**THE EASTERN CARIBBEAN SUPREME COURT**
**IN THE HIGH COURT OF JUSTICE**
**ANTIGUA AND BARBUDA**

**CLAIM NO. ANUHCV2010/0197**

**BETWEEN:**

**ANDREA STOELKER AND BARBARA STREETE** **Claimant**
**Acting under a Power of Attorney for and on behalf of**
**STANFORD FINANCIAL GROUP LTD**

**And**

**BANK OF ANTIGUA** **Defendant**

**Appearances:**
Mr. Hugh Marshal Jnr. **For the Claimant**
Mr. Sydney .A. Bennet Q.C. and with him Ms. Veronica Thomas **for the Defendant**

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**2010:**
**2010: 12, October**

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**JUDGMENT**

1. **Harris, J.:** This is a matter concerning the application for Summary Judgment pursuant to the Civil Procedure Rules Part 15 against the Defendant in the sum of EC$7,784,307.99 plus all interests accrued. The breakdown of this Claim is set out in paragraph 8 of the Statement of Claim.

2. As at 15 March 2010 the amounts overdrawn on the accounts of the companies in the Stanford Group was some $35,604,239.08: see Affidavit of William McDavid at paragraph 38. On that date Stanford Financial Group ("SFGL") sought to make a withdrawal of $450,000 from its account No. 40073029 at the Bank of Antigua. The Bank refused to permit the withdrawal and advised that-

*"The Bank of Antigua will not be permitting withdrawal against deposit balances on our books in the same name of Stanford Financial Group Limited until such time as suitable arrangements are concluded to achieve orderly liquidation of various outstandings in the names of Affiliate companies of the Stanford Group, also on our books.."*

3. The Claimants have commenced the instant action in which it is maintained that the refusal of the Bank to honor the demand of SFGL for the payment of the US$450,000 was a breach of the Banker Customer relationship and a breach of the existing contract of Banking between itself and the Bank. Accordingly, to the Claimant's now claim the total sum of $7,784,307.99 being all monies held to the credit of SFGL in its accounts at the Bank.

4. CPR Rule 15.2 (a) provides:

"…..15.2 The Court may give summary judgment on the Claim or on a particular issue if it considers that the –

….. (b) Defendant has no real prospect of successfully defending the claim or the issue……".

**THE ISSUE**

5. The principle issue to be decided in this case is whether by virtue of an agreement between SFGL and the Bank, SFGL pledged its accounts, including Account No. 40073029, to the Bank as security for repayment of monies advanced to other companies in the Stanford Group under the umbrella facility so that, on 15 March 2010 when SFGL sought to make a withdrawal of US$450,000 from its account No. 40073029, the Bank was entitled as against SFGL to retain the monies in that account as security for repayment of the overdrawn balances on the accounts of other companies in the Stanford Group.

**THE CLAIMAN'T CASE[1]**

6. The Claim is in the amount of the sum that stand to the credit of Account number 73028, 307225; 40073029; 302781; 303674 each in the name of Stanford Financial Group Ltd. at Bank of Antigua.

[1] This is a substantial reproduction of the claimant's statement of case and counsel's written submissions.

7. In March 2010, the Claimant sought to make a withdrawal from the chequeing account 40073029 at the Bank of Antigua. That withdrawal was not met – Statement of claim ("SOC") paragraphs 5 and 6 and the admission by the Defendant that such a request was made and denied.[2]

8. This amount to repudiation of the banking relationship and now the Claimant is entitled to Judgment in the amount which stands to the credit of the Claimant in the above identified accounts. The Claimant is entitled not only to the withdrawal of the sums that stand to its credit in 40073029 but its other accounts as well.

9. SFGL takes the position that it was never part of a group to which the Bank extended an umbrella overdraft or other group loan facility, or part of any other arrangement which could have resulted in the Bank having any lien or right of set off of its credit balances against the liabilities of any other companies in the Stanford Group.

10. The Claim is a straightforward claim to sums that stand to and are recognized as standing to the credit of the Claimant. The Defendant has no real prospect of defending a claim to these sums that stand to the credit of the Claimant and judgment should be entered for the sum of EC$7,784,307.99 plus all interest accrued pursuant to the Civil Procedure Rules 2000 Part 15.

Banks Obligation to pay the demand of the withdrawal

11. The simple question that arises on this Application for summary Judgment was whether or not the Claimant was entitled by its mandated signatories, Andrea Stoelker and Barbra Streete to make a withdrawal of US$450,000.00 from its chequeing account that stood in credit of sums of US$486,735.05.

12. The Claimant submits that it was plainly so entitled. There is no Defense to this Claim. As a consequence the Claimant's Claim for the sums that stand to its credit of five (5) accounts at Bank

2. See Defense at paragraph 5.

of Antigua to honor its withdrawal request amounts to a plain repudiation of the banking relationship.

13. The claimant submits that a current account or chequeing account with the Bank constitutes a relationship of debtor and creditor. The Bank owes the customer on demand the amount which stands to the credit of the customer.

No arguable case of right of lien or charge over the sums to the credit of the Claimant

14. In response to the claim in debt the defendant alleges that the Claimant has granted the Defendant a charge or a lien over the sums that stand to the credit of the Claimant as security for the indebtedness of other affiliates Companies to the Bank of Antigua[3].

15. The simple fact contends the claimant, is that this allegation is unarguable and does not give rise to any realistic prospect of a Defense at Trial. In particular it is:

    a. Unarguable in Law;
    b. Unarguable in fact;
    c. It is directly contradicted by the Defendant's and the Defendant's auditors' own admission in writing;
    d. Is directly contradicted by the Banks' documentation.
    e. The Defendant moreover has been asked to and has refused to provide the documents referred to in its Defense contrary to the mandatory provisions of CPR 28.16.

16. The claimant's argue that the pleading is a desperate attempt to stave off the inevitable Day of Judgment.

Unarguable In Law

[3] See Defense paragraph 11-18..

17. The claimant submits that a Bank is not permitted to combine or set off against a debt owed to one customer the sums owed to the Bank by third parties irrespective of whether or not they are affiliates of the customer to whom the debt is owed.

18. Equally no lien or charged arises in Law with respect to monies owing or due from third party[4].

19. The Defendant does not assert that the Claimant is indebted to the Defendant but rather asserts that there affiliates Companies which owe the Defendant monies[5].

20. This plain state of affairs in law suggests the claimant; gives arise to no right of set off, combination or lien. In Banking Law the distinction between sums owed by different entities is too well known to bear contradiction.

21. The issue in the present case arose in the English Court of Appeal in **Bhogal v Punjab National Bank [1988] 2 ALL ER 296** together with **Uttamchandani v Central Bank of India** both being discussed in detail in Paget (supra) at 29.27.

22. In these circumstances, the suggestion that a security right (or right of hypothecation) over the credit balance held in the name of the Claimant has been arguably established by reference to the Bank of Antigua internal minutes and documentation is even more absurd given the total absence of any specific legal requirements to ender such an arrangement valid in law. The exact Companies that form this Umbrella Facilities [para 7 of the defense] appear to be a mixture of local corporations and the Claimant, which is an International Business Corporation. There is no evidence in the Affidavit of McDavid that any of these Business Corporation that are indebted to the Bank and part of this umbrella facility have lodged with the Register of Companies under the 1995 Companies Act the required Statement of Charge. Accordingly, any such charge in accordance with s250 (1) of the Companies Act would be void for want of registration. The facts therefore alleged by Mr. McDavid even if established at Trial would not establish any valid charge at law. The Defendant could only establish a valid charge over the credit balances held by the Claimant as security for the loans it advanced to other Companies if that c harge had been registered pursuant to s250 of the Companies Act. Plainly there was no such registration.

[4] See **Paget Law of Banking 9th Ed, Ch 29** in particular at 29.27.
[5] see Defense at paragraph 14.

Unarguable on the Facts

23. It is equally unarguable on the facts contend the claimant. The documents which have been exhibited to Andrea Stoelker's Affidavit make it quite clear that certain accounts were opened by SFGL with Bank of Antigua. The banking contract and documentation is only between the Claimant and Defendant. This is uncontradicted by the Defendant.

24. It is not necessary to go further than this says the claimant, but in any event for the sake of the completeness, the fact averred in the Defence even if established at Trial do not go further than a practice of regular settling of accounts and debts amongst a group of Companies. If any formal arrangement was to be concluded giving rise to a contractual right on the part of the Bank, it would have to involve a multi-party contract evidence by each of the Companies documents, it would have to specify the account involved, the currencies and the duration. Quite clearly none of this took place. Otherwise, the Defendant would have produced such documents long ago.

25. An examination of the Affidavit of McDavid raises the following questions Firstly, what documentary evidence is there that the Claimant was a part of this Group Facility? The claimant points out, that in fact, there is not a single document that purports to represent that SFGL was a part of the umbrella facility ort indeed included in the definition of "Stanford Group of Companies". Secondly, there is no document that sets out the terms and conditions of this facility. Thirdly, there is no document that sets out SFGL's knowledge or acceptance of this facility and its willingness to participate, and if so, to what extent?

Ernst & Young conclude no group facility or security interest

26. In September 2009, the Defendant commissioned Ernst & Young to provide a Valuation of the Bank. One of the very issues which Ernst & Young was asked to consider was whether or not there was any factual basis on which the Defendant was entitled to set off/or combine or secure itself against the various accounts held in the name of the Claimant and affiliate Companies.

27. Ernst & Young in the course of their investigation spoke to the highest echelons of Management of the Defendant and concluded that there was no factual basis on which any set off or group facility or security interest could be asserted[6]. As a result the Defendant has written down to zero the amounts owed by the affiliate Companies. This contends the claimant, directly contradicts the Defendant's case. Mr. William McDavid who has signed the Defence and its truth was the very person who informed Ernst & Young that there was no set off or group facility.

28. Applying the well known and understood test in CPR 15, Summary Judgment should be entered when the Defendant has no realistic prospect of defending the Claim.

**THE DEFENDANT'S CASE**

29. The Bank of Antigua is an institution of which one individual R Allen Stanford is a director and sole beneficial shareholder. Its shares are held by R Allen Stanford in his own name, and by Stanford Bank Holdings Ltd, a company of which R Allen Stanford is a sole shareholder. Stanford Financial Group Ltd. ("SFGL") is one of the several Companies, other than the Bank, of which R Allen Stanford is a director and a sole beneficial shareholder. Among t hose other Companies are Stanford Development Company Limited, Maiden Island Holdings Limited, Stanford 20/20 Inc, Stanford Pro Team and Sun Printing and Publishing Ltd. Those Companies, listed in **Paragraph 7 of the Defence**, are hereinafter referred to as Stanford Group of Companies. The Bank asserts that the said Companies were at all material items and continue to be under the control and ultimate ownership of R Allen Stanford: see **paragraph 15 and 16 of the Affidavit of William McDavid dated 28 June 2010.** SFGL has maintained an account with the Bank since 1999.

30. The defendant argues that it cannot and has not been disputed that the Companies listed in Paragraph 7 of the Defence ("the Stanford Group of Companies") were affiliated Companies within the meaning of **Section 538 of the Companies Act No 18 of 1995 and of Section 362 of the International Business Corporations Act Cap 222** ("....each of them is controlled by the same person...."). It further is not disputed according to the defendant, that they constitute a borrower group within the meeting of **Section 2 of the Banking Act No. 14 of 2005** ("....a group of Companies which is under a common control...."). One objective of the **Banking Act** is to restrain

[6] See Stoelker Affidavit paragraph 14 and p17 of Ernst & Young Report at 'AS9'.

financial institutions from extending so much credit, relative to their assets to a single borrower or group of related borrowers that they incur an unacceptable risk of insolvency in the event of default by that Borrower or group of borrowers. It is accordingly a requirement of **Section 16(1)(a) of the Banking Act No 14 of 2005** that a financial institution such as the Defendants Bank could not, directly or indirectly, except with the approval of the East Caribbean Central Bank ("the Central Bank") and subject to such terms as the Central Bank may determine-

> *".....(a) incur exposure to any person, any member of the borrower group or to any borrower group so that the total value of the exposures in respect of any such person, member or borrower group is at any time greater than 25% of the financial unimpaired capital and reserves....."*

Moreover points out the defendant, by **Section 16(2)(a) of the Banking Act**

> *"....Where the total value of the exposure granted under paragraph (a) of subsection (1) is at any time more than 15% of the aggregate amount of a financial institution's unimpaired capital and reserves the transaction shall be secured by collateral, fully covered by insurance, having an ascertainable market value or otherwise having such a value as collateral found in good faith by an officer of such financial institution, of at least 20% more than the amount of the obligations secured thereby..."*

31. The Defendant submits that the Bank was accordingly restricted by law as to
    - The amount of credit that it could extend to companies such as SFGL which had common beneficial ownership with other customers of the Bank;
    - The minimum amount of collateral which it was required to take as security as a pre- condition to the extension of such credit.

32. The defendant contends further, that the Affidavit of Mr. McDavid filed 28 June 2010 in opposition to the application ("the McDavid Affidavit") shows that R Allen Stanford ("Stanford") generally treated the affiliated companies in the Stanford Group included SFGL as arts of a single entity, and often used monies in the accounts of SFGL to offset or reduce the indebted of other Companies in

the group. By way of example the defendant represents that documents exhibited at page 42 of the Bundle of Exhibits to the McDavid Affidavit ("the Defendant's Bundle") show that on 31 March 2006 the sum of $4,390,991.89 was debited from CD account No 302781 held by SFGL, and used to clear the overdraft liability of another Company in the Stanford Group, Stanford 20/20 in respect of its account 500058. Another debit advice on the same page evidences transaction on that same day whereby $37,253 was debited from the same SFGL account and used to clear an overdraft on a different Stanford 20/20 account, being account No 307162.

33. In keeping with what the defendant refers to as the practice of treating the various Companies in the Stanford Group as parts of a single entity, on 5 April 2007 the lending committee of the Bank recommended, and the Board of Directors of the Bank, chaired by Stanford, agreed to make available to the Companies in the Stanford Group an umbrella overdraft facility of EC$15,000,000 to encompass the total amount of advances made collectively to that borrowing group. This was to be done as a group facility because as per memorandum dated 4 April 2007 from the Loans Committee to the Bank's Board of Directors, shown at page 26 of the Defendant's Bundle of Exhibits-

> *".....we recognize that to assign limits to specific accounts would not provide the flexibility needed in maintaining the multiple accounts within the Group. An umbrella limited to be used collectively by the entire Group would be more practicable....."*

34. The Board of Directors of the Bank at a meeting chaired by Stanford and held on 5 April 2007, approved a loan facility having an umbrella limit of EC$15,000,000 to encompass, what the defendant contends is advances made to the companies in the Stanford Group, and decided that this facility was to be secured by *"Hypothecation of credit balances for a minimum of EC$18,000,000....."*[7].

35. The Bank asserts that following this decision an umbrella overdraft facility was made available to the Companies within the Stanford Group and the credit balances of the Companies in the group were hypothecated as security for repayment of the facility.

[7] See: Minutes of meeting of the Board of Directors of the Bank at page 20 of the Defendant's Bundle of Exhibits.

36. The defendant notes that SFGL makes the point that the Bank claims the right to a change over its credit balances not an account of its own indebtedness of the Bank, but on account of the indebtedness of other affiliated Companies. It cites the case of **Bhogal v Punjab National Bank 1988 2 ALL ER 296** as authority for the proposition that a Bank is not entitled to combine the accounts of a customer with that of a Third party, or to set off against a debt owed by one customer a credit standing in the name of the Third party, was an affiliate of the indebted customer.

37. The defendant submits in response to the ***Bhogal*** proposition, that a person is however, perfectly entitled to agree to hypothecate his property as security for the repayment of the debt of the Third Party. As was explained by the Privy Council in the case of **Lowe v National Insurance Bank of Jamaica 2008 UKPC 26** " *Hypothecation is a word well known in the legal lexicon. It signifies in its most usual meaning the pleading of something as security for a debt or demand without the pledgor parting with the possession of the thing pledged: see Jowitts Dictionary of English Law 2nd Edition [1977] Volume 1.... It would usually be the debtor who would be the Hypothecator, but there is no reason why the owner of the property should not hypothecate his property as security for someone else's debt.....".*

38. Moreover, there is nothing to prevent a Bank from taking security by way of hypothecation or other charge on the credit balance due to the customer on his account at the bank. In **Re Bank of Credit and Commerce International SA (No 8) 1997 4 ALL ER 568,** Lord Hoffman of the English House of Lords explained at page 576-

> *"The depositor's right to claim payment of his deposit is a chose in action which Law has always recognized as property. There is no dispute that a charge over such a chose in action can validly be granted to a Third..... [if the beneficiary of the charge was a debtor himself]....The method by which the property would be realized would differ slightly: instead of the beneficiary of the charge having to claim payment from the debtor, the realization would take the form of a book entry. In no other respect, as it seems to me, would the transaction have any consequences different from those which would attach to a charge given to a third party....."*

39. In summary, the right to withdraw money from an account at a Bank is a species of property which can be charged to secure repayment of a debt. If, therefore, affiliates Companies agree that the credit balance on their accounts should be hypothecated to secure the payment of debts due to the bank under a group umbrella facility the Bank will have an effective security by virtue of that agreement.

40. It is submitted by Council on behalf of the Bank that

    a. A contract of hypothecation constitutes an equitable charge: see **Paget's Law of Banking 13th Edition paragraph 31.10** which states that "hypothecation is a term more often found in the Civil Law. The contract of hypothecation is to be distinguished from pledge in that a pledge entails delivery of possession whereas a hypothecation does not. Both constitute an equitable charge....". An equitable charge may be created without any particular formality: see **Re Bank of Credit and Commerce International SA (supra)** per Lord Hoffman at page 176 "....an equitable charge can be created by an informal transaction for value....and over any kind of property....".

Council for the defendant asserts that there is a clear evidential basis upon which the Court could infer an agreement between SFGL and the Bank for the hypothecation of the credit balance on the account of SFGL as well as the implementation of that agreement. Moreover, the Court should be reluctant to find, on a summery basis and without a trial, that the Bank had failed to implement the decision to hypothecate the credit balances of the Companies in the Stanford Group. This would bear the implication that the Bank has acted in breach of the **Banking Act** by extending the facility to the Stanford Companies without having demand and obtained the mandated collateral security.

41. The Claimant further points to the fact that in a report commissioned by the East Caribbean Central Bank and prepared by Ernst & Young Services Limited, the authors concluded that at **page 17** that "*.... Stanford affiliated Companies used B o A for their Retail Banking requirements in Antigua. Due to the related ownership of the entities, no formal securities at a group level have been in place. Offset of these overdrafts against deposits held in the Stanford Group is not possible due to the lack of Group securities. Limited offset was available in some cases*".

42. With respect to the claimant's reliance on the Ernst and Young report, Queen's CouncilCouncilfor the defendant submitted that in the First place, the report will probably be inadmissible in evidence for the purpose of proving those findings of fact and conclusions. In the case of **Three Rivers District Council v Governor and Company of the Bank of England 2001] UKHL 16** a similar attempt was made to use the report of the Commission of Inquiry led by Lord Bingham for the purpose of establishing certain facts. Lord Hope of Craighead pointed out at **paragraphs 29-31 of the Judgment that:**

> *".....The report (inquiry into the supervision of the Bank of Credit and Commerce International (HC Paper 1992-93) No 198) contains a masterly and eminently readable account of the entire sequence of events from the establishment of BCCI in the UK in1972 to its closure in July 1991. Bingham LJ took evidence both orally and in writing from a large number of witnesses and he had access to many documents. In this covering letter he paid tribute to the very high level of co-operation which he had received from, among others, the Bank and the UK firm of Price Waterhouse, who acted from June 1987 to July 1991 as the Group's auditors. He said that in deciding what was said and done during BCCT's nineteen year history he had relied heavily on contemporary notes and minutes of meetings and conversations between the Bank and Price Waterhouse. His report contains numerous findings of fact and expression of option relevant to the questions which he understood to have been comprised within his terms of relevance. ....Much of the Claimant's pleading has been based on upon material taken from that report..... The assumption can properly be made at this stage that the narrative which the report contains will in due course be capable of being established by evidence once the Claimants have obtained access to the relevant documents. But there are important limitations on the use which can be made of this document.... The First point that has to be borne in mind is that neither the report itself nor any of its findings or conclusions will be admissible at any trail in this case...."*

43. The question as to whether arrangements existed which entitled the Bank to withhold the account as security for the indebtedness of the Stanford Group of Companies must be decided upon

evidence at the Trial. It cannot be said that the Bank has no real prospect of defending against the Claim.

**THE RULES/THE LAW**

44. CPR Rule 15.2 (a) provides:

"…..15.2 The Court may give summary judgment on the Claim or on a particular issue if it considers that the –

….. (b) Defendant has no real prospect of successfully defending the claim or the issue……".

45. The principle on an application for summary judgment were reviewed by Gordon J A in the Court of Appeal in the case of **Alfa Telecom Turkey Limited v Cukorova Finance Int. Limited and Cukorova Holdings Limited BVI Civil Appeal No 001 of 2009.** These may be summarized as being

a. The objective of the Judge in considering as application for summary judgment is to determine whether the claim or defense has no realistic chance of success and accordingly should be decided without trial.

b. At this stage the Judge is making as assessment of the prospects of success of the relevant party, not conducting a fact finding exercise.

c. The decision on a summary Judgment application does not involve the judge in conducting a mini trail. The Judge should not therefore apply the standard which would be applicable at trial, namely the balance of probabilities on the evidence presented. By its very nature the testing of evidence is not an option.

d. If the pleaded case of the parties indicated that there is a factual issue to be tried, which, it proved in favour of the respondent might result in a decision in that latter's favour, then the pre-emptive power of the Court should not be used.

## CONCLUSION

46. The court is unable to support the contention of the claimant that the defendant has no realistic prospect of success. This is not a case where the defendant proposes to prove its case – the existence of an agreement of a group hypothecation agreement – by way of a clear written agreement. The existence of an agreement, if there is one, appears to the court to be one to be proved substantially by way of circumstances and the conduct of the parties.

47. Further, the involvement of Mr. Stanford as a director in all the companies including the defendant company at the material time, in my view imports a dimension to the matter that does not allow for the pedantic application of the ***Bhogal*** case or indeed, several of the other authorities provided by both parties in this matter. Where Queen's Council for the claimant submits that the law is trite is not necessarily so. But more importantly, the facts upon which the law is to be applied, notwithstanding counsel's strident conclusions, are yet to be found and by no means settled. The resolution of the issues raised in the submissions and the effect, if any, on those issues, are in my view best left to trial.

48. I accept as the law governing the court 's deliberations in an application for summary judgment as that set out in Alpha Telecom Turkey Ltd v Cukarova Finance Int. Ltd. And Cukarova Holdings Ltd. BVI Civil Appeal No. 001 of 2009 and the relevant dicta reproduced in para. 45 above.

49. There are factual issues to be tried including, the establishment of the group agreement, the effect on the establishment of a group agreement (if any), of Mr. Stanford's role as a director in all the companies, the meaning and purpose of the various bank documents exhibited in the substantive matter, the true meaning and effect of the Ernst and Young report. Further, with respect to the admission of the Ernst and Young report into evidence, procedural issues are still unfolding with respect to the Evidence Act of Antigua and Barbuda and the service of notice of intention to adduce here say evidence and the defendant's response to that notice. The weight the court may place on that report is still very much at large.

50. There is an alternative limb of the Application for Summary Judgment. The claimant applies for an order that unless the defendant obtains relief from sanctions for its non-compliance with part 28.16 of the CPR2000 that judgment be entered for the claimants. There is no application for relief from sanctions before me. Further, and in any event, the duty to disclose under 28.16 is an ongoing one. The subject documents referred to in letter dated 19th May 2010, as admitted by the claimant, have subsequently been disclosed

and served. The claimant is entitled under part 34 to have applied for an order compelling the production of the documents It requested. It did not do so and still does not ask for such an order. The sanction of entering Summary Judgment in favor of the claimant is draconian and not commensurate with the breach, if that is what it is.

51. I have considered the evidence of Andrea Stoelker and that of Mr. McDavid. I have considered the submissions of the Council for both parties in relation to this evidence and the applicable law. The court is of the view that this case is not suited to its use of its preemptive powers to decide a case without a trial.

**ORDER**

52. The Application for Summary Judgment pursuant to CPR2000, Part 15 and filed on the 11th June 2010 is dismissed.

53. With respect to the second limb of the application – the application to enter summary judgment for the defendant's alleged breach of Part 28.16 and Part 34 is dismissed.

54. The costs of this application to be paid to the defendant by the claimants in the sum of EC$7,500.00 fit for two council.

.....
DAVID C HARRIS
HIGH COURT JUDGE
ANTIGUA and BARBUDA