoAB to BoA. Accordingly, the Attorney General submitted that the Registrar of Land was correct in her interpretation of the law and was right to reject the Instruments of Transfers for registration.

[42] BoA's witness Mr. Alvarado, General Counsel admitted that he did not advise himself on the matter, but relied on the alleged advice of the GoAB's representatives; however, he admitted that the GoAB must act lawfully in accordance with the laws of the country.

[43] Mr. Simon QC, the learned Attorney General posited that the prohibition against purchasing, acquiring or leasing is unequivocal by use of the words "shall not directly or indirectly". However, it is undisputed that the words of the section do provide for exceptions to the prohibition. The matters in issue then are: the proper interpretation of the

exceptions as stated and whether such exceptions properly apply to the facts of the case at bar. Mr. Simon QC said that these exceptions must be interpreted in the context of the Banking Act as a whole which is clearly on its face a statute for the regulation of financial institutions and preservation of a sound economy. See Halsbury's Laws of England, 4th Edition, Vol. 44, Paragraphs 871 and 872.

[44] The Act, when taken as a whole, provides a two tiered regulatory framework in which ministerial licensing authority resides with the Minister of Finance while regulatory and supervisory authority is exercised by the Central Bank. It is the Central Bank throughout the Act which would be privy under the Act to the type of information which would properly inform a decision to grant or refuse approval under one of the exceptions noted in section 16(1). See Capital Bank International Ltd. v Eastern Caribbean Central Bank and Sir K. Dwight Venner, OECS Civil Appeal No: 13 & 14 of 2002, with particular reference to then Chief Justice Byron's description (at paragraph 36) of Grenada's Banking Act 1993 which is almost identical in all material particulars to our own Banking Act, Cap 40.

[45] The learned Attorney General Mr. Simon QC said that in section 16(1) (h) there are two distinct types of exceptions noted. The first arises from the chapeau of subsection (1) and therefore applies to all subsequent sub-paragraphs (a) through (h). The second arises in the body of sub-paragraph (h) itself and is therefore confined in its effect to the matters in (h). This distinction is important in determining the correct approach with regard to interpretation because any interpretation of the first type of exception must take into consideration and be consistent with paragraphs (a) through (h). Thus the words "except with the approval of and subject to such terms and conditions as the Minister, after consultation with the Central Bank, may by order prescribe" must be interpreted with sub-paragraphs (a) through (h) in mind.

[46] In this context, Mr. Simon QC learned Attorney General submitted that (1) the Minister is required to consult with the Central Bank before granting any approval of the otherwise prohibited acts; and (2) that any such approval must be in the form of a Ministerial Order to have effect. BoA, by its attorney in oral submissions has proposed that the need for

consultation with the Central Bank and for a Ministerial Order only arises in cases where the Minister wishes to make the approval subject to terms and conditions. However, this is inconsistent with paragraph 27 of BoA's own written legal submissions where it is admitted that the exception applies "when the Minister of Finance so approves and prescribes". The word 'prescribe' is clearly used in reference to the making of an order after consultation with the Central Bank. The Minister must therefore not merely approve, but such approval must be prescribed in an Order after consultation. Any other interpretation would mean that the Minister had unilateral power to authorize any of the actions prohibited by sub-paragraphs (a) through (h), including the making of credit facilities that negatively affect a bank's minimum liquidity levels (a-d) or its preservation of capital (f-h) to the potential detriment of account holders. By such an interpretation the Minister could also take such action without any notice to the public by way of Ministerial Order properly published.

[47] Instead, learned Attorney General Mr. Simon QC invited the Court to consider that there is only one interpretation that allows for a literal and grammatically correct understanding of the chapeau in section 16(1). The word "and" acts conjunctively to join the clauses "with approval of" and subject to such terms and conditions as". Everything that follows must then apply to that conjoined phrase such that both the approval and the application of terms and conditions are (1) made by the Minister, (2) made only after consultation with the Central Bank and (3) made by Ministerial Order.

[48] The second type of exception in section 16(1) is contained in sub-paragraph (h). There are three such exceptions in (h), namely

> "(1) where the purchase, acquisition or lease is "necessary for the purpose conducting (the financial institution's) business as a financial including provisions for future expansion and housing its officers and employees" (see s. 16(1) (h);
>
> (2) where the property was acquired prior to the commencement of the Act (for a limited time) (see proviso at s 16(1) (h) (i); and

(3) where the property was charged as security for a debt and is acquired by the financial institution upon default of payment (see proviso at s 16 (1) (h) (ii)).

[49] In the case at bar, the land was neither acquired prior to commencement of the Act nor was it ever charged as security for any debt. Therefore sub-sections 16(1) (h) (i) and (ii) are not relevant in this case. However, as regards the substantive section 16(1) (h), BoA has argued that the purchase in this case was necessary for the purpose of conducting BoA's business as a financial institution because it was a part of its business as agent for SFGC to arrange for payments on SFGC's debts.

[50] First of all, it is incredible that it would be part of any agent's duty or "business" "as a financial institution" to enter into a substantive personal commitment (purchase of land) for the sole purpose of assisting its principal in recovering a debt. The link between BoA alleged purchase in this case and its business as a financial institution is tenuous at best. Mr. Simon QC again invited the Court to find as a matter of fact that the alleged purchase was not part of BoA's business as a financial institution and now further refers the Court to the interpretation/definition section (section 2) of the Act. By that section "financial institution" is defined as "includes any person doing banking business" and "banking business" is further defined as:

"(a) the business of receiving funds through-

(i) the acceptance of monetary deposits which are payable on demand or after notice of any similar operation;

(ii) the sale or placement of bonds, certificates, notes or other securities and the use of such either in whole or in part for loans or investments for the risk of the customer; and

(b) any other activity recognized by the Central Bank as customary banking practice and with financial institutions may additionally be authorized to do."

[51] These definitions clearly do not include buying property, whether as a means to provide funds to the GoAB from which a debt to SFGC could be paid or for any other reason. Accordingly, Mr. Simon QC maintains that on a proper interpretation of section 16(1) it was not "necessary" for BoA to purchase land in order to enable or allow it "to conduct its business as a financial institution".

[52] Further, Mr. Simon QC learned Attorney General said that, given the context of the entire Banking Act as a regulatory statute, the words "necessary for the purpose of conducting its business as a financial institution" must be construed narrowly and are constrained to mean that which is necessary for the institution to operate its (financial institution) business administratively. See Halsbury's Laws of England, 4th Edition, Vol 44, Paragraph 874. This is supported by the examples given in (h) of the circumstances in which the exception would apply, that is, where the purchase was necessary for "provision for future expansion and housing of its officers and employees". It is clearly this type of circumstance that the exception is intended to allow for, rather than allowing for a bank to purchase land any time such purchase has to be incidental to any part of its business. Otherwise a financial institution would effectively be allowed to circumvent the regulatory purpose of this section and of the Banking Act in general.

[53] Further, the learned Attorney General Mr. Simon QC argued that in any event, the Banking Act prohibits the very creation of a contract to purchase real property in those circumstances, and as such any alleged agreement for sale is a complete nullity. Performance of such a contract is impossible at law.

[54] Alternatively, any agreement for sale of land is unenforceable because it would have been illegal at the time of its negotiation and execution. The Banking Act serves to regulate financial institutions such as the bank, for the protection of the public. The learned Attorney General invited the Court to find that the Court cannot be used as an instrument to enforce a contract which offends against statute. In such a circumstance, the intent of the parties is irrelevant. The learned Attorney General Mr. Simon QC submitted that the agreements for

sale are unenforceable regardless of whether or not the parties were aware of the illegality at the time of execution; Birkett v Acorn Business Machines Limited ibid.

[55] Registrar's refusal

Next, the learned Attorney General Mr. Simon QC then said that the Registrar of Land, Mrs. Cecile Hill, received from the BoA's solicitors on or about March 9 2004, the six Instruments of Transfer executed by BoA and the then Governor General on March 8 2004, for the purpose of having them registered against the respective Land Registers. She quite properly rejected the Instruments of Transfer on the ground firstly, that they offended against section 16(1) (h) of the Banking Act and secondly, as to parcels 37 and 39 only, their boundaries had not been demarcated and duly authenticated by the Chief Land Surveyor.

[56] The learned Attorney General Mr. Simon QC further submitted that the Registrar of Land was well within her legal rights to require a demarcation of parcels 37 and 39, whose Land Registers do not indicate their respective approximate areas due to the absence of a boundary plan as mandated by the Registered Land Act; see sections 6(a) and 17(1). It was BoA's duty to satisfy itself of the quality and condition of what it is buying.

[57] Consideration

Each of the Instruments of Transfer speaks to the monetary consideration paid for each parcel of land, and represents a receipt that the monies were paid. Mr. Simon QC submitted that the monies should have been received by the GoAB as at the date of the transfers i.e. 8th March 2004, and this is admitted by BoA through Mr. Alvarado's evidence (under cross-examination), but he states that he does not know the date when the payments were made.

[58] Mr. Simon QC stated that interestingly, while on June 11th 2004, BoA's Managing Director stated in a Statutory Declaration that the lands were transferred to BoA in partial set-off of loans in the sum of EC $30,314,638.83 made by BoA to the GoAB, BoA through its Senior Vice President in Further and Better Particulars filed herein and dated June 9th 2006 and

October 10th 2006, stated that the aggregate consideration of US $3,516,302.36 was applied to the SFGC loan and that "the said sum was effectively credited on the 4th March 2004".

[59] The learned Attorney General Mr. Simon QC stated that BoA's evidence through its Loans Manager Mr. Antonio is that "on the 31st December, I physically posted to loan account number 702536 the amount of US $3,516,302.36 as a credit with value date as of March 4 2004", which he then explains under cross-examination by his Counsel as meaning that "March 4 2004 represents the value date on which the sum was credited to the loan". And under examination: "A value date of March 4 2004 means the date on which the transaction is given value; in other words, irrespective of the date in time of the physical posting. I have stated that this was physically posted on December 31 2005. I do not know why this was done then; that was the date I was so instructed. It would have been by the manager of the bank at the time. I gave the posting date based on the sale agreements. My instructions were exactly what I did. The transaction was backdated. The bank would have a record of the posting. No, I was not asked to provide the record of the posting".

[60] It is clear from BoA's own evidence that the consideration was not paid at the date of the execution of the transfer; nor was it paid at the date when BoA filed a caution against the lands at the Land Registry; it was paid, they allege without documentary proof, twelve days before BoA filed this action, and even then without any notification to the GoAB. In respect of the 'crediting', Mr. Simon QC commended the evidence of its witness Ms. Claudia Steele-Henry to the Court, that in early 2006 Mr. Antonio advised her that 'not a cent' had been paid to the loan account.

[61] Given the various explanations by BoA, some of which are contradictory, and in the absence of any documentary confirmation, the learned Attorney General Mr. Simon QC invited the Court to find that the credit to the loan account was not posted until after this action was initiated, and was in fact sparked by the enquiry of Ms. Steele-Henry. In any event, BoA cannot claim that it was entitled to a transfer of the land on the basis that it had at the date of the transfer, duly paid the consideration which it had agreed to pay at that

date. Its failure so to do clearly entitled the GoAB, in any event, to rescind the contracts by the respective transfer instruments for failure of consideration.

[62] The learned Attorney General said that in the circumstances and based on the evidence before the Court, BoA's claim must be rejected, and the equitable reliefs or declarations and specific performance sought should be denied.

[63] Costs

On the matter of costs, the learned Attorney General Mr. Simon QC accepted that the principle that costs follows the event. The claim is not for a specific sum although general damages have been claimed, but no evidence has been provided in respect thereof. In the circumstances, Mr. Simon QC submitted that Part 65.5 (2) (iii) applies in the absence of any agreement between the parties. Costs should be awarded as if the claim were for a sum of EC $50,000.00.

[64] Evidence

The Court has paid regard to the documentary evidence that was admitted together with the oral evidence. In this regard Mr. P Mauricio Alvarado General Counsel, Mr. Norris Antonio Loans Manager, Mr. Kennard Byron Deputy Manager and Mr. William McDonald provided witness statements on behalf of BoA and were cross-examined. Ms. Claudette Steele-Henry Senior Debt Officer and Mrs. Cecile Hill, the Registrar of Land provided witness statements on behalf of the GoAB. While Ms. Steele was cross-examined, Mrs. Hill was not.

[65] Assessment of witnesses' evidence

Throughout his testimony, Mr. Alvarado struck me as a very astute and keen lawyer. He played an integral role in advising BoA during the negotiations of the agreements for sale. It was clear to the Court that he was reluctant to tell the Court everything he knew and when pressed in cross examination, he, very hesitatingly, was forced to admit important facts that were of no assistance to BoA's case. Let me say straight away that I found the evidence of Mr. Antonio very wanting. On more than just a few occasions, he was forced

under cross-examination to resile from early positions he had taken. It was clear that he was not as forthright as he ought to have been and definitely gave the impression of concealing information. For the most part, his evidence was not reliable and the Court was unable to place great store on his evidence. In addition, he conveniently did not remember important details in relation to the conversation that he had with Ms. Steele-Henry as to whether any credits or payments had been made to the loan. Even though he did not paint a very good picture, he seemed to be an otherwise decent gentleman. He looked extremely uncomfortable when he was placed in a situation in which he had to testify and to state matters that were untrue. On several occasions he was visibly embarrassed, particularly when testifying to in relation to the posting of the monies on 31st December, 2005 towards the loan account, with a value date of 4th March, 2004. He prevaricated quite a bit and was a most unconvincing witness. His credibility was seriously affected, perhaps through no fault of his. He seemed not to be able to recall several important details. His evidence stood in stark contrast to the evidence of the witnesses called by the GoAB. Ms. Steele-Henry on the other hand, struck me as a straight forward and honest witness who was concerned with speaking the truth and to assist the Court in coming to a true determination of what had transpired. She was able to provide many details which were borne out by the documentary evidence. She was a very careful and credible witness. There is no reason to question the reliability of her evidence. Where there is conflict between her evidence and that of Mr. Antonio without any hesitation, her evidence is preferred.

[66] Neither Mr. McDonald nor Mr. Byron offered very much by way of evidence in relation to the issues that have been joined.

[67] Court's analysis and conclusions

I have reviewed the submissions of learned Counsel and I have given deliberate consideration to the evidence. The following represents my findings of fact. SFGC and BoA are affiliate companies. In 2001, SFGC lent money to the GoAB and a loan account number 702536 at BoA, was created for the purpose of GoAB being able to withdraw installments. At all relevant times, BoA acted as the agent for SFGC. The GoAB drew

down several installments and contrary to the terms of the agreement, it never paid any monies towards liquidating its indebtedness to the SFGC. This continued to be so for several years.

[68] On 4th March, 2004 BoA and the GoAB entered into two agreements for sale of the land in dispute (which belong to the Crown). The undisputed fact is that Mr. Lester Bird, then Prime Minister, purported to act on behalf of the GoAB in executing the agreements, whereas Mr. McDonald and Mr. Byron acted on behalf of BoA. The purchase price for all of the properties is US$3,516,302.36. There is no Order (Statutory Instrument) which indicates that BoA received approval to purchase the land.

[69] On the 8th March, 2004, Instruments of Transfer were executed by the then Governor General on behalf of the Crown. The Instruments of Transfer recited that BoA had paid monies for the land. BoA meanwhile sought to get the GoAB to convey the land. The Instruments of Transfer were presented to the Registrar of Land who refused to register them, on the ground that the agreements for sale on which they were based are illegal since BoA could not properly enter into those agreements for sale with the GoAB without an Order. The Registrar of Land also refused to register two of the above mentioned Instruments of Transfer on the ground that the boundaries (in relation to two of the parcels of land) were not properly demarcated.

[70] There were reporting systems created by BoA and monthly reports were forwarded to the Ministry of Finance which indicate the movement on the loan account held by the GoAB with BoA. However, BoA never reported to the Ministry of Finance any loan activity in relation to account number 702536 until January, 2006. Meanwhile, it consistently did so in relation to other loans that BoA, SFGC had granted to the GoAB.

[71] Early in 2006, investigations were carried out by the Ministry of Finance and it was then realised that there was no indication that any repayment had been made by GoAB on the loan. This was when Ms. Steele-Henry telephoned Mr. Antonio (early in 2006) and

enquired of him whether any money had been paid towards the SFGC loan and was advised that "not a cent" had been paid.

[72] There is no reason to doubt or disbelieve Ms. Steele-Henry when she stated that early in 2006 she spoke to Mr. Antonio about the loan. Mr. Antonio is not to be believed when he stated that he posted the money towards the account on 31st December, 2005. The Court is of the considered opinion that the posting of the stated sum was done sometime after she had spoken to him and it was given a value date of 4th March 2006, in order to buttress BoA's claim. This view is fortified having examined the date on which there was the first reporting of the loan coupled with Ms. Steele-Henry's reliable evidence. The evidence indicates that the agreements (dated 4th March, 2004) state that in consideration of GoAB conveying the land to BoA, BoA or its affiliates had paid the purchase price of US$3,516,302.36 for the land by GoAB reducing the debts owed to BoA or any of its affiliates. Credit to the loan account was made nearly two years after and backdated. (My emphasis).

[73] The Court digresses to state, regrettably that on the morning during the commencement of the trial; both sides took objection to a number of documents being admitted into evidence. It bears noting that these objections ought to have been made and addressed long before the morning of the trial. These are matters that are dealt with, as matters of case management, before the commencement of the hearing. In an effort to prevent the protraction of the trial, the Court ruled that the trial would continue and the objections were noted and both learned Counsel were advised to address the issues by way of closing arguments, to which they agreed. Fortunately, by the conclusion of the trial some of the objections were no longer sustained. However, a few objections were maintained. This necessitated the Court having to decide on the issues of the admissibility of the agreements for sale; the Cabinet note and the Debt Service Reporting Forms. Shortly, the Court proposes to address those issues.

[74] I will now deal with the issues raised.

[75] Admissibility of agreements for sale

At this juncture, it is of necessity that the relevant provisions of the Registration of Records Act Cap 375 of Laws of Antigua and Barbuda (the Registration Act) be examined.

Section 2 of the Registration Act defines:

> "Deed" to include every document in writing affecting or relating to lands, tenements, or hereditaments in Antigua and Barbuda."

Section 4 of the Registration Act states that:

> "No deed shall be received in evidence in any proceeding whatever, whether at law or equity, in Antigua and Barbuda unless such deed shall have been duly registered."

Section 6 of the Registration Act states that:

> "Every deed shall be lodged in the Record Office of Antigua and Barbuda, for registration, within the time hereinafter limited, that is to say –
>
> If executed within Antigua and Barbuda, within three months after execution:
> If executed anywhere out of Antigua and Barbuda, within twelve months after execution:
> Provided that any Judge may, on cause shown, order any deed to be registered notwithstanding its not having been presented for registration within the time hereinbefore limited; and, in such case, a copy of the order of the court shall be attached to the deed and registered therewith. In the case of deeds executed before the coming into operation of this Act, the same shall be received for registration without the Judge's order required by this section."

[76] It is common ground that the agreements for sale affect or relate to land in Antigua. It is clear that section 4 of the Registration Act prohibits the Court from receiving into evidence any deed, whether at law or equity, unless such deed shall have been duly registered. The section is pellucid and there is no reason to depart from the clear and unambiguous meaning of the section. Accordingly, I am afraid that I cannot agree with the submissions of learned Counsel Mr. Carrington when he argued that there is no requirement in law for the agreements of sale to be registered. It is equally clear that the Registered Land Act Cap 374 speaks to the practice and procedure in relation to administration of registered land. This legislative scheme is different from that of the Registration Act. The latter

addresses, by virtue of section 4, the ability for a deed to be received in evidence. This is separate and distinct from any question as to administration of matters in relation to registered land which is the focus of the Registered Land Act. It is equally clear that the agreements for sale are "Deeds" as defined by section 2 of the Registration Act and are therefore to be registered, under the Act, in order for them to be admissible in evidence. Further, I am not of the view that section 4 of the Registration Act is in any way inconsistent with the Registered Land Act. By way of emphasis section 4 of the Registration Act speaks to the admissibility of the deed relating or affecting land; it however in no way prohibit its enforceability if it is not registered.

[77] It is the law that an agreement for the sale of land is enforceable once it is in writing. By way of emphasis, this is a separate and distinct matter from whether an unregistered agreement for the sale of land is admissible in evidence. As stated earlier, the answer to this question is dealt with in the Registration Act. The short answer is that such an agreement is not admissible in evidence unless it is registered. However, the party who seeks to rely on the terms of the unregistered deed is not precluded from giving oral evidence as to the terms of the agreement. I therefore do not accept the learned Attorney General's submissions that if the Court were to rule that the agreements for sale are inadmissible in evidence the Court should go on to expunge from the record the evidence that was adduced through the witnesses called by BoA in relation to the agreements.

[78] Accordingly, I am of the considered opinion that in so far as the agreements for sale were not registered as required by the Registration Act, they are not admissible in evidence. However, there is no basis for the Court to disregard the other written and oral evidence provided by the witnesses as to the essential terms of the agreement. I therefore accept the submissions of learned Counsel Mr. Carrington that the evidence of the witnesses who testified, on behalf of BoA, in relation to the agreements for sale is admissible.

[79] Admissibility of the Cabinet Note - Bundle D

The relevance of the Cabinet Note is not apparent to the Court. Indeed, there was no evidence given in relation to the Cabinet Note; without the benefit of either written or oral

evidence in relation to the Cabinet Note, the Court is unable to glean the relevance of the document, to the case at bar. I therefore uphold the objection of learned Counsel Mr. Carrington in ruling that the Cabinet Note is inadmissible.

[80] Admissibility of Debt Services Reporting Forms – Bundle D

Learned Counsel Mr. Carrington has objected to the documents being admitted into evidence. I have given deliberate consideration to his objections and the basis for objecting. However, I am far from persuaded that they have no relevance to the issues in the case at bar. In fact, to the contrary they are particularly relevant to the GoAB's case in so far as GoAB contends that at the date of the execution of the agreements for sale or the Instruments of Transfer, BoA had not paid any monies to GoAB towards the purchase price of the land. In addition, it is an essential part of GoAB's case that as late as January 2006, BoA had not credited any monies in reduction of the loan that GoAB had received from SFGC (as agreed in the Agreement of Sale). The forms are utilised by the GoAB to buttress Ms. Steele-Henry's evidence that it was not until January 2006 that BoA credited any monies to the loan account held by GoAB.

[81] I have reviewed the submissions of both learned Counsel and is of the respectful opinion that these documents are admissible in evidence since they are clearly relevant to the issues that are being ventilated. Further, GoAB's position is that until January 2006, BoA never reported any payment activity in relation to the loan account; it is their wish to have these documents admitted into evidence in support of their case. I am of the view that this bit of evidence is relevant and admissible. I so rule.

[82] Consideration

In passing, I state that the Instruments of Transfer were executed on the 8th March, 2004 and serve as evidence that GoAB had received the purchase money from BoA. While Mr. Alvarado accepted under strenuous cross-examination that by the 8th March, 2004 BoA ought to have paid the monies for the land, the clear evidence is that by that date this had not occurred. As stated earlier, whatever credit or payments that were made by BoA were done in January 2006 and backdated to 4th March, 2004. Cognisance must be paid to the

fact that BoA filed his claim on January, 2006. The Court will refrain from making any further comment on the matter of the consideration for reasons which will become apparent very shortly.

[83] Legality of agreements for sale

The issue of the legality of the agreements for sale brings into sharp focus the relevant provisions of the Banking Act.

[84] Section 2 of the Banking Act states that "bank" means any financial institution whose operations include the acceptance of deposits subject to the transfer by the depositor by cheque.

[85] Further, "financial institution" is defined as follows:

> "financial institution" includes any person doing banking business and all offices and branches of a financial institution in Antigua and Barbuda shall be deemed to be one financial institution.

[86] Further, in order to be able to make a determination of this issue it is essential that section 16(1) (h) of the Banking Act be thoroughly examined and its meaning ascertained. Section 16(1) (h) is quoted for ease of reference as follows:

> 16. (1) A financial institution shall not directly or indirectly, except with the approval of and subject to such terms and conditions as the Minister, after consultation with the Central Bank, may by Order prescribe –
>
> (h) purchase, acquire or lease real or immovable property except as may be necessary for the purpose of conducting its business as a financial institution including provision for future expansion and housing its officers and employees; provided that:
>
> (i) in respect of any real or immovable property held or leased by it prior to the commencement of this Act for purposes other than those referred to herein, it shall be

allowed a period of three years in which to comply with this paragraph; and

(ii) it may secure a debt on any property immovable or movable and in default of repayment may acquire such property for resale as soon as possible thereafter.

[87] It is common ground that BoA is financial institution. The section clearly prohibits a financial institution from directly or indirectly purchasing land, except as may be necessary for the purpose of conducting its business, without the approval of the Minister. Before granting approval, the Minister is obliged to consult with the Central Bank. I do not agree with learned Counsel Mr. Carrington that it is only if the Minister wishes his approval to be subject to terms and conditions, then he is required to issue an Order prescribing such terms and conditions. The Minister is required to consult the Central Bank and he is obligated to issue an Order so prescribing, once he approves.

[88] There is no doubt that section 16(1) (h) clearly prohibits a financial institution from directly or indirectly purchasing land, however the section gives the Minister the discretion to approve of such a purchase, after he has consulted with the Central Bank. What is equally clear is that the legislature has given the Minister absolutely no discretion as to whether to publish a (Statutory Instrument) Order if he approves of the financial institution purchasing real or immovable property. Therefore, I accept the meaning of section 16(1) (h) as advocated by the learned Attorney General; the Minister is required to consult with the Central Bank before granting any approval to any financial institution to do the prohibited acts, and any such approval must be in the form of an Order, in order to have effect. The Order here is a Statutory Instrument that is published to the world and informs the public that approval has been granted by the Minister to the financial institution to purchase land.

[89] Based on the above meaning of the section, it falls to reason that the Minister cannot lawfully approve of the purchase of any land by a financial institution in the absence of the requisite Order. Therefore, I agree with the learned Attorney General that the Minister has no authority to unilaterally approve of any of the activities restricted by section 16(1) (h)

unless he consults with the Central Bank and publishes his approval by way of an Order (Statutory Instrument) through which the public is notified. The corollary is equally true, that is, the financial institution, namely BoA, cannot directly or indirectly, lawfully purchase land in Antigua and Barbuda except with the approval of the Minister, after consultation with the Central Bank which is prescribed by Order.

[90] For what it is worth, it is prudent to state that the Court need go no further and examine the issue of consideration since it has been determined that there was no approval by way of Ministerial Order to purchase the land, the agreements for sale were entered into by BoA in clear breach of the legislative provisions and were unlawful. Accordingly, BoA could not lawfully acquire title to the land.

[91] The Court is fortified in the above view, having examined also section 43 of the Interpretation Act Cap 224 Laws of Antigua and Barbuda which states as follows:

> "In an enactment the expression "may" shall be construed as permissive and empowering".

This interpretation taken together with the clear prohibition in section 16(1) (h) of the Act, together with the exception that is stated in relation to financial institutions purchasing real or immoveable property clearly gives the Minister a discretion to, by way of Order, grant approval which runs counter to the prohibition provided that the financial institution can bring itself within one of the stated exceptions.

[92] Therefore, and contrary to the arguments advanced by learned Counsel Mr. Carrington, the Banking Act prohibits the financial institution (BoA) from directly or indirectly purchasing land. However, the legislature in its wisdom relaxed the prohibition by making exceptions if there is the approval by the Minister, after he has consulted with the Central Bank. The legislature did not stop there; it very clearly mandates the Minister to publish a Statutory Instrument (Order) giving notice to the public if he has approved of the purchase of the land by the financial institution. This is so whether or not the Minister wishes to attach any terms and conditions to the approval.

[93] Therefore, in the case at bar, even if the Court were to accept that BoA's purchase of the land came within the exception since they were related to the purchase of immovable or real property, as was necessary for conducting its business, in order for it to be lawful, the Minister should have published his approval by way of Order. This did not occur. Accordingly, the learned Attorney General is right in arguing that the agreements for sale were unlawful at the time of their execution and are therefore illegal.

[94] In view of the foregoing, the Court is fortified in the above view based on the fact that the agreements for sale could not be performed in accordance with their terms without infringing section 16(1) (h) in so far as there was no Order which authorised them. See Chitty op cit paragraphs 16-007 and 16-008. It is the law that where an agreement is on its face illegal and in breach of the relevant statutory provisions, it is unenforceable. I find the principles enunciated in Birkett v Acorn Business Machines ibid very helpful and can do more than adopt them.

[95] In the premises, there is no doubt that the agreements are illegal in their formation and offend section 16(1) (h) of the Banking Act. Accordingly, they are unenforceable.

[96] Registrar's refusal

In view of the Court's conclusion that BoA could not lawfully purchase the land in the absence of the Statutory Instrument which authorised the purchase, there is no doubt that the Registrar of Land acted lawfully in refusing to register the Instruments of Transfer.

[97] By way of emphasis, BoA was prohibited from purchasing the land directly or indirectly without the approval of the Minister and there must be an Order (Statutory Instrument) which puts everyone on notice that the Minister had authorised BoA to purchase the land.

[98] The Court agrees with the learned Attorney General that the Banking Act serves to regulate the activities of the bank. The Act also seeks to protect the public by advising them of any acts the financial institutions are involved in which, save for in the excepted circumstances, are prohibited. By way of emphasis, the Registrar of Land has acted

lawfully in refusing to register the Instruments of Transfer since they were based on agreements for sale that were unlawful and executed in violation of the Banking Act.

[99] Reliefs

Accordingly, the Court has no doubt that BoA has failed to prove its claim against the GoAB. It is clear that section 16(1) (h) of the Banking Act prohibited BoA from purchasing real or immoveable property in the absence of an approval which should have been published in a Statutory Instrument (Order). BoA is therefore not entitled to any reliefs or declarations it seeks.

[100] Conclusion

Accordingly, Bank of Antigua Limited has failed to establish its claim against the Government of Antigua and Barbuda. The Court herby dismisses Bank of Antigua Limited's claim against the Attorney General of Antigua and Barbuda.

[101] In view of the foregoing premises, it is ordered as follows:

(a) Bank of Antigua Limited's application for a declaration that it has a beneficial interest in land registered as Registration Section: Crabbs Peninsular and Neighbouring Islands, Block 21 2692A, Parcels 20, 21, 22, 34, 37 and 39 is refused.

(b) Bank of Antigua Limited's application for a declaration that it is entitled to exclusive possession of the parcels of land registered as Registration Section: Crabbs Peninsular and Neighbouring Islands, Block 21 2692A, Parcels 20, 21, 22, 34, 37 and 39 is refused.

(c) The Court also refuses to order the Government of Antigua and Barbuda to take any steps to convey the land to Bank of Antigua Limited.

[102] Costs

In so far as Bank of Antigua Limited's claim is not for a specified sum, costs should follow the event in accordance with the ordinary rule of Part 646 of CPR 2000. Accordingly, costs are awarded to the Attorney General of Antigua and Barbuda pursuant to Part 65.5(2)

(b)(iii) 2000, in the sum of $14,000.00, based on the presumed value of the claim at EC$50,000.00

[103] The Court gratefully acknowledges the tremendous assistance of all learned Counsel.

Louise Esther Blenman
High Court Judge
Antigua and Barbuda