ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2009/003

ANTIGUA AGGREGATES LIMITED

Appellant

and

[1] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[2] ANTIGUA COMMERCIAL BANK LIMTIED

Respondents

Before:

The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]
The Hon. Mr. Davidson Baptiste	Justice of Appeal [Ag.]

Appearances:

Mr. Hugh C. Marshall Jr. and Ms. Cherisse Roberts-Thomas for the Appellant
Ms. Karen Defreitas-Rait for the First Respondent
Sir Clare Roberts, Q.C., and Ms. C. Kamilah Roberts for the Second Respondent

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2009: July 23;
October 19.

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Civil Appeal – Land Law – removal of restriction – whether application to be made to the Registrar of Lands or directly to the court – basis for removal of restriction - mandatory injunction – least risk of injustice Mortgage claim CPR Part 66 - claim for an account from chargee – whether mortgagee should be restrained from exercising power of sale – whether chargor should be permitted to sell charged property without chargee's consent - whether there was a serious issue to be tried – adequacy of damages – balance of convenience – fetter of right of redemption – sections 67, 68 and 134 of the Registered Land Act Cap. 374 of the Revised Laws of Antigua and Barbuda

The appellant is the proprietor of two parcels of land situate at Crabbs ("the Property") allegedly purchased from the Crown at an undervalue. The main directors of the appellant company were then ministers of Government. The Property was charged to the second respondent ("the Bank") as security for loan(s) made by the Bank to Galeforce Windows, in which the appellant had a majority shareholding. The loan(s) fell into arrears and some $3.6 million is due to the Bank under the charge. The Bank has already obtained judgment in a separate action for an unsecured substantial sum against the appellant.

The Attorney General filed a claim against the appellant seeking rescission of the agreement of sale on the ground of illegality. By application to the Registrar of Lands, the Attorney General caused a restriction to be placed on the Property. With the intention of exercising its rights as chargee, having served notices for payment on the appellant, the Bank retained the services of an auctioneer and advertised the Property for sale. In the meanwhile, the appellant entered into a private contract to sell the lands to a third party, allegedly at an undervalue.

The appellant filed a without notice application seeking an order directing the Registrar of Lands to remove the restriction placed against the lands; preventing the Bank from exercising its power of sale; requiring an accounting from the Bank in relation to the monies that were paid towards the loan; and permitting it to sell the lands by private treaty and to have the monies paid into court. The fixed date claim form which was filed subsequently seeks declarations and injunctions in similar terms. No relief is sought against the Attorney General who it appears had been joined solely for the purpose of the interlocutory application.

The application was heard inter partes and dismissed on the ground that: (1) the application for the removal of the restriction should have been made to the Registrar of Lands and not the court; (2) the least risk of injustice in the particular circumstances favoured the court declining to grant the mandatory order, that is, the order that the restriction be removed; (3) there was no basis for concluding that the restriction had been improperly placed on the Property; (4) the application with regard to the Bank was, in essence, an application for an interim injunction which did not fit the general matrix for the grant of an injunction; and (5) an order permitting the appellant to sell the Property would sanction a breach of section 67(g) of the Registered Land Act Cap. 374 ("the RLA"). The appellant has appealed against these findings.

Held: dismissing the appeal with costs to the respondents:

1. Section 134(1) of the RLA deals with the circumstances in which any person (other than the proprietor) interested in the land may apply to the Registrar for removal or variation of a restriction. Section 134(2) of the RLA however gives a free standing right to a registered proprietor to apply directly to the court for such removal or variation. The appellant, being the registered proprietor, was competent to invoke the court's jurisdiction in seeking removal of the restriction. The trial judge accordingly erred in holding that the court lacked jurisdiction to entertain the application on the basis that the procedure laid down was for application to first be made to the Registrar of Lands.

2. No notice of the application was given to the Registrar of Lands as required by section 134(2) of the RLA. This lack of notice coupled with the fact that removal of the restriction was sought by way of interlocutory proceedings prevented a proper ventilation of the matter by way of a full trial on the merits. In essence, the appellant sought a final remedy by way of interlocutory proceedings which was wholly inappropriate. The learned judge accordingly properly refused the application.

3. Having regard to the purpose for which the restriction was placed on the Property, the three year delay before any step was taken by the appellant to remove the restriction and the reason now being advanced for its removal, the learned judge quite rightly determined that the least risk of injustice in the particular circumstances favoured the court declining to order the removal of the restriction.

   Zockoll Group Ltd. v Mercury Communications Ltd. (No. 1) [1998] FSR 354 applied.

4. Further, as the learned judge rightly found, it had not been shown that the restriction had been improperly placed or by inference, that there was a change of circumstances since the placement of the restriction. The fact that the appellant chose to enter into an agreement for sale of the Property some 3 years later, despite the restriction thereon and the bank charges, does not equate to a change of circumstances.

   Christopher and DeCastro (Executor for O Flax) v The Registrar of Lands and The Attorney General BVIHCV 2002/0200 followed.

5. The fact that the appellant required an accounting from the Bank in terms of what was owed to the Bank did not give rise to an issue as to whether or not the Bank was entitled to exercise its power of sale. In essence, the appellant did not show how sale of the Property by the Bank in the exercise of its power of sale infringed any right of the appellant as chargor as it related to its entitlement to an accounting. The exercise of the power of sale does not hamper, diminish or infringe the appellant's right to an accounting from the Bank. The learned judge accordingly did not err in finding that there was no serious issue to be tried.

6. The learned judge did not err in holding that damages would be an adequate remedy or that the balance of convenience lay in favour of the Bank.

7. Having regard to the instruments of charge and sections 67(g) and 68 of the RLA, the learned judge correctly found that the appellant had no right to sell the Property and thereby fetter the chargee's (the Bank's) rights.

JUDGMENT

[1] GEORGE-CREQUE, J.A.: This appeal arises out of a without notice application filed prior to the issuance of a fixed date mortgage claim[1] seeking, inter alia:

[1] So stated by the appellant.

(i) an order directing the Registrar of Lands to remove a restriction on lands registered in the name of the appellant ("the Property") upon payment into court of the proceeds of sale of the Property;

(ii) an order directing the second respondent ("the Bank") not to sell the Property encumbered by a charge in its favour pending an accounting;

(iii) an order permitting the appellant to sell the Property; and

(iv) a full accounting of the loan secured by the charge.

[2] The application was heard inter partes and the trial judge dismissed all limbs of the application holding, with regard to the Bank, that the appellant's application was in essence an application for an interim injunction which did not fit the general matrix for the grant of an injunction in that:

(a) the issue as to whether or not the appellant owes the Bank $2,200,000.00 or a greater sum did not give rise to a cause of action based on the Bank's proposal to sell the Property [para. 46];

(b) damages would be an adequate remedy for the appellant, but not for the Bank [para.51];

(c) the balance of convenience lies in favour of the Bank [para.52]; and

(d) the status quo must be maintained and there should be, in essence, no fetter on the Bank's ability to '*liquidate it rights as chargee'.* [para.53]

[3] The trial judge also held that the grant of an order permitting the appellant to sell the Property would in effect be sanctioning the breach of section 67(g) of the

Registered Land Act[2] ("the RLA") by allowing the sale of the charged Property without the consent of the Bank.

[4] With regard to the first respondent the trial judge held that the application sought a mandatory injunction compelling the Registrar of Lands to remove the restriction placed on the Property by the Registrar of Lands at the instance of the Attorney General and that such an application ought in the first instance, to have been made to the Registrar of Lands and not to the court pursuant to the provisions of section 134 of the RLA. She further held that there was no basis for concluding that the restriction had been improperly placed on the Property. She went on further to hold that in any event, the application being one seeking a mandatory injunction was not an appropriate case for the grant of such relief in that the least risk of injustice favoured the refusal of such an order.

The grounds of appeal

[5] Although multiple grounds of appeal were stated, as it relates to the appellant's case against the Bank, the appellant categorised them under two main heads, namely the main issues of fact and main issues of law. Two main issues of fact were identified by the appellant as being:

(i) whether the charge(s) under which the chargee bank sought to exercise its power of sale was valid; and

(ii) what monies, if any, were due under the valid charges entitling the appellant to discharge the charges;

The related issues of law were stated as being:

(iii) whether the appellant was entitled to an accounting of the monies owing in order to redeem the charges; and

[2] Cap. 374 of the 1992 Revised Laws of Antigua and Barbuda

(iv) as a corollary of (iii) whether the Bank was entitled to refuse to give an accounting to the appellant of what was due under the charges and elect to exercise its power of sale.

[6] With regard to the first respondent, the appellant takes issue with the trial judge's interpretation of section 134 of the RLA, leading to the conclusion that the application for removal of the restriction must first be made to the Registrar of Lands and not the court. In order to gain an appreciation of the matter it is necessary to set out a brief background as well as set out the relief sought by the appellant in the fixed date claim form and in the application.

Background

[7] (a) The appellant is a company which no longer carries on business and is registered as proprietor of two parcels of land situate at Crabbs, in the island of Antigua described as Block 21 2692A, Parcels 27 and 28. The main directors of the appellant were former ministers of the Government of Antigua and Barbuda and the Property was bought from the Crown allegedly at an undervalue.

(b) The appellant guaranteed a loan(s) made by the Bank to an entity called Galeforce Windows in which the appellant was majority shareholder and charged the Property to the Bank by way of security. The loans fell into arrears since 2005. The Bank alleges that some $3.6 million is due to it under the charges. The Bank has already obtained a judgment in a separate action for an unsecured substantial sum against the appellant.

(c) The Attorney General in a separate action filed a claim against the appellant alleging that the Property was purchased illegally and seeking rescission of the agreement for sale. In relation to that claim the Attorney General applied for and obtained the entry of a restriction on the land registers relating to the Property.

(d) The Bank sent "Notices to Pay Off" to the appellant in 2004, and again in 2005. The Bank also began taking steps towards exercising its power of sale and retained the services of an auctioneer and advertised the Property for sale.

(e) Meanwhile, the appellant sought to sell the Property on its own and entered into an agreement for sale of the Property and wishes to be able to conclude that sale, allegedly at an undervalue to a third party.

The relief sought in the Fixed Date Claim and in the Application

[8] The fixed date claim issued after the application was filed, apart from asking for various related declarations, seeks as against the Bank, injunctions restraining the Bank from exercising its power of sale, mandating that the Bank provide an account of the amounts due under the loan, and alternatively, time to the appellant to redeem the mortgage or otherwise negotiate the terms of repayment. It seeks no relief as against the first respondent. Indeed nothing is said about the restriction on the Property save to seek a declaration at paragraph (g) of the prayer that it is '*entitled to apply*' to the court for removal of a restriction which, in my view, would take the matter no further.

[9] The application for interim relief filed prior to the fixed date claim sought, as stated above:

(a) an order directed to the Registrar of Lands for the removal of the restriction (placed by the first respondent) upon payment into court of the proceeds of sale of the Property.

(b) an order forbidding and restricting the Bank (as chargee) from selling the Property without the court's permission;

(c) an order compelling the Bank to render a full accounting of the loan secured by the charge;

(e) an order permitting the sale evidenced by the agreement for sale dated 23rd June 2008, to be proceeded with and the proceeds of sale to be paid into court;

(f) that the Bank, upon satisfactory accounting, be paid all monies due to it under the charge.

[10] Curiously, the application seeking interlocutory relief in this mortgage claim sought as its first ground of relief, an order directing the Registrar of Lands to remove a restriction placed on the Property at the instance of the Attorney General in relation to a wholly different issue which is the subject of an unrelated action brought by the Attorney General against the appellant. The Attorney General has presumably been joined in this action solely for the purpose of the interlocutory application since there is no other connection as between the Attorney General and the appellant on the one hand and the appellant and the Bank on the other. It must be said at the onset, that joining such a claim in this manner and in respect of matters and parties that are wholly unconnected is a most undesirable course. As it stands, the relief being sought as against the Attorney General by way of an interlocutory application only, would, had it been granted, have been in the nature of a final order. There would be no remaining issue to be tried as between the appellant and the Attorney General. It stands to reason that such relief cannot be considered as interim relief and on that basis alone was inappropriate and afforded good ground for refusal.

[11] Turning to the grounds of appeal I propose to deal firstly with the ground relating to the Attorney General and the procedure for removal of a restriction under section 134 of the RLA.

[12] Counsel on behalf of the Attorney General readily conceded that section 134 (2) of the RLA gives the court jurisdiction in respect of an application by a proprietor for the removal of a restriction. Section 134 states as follows:

> "(1) The Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal or variation of a restriction.
> (2) Upon the application of a proprietor affected by a restriction, and upon notice thereof to the Registrar, the Court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs."

Accordingly, the trial judge was wrong to hold that the court lacked jurisdiction to entertain the application on the basis that the procedure laid down was for application to be first made to the Registrar of Lands. Section 134 addresses two distinct sets of circumstances. Section 134(1) deals with the circumstances in which any person (other than the proprietor) interested in the land may apply to the Registrar. Section 134(2) however, gives a free standing right to a registered proprietor to apply directly to the court. The appellant, being the registered proprietor, was competent to invoke the court's jurisdiction in seeking the removal of the restriction. It must now be determined whether, had the jurisdiction been exercised, the restriction ought to have been removed.

[13] It is common ground that no notice, as required under this section, was given to the Registrar of Lands. This lack of notice, counsel says, coupled with the fact that removal of the restriction was sought by way of interlocutory proceedings, deprived the Registrar of an opportunity to defend her decision as well as prevented a proper ventilation of the matter by way of a full trial on the merits which would have provided the opportunity for cross examination in arriving at a determination as to whether the restriction ought to be removed. In essence, the Attorney General contends that the appellant sought a final remedy by way of interlocutory proceedings which was wholly inappropriate. I agree. For this reason as stated before, the application ought to have been refused.

[14] In any event, the trial judge considered that the relief sought was in the nature of a mandatory injunction and concluded, based on an application of the principles in

Zockoll Group Ltd. v Mercury Communications Ltd. (No. 1)[3] that the least risk of injustice in the particular circumstances favoured the court declining to order the removal of the restriction. Based upon the matters presented to the trial judge, in respect of the purpose of having a restriction placed thereon coupled with the delay of over three years without any step being taken by the proprietor for removal, and the reason now being advanced for its removal, the trial judge, in my view, quite rightly exercised her discretion in declining to remove the restriction.

[15] Furthermore, the Attorney General contended that there are two bases on which a restriction may be removed namely: (a) that it had been improperly placed;[4] and (b) there was a change of circumstances since the placement of the restriction. The trial judge concluded at paragraph 54 of her judgment that it had not been shown that the restriction had been improperly placed. Additionally, the fact that the appellant chose to enter into an agreement for sale of the Property some three years later, despite the restriction thereon, and the bank charges, surely does not equate to a change of circumstances. I can find no fault with the trial judge's conclusion.

[16] I now turn to the grounds of appeal as they relate to the Bank.

The issues raised

[17] Firstly, the appellant seeks to argue before this court as a ground of appeal the validity of the charges under which the Bank seeks to exercise its power of sale, and the validity of the "Notices to Pay off". This issue was not raised before the court below. Further, paragraph 2 of the appellant's pleaded case is that the Bank is the mortgagee and holder of charges on the Property. Nowhere in its pleaded case does it challenge the validity of the charges – the appellant's main complaint was the lack of an accounting by the Bank of what sums are actually due and

[3] [1998] FSR 354

[4] On the authority of Christopher and DeCastro (Executor for O Flax) v The Registrar of Lands and The Attorney General BVIHCV 2002/0200 per Rawlins J (as he then was)

owing to the Bank. It can hardly be a justifiable complaint to now say that the trial judge failed to grasp this issue in her consideration of the matter when it was plainly not before her. In my view, the trial judge correctly identified the issues raised for her consideration. The orders sought in the application are clear. In paragraph [1] of her judgment she referred to the orders being sought. At paragraph [7] she identified the issues raised as being:

(a) Whether the Bank should be restrained from selling the Property;

(b) Whether the restriction on the Property should be removed; and

(c) Whether, the appellant should be permitted to sell the Property.

No serious issue to be tried

[18] Secondly, the appellant contends, in essence, that the learned judge erred in concluding that there was no serious issue to be tried and says that the following were triable issues:

(a) the amounts due under the charge; and

(b) whether the advance relating to the charge for $1.2 million had been made in April 2002.

[19] The trial judge after referring to the guiding principles enunciated in American Cyanamid Co. v- Ethicon Ltd.[5] to be applied in granting interlocutory injunctions at paragraphs [42] – [44] stated at paragraph [45] thus:

> "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..."

[20] At paragraph [46] the learned judge concluded thus:

> "…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 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,

[5] [1975] 1 ALL ER 504

> including giving the Notice to Pay, it is perfectly entitled to exercise its right under the charge. I am afraid I do not see any serious issue to be tried."

[21] My understanding of what the learned judge said at paragraph [46] and again at paragraph 48 was simply this: the fact that the appellant required an accounting from the Bank in terms of what was owed to the Bank did not give rise to an issue as to whether or not the Bank was entitled to exercise its power of sale. In essence, the appellant did not show how sale of the Property by the Bank in the exercise of its power of sale infringed any right of the appellant as chargor as it related to its entitlement to an accounting. The exercise of the power of sale does not hamper, diminish or infringe the appellant's right to an accounting from the Bank.

[22] On appeal, the issue as to whether an advance relating to the charge for $1.2 million had actually been made became tied to the issue of the validity of the charge and by extension the validity of the "Notices to Pay", but as I have already stated, this appears nowhere in the pleaded case or in the evidence before the judge at the time of hearing of the interim application. At paragraph [48] of her judgment, the learned judge stated as follows:

> "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... The issue that 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 debt since 2005, and has no means of doing so."

[23] I can find no fault with the judge's reasoning in this regard and accordingly in holding that there was no serious issue to be tried as it relates to the Bank's right to exercise its power of sale.

The fetter on the right of redemption

[24] The appellant also contends that the issue as to whether the Bank was seeking to fetter its rights to redeem the Property was also a live and triable issue. This, it contends, is grounded in the failure of the Bank to render an account with regard to what monies were due and owing. It seems, based on the evidence before the trial judge, that the Bank made known to the appellant the sums it said was due and owing. However, there were apparent errors in the calculation of those amounts since differing amounts were given at different times. What was clear however was that sums were due and owing to the Bank. The appellant acknowledged that the loan went into default sometime in 2005. Furthermore, no evidence was put forward showing that the appellant had sought to tender any amounts of what it said was due or what the Bank said was due at any time and that such tender had been refused by the Bank.

[25] There was evidence placed before the trial judge that the appellant wished to sell the Property to a third party and had entered into an agreement for sale to this end. There was also evidence before the judge of the Crown's claim to a beneficial interest in the Property as well as evidence to the effect that the proposed sale by the appellant was at an undervalue by as much as $1million. The appellant was also said to have no other assets. On the appellant's own admission there were also other creditors such as utility providers. The Bank itself, apart from the advances said to be secured by the charges, was also a judgment creditor of the appellant for an unsecured sum in excess of $4million with interest accruing. Indeed the appellant, at paragraphs 7 and 8 of its affidavit in support of the application, states that:

> "7. The Claimant (the Appellant) had made several attempts to refinance but for reason of the Restriction no investor was prepared to make any advance on the security of the property"

> 8. Accordingly, the Claimant sought actively to sell subject property to repay advances and settle creditors. ...." (my emphasis)

[26] The trial judge, at paragraph [60] of her judgment stated thus:

> "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 be doing so in clear breach of [its] statutory duty "not to transfer the land[6], lease or charge without the written consent of the chargee." It simply has no right to sell the charged property and so fetter the chargee's rights."

[27] In my view, the trial judge, having due regard to the provisions of the RLA, was entitled to so find, based on the evidence before her which included copies of the instruments of the charges which contained, as is permissible under section 68 of the RLA, an express agreement against selling, assigning or transferring the Property without the '*written consent of the Bank first had and obtained, such granting of consent to be in the absolute discretion of the Bank'*.[7]

[28] I hasten to point out however, that this judgment is not to be interpreted as a general ruling on a chargor's right of redemption but only in the specific context of this case.

[29] I do not consider it necessary to address the questions as to adequacy of damages or the balance of convenience save to say that I can find no fault in the trial judge's treatment of those matters and to affirm her conclusion that the appellant's case simply does not fit the general matrix for the grant of injunctive relief; more so given the nature of the reliefs sought on an interlocutory basis. As counsel for the Attorney General and the Bank rightly contend, the grant of such relief at an interlocutory stage would in effect render the substantive claim moot.

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[6] My insertion, per sections 67(g) and 70 of the RLA.

[7] See: Instrument of Charges at pp. 205 and 213 – Record – (paras. 6 and 5 respectively)

No cogent basis has been put forward by the appellant for disturbing the discretion exercised by the trial judge in declining to make the orders sought.

Conclusion

[30] For the foregoing reasons, I would dismiss the appeal. The costs of the appeal shall be borne by the appellant fixed at two thirds of the costs as agreed by each party in the court below.

Janice George-Creque
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]

I concur.

Davidson Baptiste
Justice of Appeal [Ag.]