ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 of 2004

BETWEEN:

ANTIGUA COMMERCIAL BANK

Appellant/Applicant

And

CHARLES JOSEPH

Respondent

Before:

The Hon. Mr. Hugh A Rawlins — Justice of Appeal [Ag.]

Appearances:

Mrs. Nelleen Rogers-Murdoch for the Appellant
The Respondent in Person

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2004: May 24, 25

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JUDGMENT

[1] **RAWLINS, J.A. [AG.]:** This matter came on an application that was made for an Order to stay the execution of the Judgment in this case pending the outcome of the Appeal. I heard it under Parts 62.3, 62.5 and 62.6 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("the Rules"), which empower a single Judge of the Court of Appeal to consider such applications.

[2] This application was filed in the appeal by the Antigua Commercial Bank ("the Bank") against a decision that the Master gave on 25th February 2004. In that decision, the Master considered whether the Bank was entitled to debit the sum of

$3,352.00 from Mr. Joseph's loan account at the Bank. The amount that the Bank debited from Mr. Joseph's loan account represented the expenses that related to the Bank's attempted auction of property that Mr. Joseph held and on which the Bank had a charge in consideration for a loan.

[3] In her Judgment, the Master ordered the Bank to remit the sum of $3,352.00 that it had debited to Mr. Joseph's loan account with interest at the rate that was applicable to that account from the date of the deduction to the date of the Judgment, and interest thereafter at the rate of 5% per annum. The Master also awarded Mr. Joseph nominal damages in the sum of $10,000.00 for inconvenience and distress that he suffered at the hands of the Bank, and costs in the sum of $800.00.

[4] The Bank filed its Notice of Appeal against the decision of the Master on 3rd March 2004. It subsequently filed its Notice of Application for a Stay of the Execution of the Judgment on 20th April 2004. This latter application is supported by an Affidavit of even date that was deposed by Arlene Joseph. Ms Joseph is employed as a Loan Recoveries Representative with the Bank. In the application, the Bank prays that the execution of the whole of the ruling of the Master should be stayed pending the determination of the appeal.

[5] In her Affidavit, Ms. Joseph stated that the Bank was advised that the Master erred in her decision. She also stated that she does not believe that Mr. Joseph will suffer any prejudice or hardship if the Court stays the execution of the Judgment. She pointed out that Mr. Joseph has not led any evidence to this effect. Mr. Joseph was not represented by Counsel in the proceedings in the Court below. He is not represented by Counsel in this appeal either.

Submissions

[6] At the hearing yesterday, learned Counsel for the Bank, Mrs. Rogers-Murdoch, made a number of submissions in support of the Application. She reminded the

Court that the filing of the Appeal does not operate as a stay of the Judgment. This is of course stipulated in **Part 62.19(a) of the Rules**. Mrs. Rogers-Murdoch said that Mr. Joseph is seeking to have the Judgment met but that there are good reasons why the Court should stay the execution of the Judgment.

[7] In the first place, Mrs. Rogers-Murdoch submitted that the Bank's chances of succeeding in the appeal are quite good. This, she said, is because it is obvious that the Master erred in her interpretation of key clauses of the provisions that are relevant to the resolution of the dispute between the Parties. Mrs. Rogers-Murdoch referred, in particular, to section 76 of **the Registered Land Act, Chapter 374 of the Revised Laws of Antigua and Barbuda, 1992**. She also referred to relevant provisions of a Charge and Variation of Charge Agreement between the Parties. She noted, in particular, Clause 1(11) of the Variation of Charge that the Parties executed on 18th December 1985. This sub-clause provides that if the chargor defaults in the payment of the principle, then, upon demand, all expenses that are incurred in the realization of the security and/or the collection of monies due under the charge shall be repaid to the Bank by the chargor. The purport of this provision is that the Bank is thereby permitted to add the expenses to the loan principal and that amount will attract the same interest as the loan principal.

[8] In passing, I note that the Master found that the practice that the Bank sought to incorporate by this Clause is inconsistent with the Registered Land Act. She therefore held that it is an unenforceable practice.

[9] In the second place, Mrs. Rogers-Murdoch submitted that Mr. Joseph would not suffer any detriment for which the Bank could not compensate him in damages or in costs, if he were to prevail on the hearing of the appeal. She said that, in fact, the Bank as a financial institution would be in a good position to compensate him if he suffers any loss as a result of the appeal. She submitted that, on the other hand, Mr. Joseph is a private person. If the stay is not granted and the Bank has

to pay him to satisfy the Judgment, it would be more difficult for him to repay the Bank. He would also very likely have, in additional to the amount that the Master awarded him, to compensate the Bank for any loss that the proceedings occasioned, and costs. Mrs. Rogers-Murdoch expressed the view that the balance that the Court must arrive at between the Parties would be better achieved by the grant of the stay.

[10] Mr. Joseph referred the Court to his submissions in reply. He submitted that whether the appeal has a good chance of success is not relevant to the question whether a stay should be granted. He insisted that, in any case, the Land Registered Act makes no provision that mandates a chargor to pay the expenses of a sale of property that is not sold. He said that Clause 9 of the Variation and Charge Agreement clearly stipulates that the actual realization of the security is a prerequisite for the expenses to be met by the chargor. These are all contending issues that are to be determined on the appeal.

[11] Mr. Joseph further submitted that a stay of execution would put him at a great disadvantage in his effort to pay the expenses that he has incurred as a result of these proceedings and his efforts to hold the Bank accountable for its actions that caused him to come to Court in the first place. He set out a brief history of matters that he has litigated against the Bank and their status as far as his recovery of the fruits of his Judgment is concerned.

Legal Considerations

[12] The Court has always had an inherent jurisdiction to grant a stay of proceedings while an appeal is pursued. The jurisdiction is discretionary. It is exercisable where the Court thinks fit and upon such terms as the Court determines. The power of the Court to grant a stay of execution pending a determination of an appeal was given statutory force in Part 62.16(1)(b) of the Rules. This rule provides:

> "A single judge of the court may make orders for- (b) a stay of execution on any judgment or order against which

> an appeal has been made pending the determination of the appeal."

[13] We are aware of the conditions that an Appellant who prays for a stay of execution must satisfy. The principles are trite and of some antiquity. The Court is likely to grant a stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss, which could not be compensated in damages. See **Wilson v Church (No. 2)[1879] 12 Ch. 454, at page 459**.

This Application

[14] The Appeal in this case is scheduled for hearing today. The Court of Appeal is likely to hand down its judgment at the end of the hearing or during the course of this week. If it reserves its decision, it is likely to deliver it shortly. A party might wish to pursue an appeal to the Privy Council if the conditions for leave to appeal to our highest Court are satisfied.

[15] Now, in this case, I can see little detriment that the Bank is likely to suffer if the Judgment is not stayed. In this case, the Master awarded damages because she found that the Bank should not have placed Mr. Joseph in a position to cause him to pay compounded interest on an existing loan after the Bank had exercised its right to a power of sale.

[16] The sum that Mr. Joseph stands to benefit from the Judgment of the Master is relatively small in the context of the dealings of the Parties and in relation to the loan. The payment of that sum to Mr. Joseph would not, in my view, render the appeal nugatory. If everything remains on course, this Court will hear the appeal before Mr. Joseph could ever be paid on the Master's Judgment by the Bank. Even if there is a subsequent appeal to the Privy Council, this is a small sum. Mr. Joseph could repay it, together with any other monies that any Judgment against him would require him to make good to the Bank. The Application to stay the proceedings pending the appeal will therefore be dismissed with costs.

Order

[17] In the foregoing premises, the application by the Bank that was filed on 20th April 2004 to stay the execution of the Judgment that the Master delivered in this case on 25th February 2004 is dismissed. The Bank shall pay the costs of Mr. Joseph on this Application in the sum of $500.00.

Hugh A. Rawlins

Hugh A. Rawlins
Justice of Appeal (Ag.)