

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: ANUHCV2023/0281 Formerly Claim No. ANUHCV2018/0496

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED
Claimant

And

- | | |
|---|----------------------------|
| [1] ALDEN SAMUEL, CHRISTOPHINE WARREN-SAMUEL,
LYDON SAMUEL Trading as A1 Building Centre | 1 st Defendant |
| [2] CLEMENT SAMUEL in his capacity and as Personal Representative
Of the Estate of Charlesworth T. Samuel, deceased | 2 nd Defendant |
| [3] MEGAN SAMUEL-FIELDS in her capacity and as Personal
Representative Of the Estate of Charlesworth T. Samuel, deceased | 3 rd Defendant |
| [4] MIRIAM SAMUEL | 4 th Defendant |
| [5] HENDERSON FIELDS | 5 th Defendant |
| [6] ALBURN SAMUEL | 6 th Defendant |
| [7] VERONICA SAMUEL | 7 th Defendant |
| [8] RUTHLYN MARCELLA SAMUEL | 8 th Defendant |
| [9] LISA FRANCIS | 9 th Defendant |
| [10] INDRA WALKER | 10 th Defendant |

Appearances:

Ms. Eleanor Solomon for the Claimant

Ms. Denise Parillon for the 1st, 6th and 7th Defendants

Ms. Kamilah Roberts for the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants

2023: 16th, 17th October

2024: 26th January

2025: 17th October

JUDGMENT

- [1] **WILLIAMS, J.:** The Claimant, First Caribbean International Bank (Barbados) Limited commenced proceedings against Alden Samuel, Christophine Warren-Samuel, and Lyndon Samuel trading as Tyrells A1 Building Centre (the 1st Defendant) for defaulting on loans granted in 2010. The 2nd to 10th Defendants are sued as guarantors. The loans were secured by charges over various properties owned by the Defendants. Following default by the 1st Defendant the bank sold the charged properties in 2017 and 2018 respectively. However, a significant balance remains owing both in respect of principal and interest which the Claimant now seeks to recover. The Defendants have all denied claim on various grounds whilst the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants have also raised various matters by way of counterclaim.

Parties

The Claimant

- [2] It is necessary to outline the parties and the various roles they have played in this dispute. The Claimant First Caribbean International Bank (Barbados) Limited is a bank which carries out business in the state of Antigua and Barbuda and other states in the Eastern Caribbean.

The First Defendant

- [3] The 1st defendant a partnership comprising of Alden Samuel, Christophine Warren Samuel and Lyndon Samuel trading as Tyrells A1 Building Centre which entered into loan agreements with the Claimant. These loans are now in default.

The 6th and 7th Defendants

- [4] The 6th and 7th defendants Alburn and Veronica Samuel are the parents of Alden and Lyndon Samuel. They have also signed guarantees in relation to the loans granted to the 1st defendant. The extent of these guarantees will be examined in greater detail later in this decision.

The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants

- [5] The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants are alleged by the Claimant to also be guarantors of the said loans. Properties owned by them were used as security for the loans to the 1st Defendant and one of these properties was sold by the Claimant. These defendants have denied any further liability to the Claimant and have raised counterclaims alleging the illegal sale of one of their properties and defamation.

The Claim

[6] This claim commenced by Claim Form and Statement of Claim filed on 29th October 2018.

The claimant seeks the following:

1. Amount claimed on loan account number 106956181-\$3,533,081.65
2. Interest pursuant to contract at the rate of \$531.662668
per diem at the from October 11, 2018 to the date hereof- \$6379.52
3. Interest thereafter at the rate of 12% per annum to judgment
pursuant to contract.
4. Interest after judgment at the statutory rate of 5% per annum.
5. Collection Commission 10% pursuant to contract on amount awarded on
loan account number 106956181 together with 15% Antigua and Barbuda Sales
Tax.
6. Amount claimed on loan number 1069875466- \$279,014.24
7. Interest pursuant to contract at the rate of \$.00015 per diem
from October 11, 2018 to the date hereof
8. Interest after judgment at the statutory rate of 5% per annum
9. Collection Commission 10% pursuant to contract on amount awarded on
loan account number 106975466 together with 15% Antigua and Barbuda Sales
Tax.
10. Legal Fees- \$163,148.88
11. Court Costs-\$1250.00
12. Any other relief which the court may seem just.

Statement of Claim

[7] The Claimant alleges that by loan agreement dated 30th April, 2010 it agreed to lend the 1st Defendant the sum of \$3,000,000.00. The 1st Defendant signed the loan agreement as a customer of the said bank with all other defendants signing as guarantors of the said loan.

[8] According to the claimant three charges executed in favour of the Claimant to secure the loan, namely:

1. Charges for the respective sums of EC\$1,700,000.00 and EC\$1,500,000.00 over properties registered as Parcels 105, 106, 121,122, and 233 of Block 56 2084A in South East Registration Section and owned by the 1st defendant.

2. Charge for the sum of EC\$800,000.00 over Parcel 100 of Block 51 1984A in Bendals Registration Section (Parcel 100).

[9] The said charges were consolidated on 9th April 2013. Further and pursuant to the loan agreement the claimant agreed to a conditional release of newly created parcels of land resulting from a proposed subdivision of Parcel 100. According to the claimant, it was agreed that part of Parcel 100 measuring 6 acres would be registered in the names of the 1st, 6th and 7th defendants.

[10] On or about 8th September 2014 the 1st Defendant defaulted on the repayment of said loans and a formal demand in respect of the properties was issued to all defendants. According to the Claimant Parcels 105, 106, 121, 122, and 233 were sold by public auction for the sum of \$1,501,000.00 on 5th January 2017. The Claimant states that the sum of \$1,118,984.00 was applied to loan account number 106956181 and \$279,014.30 in respect of loan account number 106975466.

[11] Parcel 100 was subdivided and the charge for \$800,000.00 remained on newly created parcels 183, 185 and 187. These parcels were sold by public auction for the sum of \$355,000.00 on 22nd February 2018. The claimant avers that the sum of \$261,395.25 was applied to loan account number 106956181 leaving a balance of \$3,516,647.17 together with solicitor's fees of \$402.50 and collection commission of \$404,414.43.

[12] From 29th June 2018 to 19th September 2018 correspondence was exchanged between the Claimant and 1st defendant. However, due to the 1st Defendant's failure to provide all documents requested by the Claimant no further agreement was entered into between the parties. Thus, at the date of filing the defendants remain indebted to the Claimant in the sum of \$3,539,461.17 on loan account number 106956181 and \$279,014.30 in respect of loan account number 106975466.

Defence of 1st, 6th and 7th Defendants

[13] The 1st, 6th and 7th defendants filed a Defence on 19th February 2019. They dispute the claim on the following grounds:

1. The 6th and 7th Defendants only guaranteed a loan in the amount of \$800,000.00

2. The 6th and 7th Defendants only signed the loan agreement to use their interest in Parcel 100 as security for the said loan.
3. The 6th and 7th Defendants being the elderly parents of Alden and Lyndon Samuel were not advised to seek independent legal advice prior to signing the loan agreement as guarantors.
4. Parcels 105, 106, 121, 122, and 233 were sold at a gross undervalue as the Claimant failed to take reasonable care in the exercise of its power of sale.
5. In April 2010 when the loan was obtained Parcel 100 was owned in undivided ownership by all the defendants.
6. All of the defendants consented to the registration of a charge over parcel 100 on the condition that a fresh charge would specifically be registered over one of the new parcel of land totalling approximately six acres registered in the names of Alden Samuel, Lyndon Samuel and the 6th and 7th defendants only.
7. The subdivision of Parcel 100 was completed in 2016 and the following parcels were created:
 - i. Parcel 182: with the Estate of Charlesworth T. Samuel, Megan Samuel-Fields and Henderson Fields registered as proprietors-in-common.
 - ii. Parcel 183: with the 6th and 7th defendants, Alden and Lynden Samuel as registered proprietors
 - iii. Parcel 184: with Ruthlyn Marcella Samuel, Lisa Samuel and Indra Walker as registered proprietors
 - iv. Parcel 185: an access road to all the newly created parcels with all the defendants as registered proprietors
 - v. Parcel 186: with the Estate of Charlesworth T. Samuel, Megan Samuel-Fields and Henderson Fields as proprietors-in-common.
 - vi. Parcel 187: with the 6th and 7th defendants, Alden and Lynden Samuel as registered proprietors
8. In breach of the agreement, the Claimant failed to release the charge over parcel 100 upon completion of the subdivision and place a fresh charge over the parcels owned by the 6th and 7th defendants, Alden and Lynden Samuel.

9. The claimant also failed to release the charge over the access road Parcel 185.
10. The 1st, 6th and 7th Defendants deny the particulars of the alleged debt, commission and legal fees as stated in the Statement of Claim.

Reply to Defence of 1st, 6th and 7th Defendants

[14] In its Reply to the Defence of the 1st, 6th and 7th defendants filed on 6th March 2019 the Claimant states:

1. The 6th and 7th defendants only signed a guarantee for \$800,000.00
2. The Claimant was not under a duty to advise the 6th and 7th defendants to obtain independent legal advice as alleged or at all.
3. The Claimant denies that it breached the loan agreement as alleged or at all.
4. The Claimant took reasonable care in the exercise of its power of sale and obtained a valuation from a qualified valuer.

Further Defence and Counterclaim of 2nd, 3rd 4th, 5th, 8th, 9th and 10th Defendants

[15] In the interest of brevity reference will only be made to the Further Defence and Counterclaim of the 2nd, 3rd 4th, 5th, 8th, 9th and 10th Defendants filed on 2nd March 2020. They dispute the claim on the following grounds:

1. The loan agreement dated 30th April 2010 was superseded by other loan agreements dated 1st July 2010 and 10th August 2010 respectively. The 2nd, 3rd 4th, 5th, 8th, 9th and 10th Defendants did not sign the later agreements.
2. In April 2010 when the loan was obtained Parcel 100 was owned in undivided ownership by the 2nd, 3rd 4th, 5th, 6th, 7th, 8th, 9th and 10th Defendants.
3. The 2nd, 3rd, 4th, 5th, 8th, 9th, and 10th Defendants assented to the registration of a charge over parcel 100, contingent upon the subsequent registration of a new charge specifically over the newly acquired parcel of land, comprising approximately six acres, which is registered solely in the names of Alden Samuel, Lyndon Samuel, and the 6th and 7th Defendants.

4. The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants also refused to give personal guarantees in the sum of \$800,000.00 although they were requested to do so.
5. The subdivision of Parcel 100 was completed in 2016 and the following parcels of land were created:
 - i. Parcel 182: with the Estate of Charlesworth T. Samuel, Megan Samuel-Fields and Henderson Fields as proprietors-in-common.
 - ii. Parcel 183: with the 6th and 7th defendants, Alden and Lynden Samuel as registered proprietors
 - iii. Parcel 184: with Ruthlyn Marcella Samuel, Lisa Samuel and Indra Walker as registered proprietors
 - iv. Parcel 185: an access road to all the newly created parcels with all the defendants as registered proprietors
 - v. Parcel 186: with the Estate of Charlesworth T. Samuel, Megan Samuel-Fields and Henderson Fields as proprietors-in-common.
 - vi. Parcel 187: with the 6th and 7th defendants, Alden and Lynden Samuel as registered proprietors
6. Pursuant to the above-mentioned agreement between the parties and upon completion of the sub-division, on January 5, 2018 the Claimant discharged the charge on Parcels 182, 184 and 186. However, the Claimant also failed to release the charge over the access road Parcel 185 which is the only access to parcels 182, 184 and 186.
7. They further allege that the subsequent sale of Parcel 185 to a third party was wrongful.
8. As the charge has been discharged over Parcels 182, 184, and 186, and since the 2nd, 3rd, 4th, 5th, 8th, 9th, and 10th defendants did not execute any personal guarantees with the claimant, these defendants assert that there is no valid basis for a claim against them.

Counterclaim

- [16] The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants argue that they consented to the registration of a charge over parcel 100 pending the completion of the sub-division. This was subject to the strict condition that the charge would be discharged upon the completion of the sub-division and the registration of a charge over new parcels of land totalling approximately six acres in the names of Alden Samuel, Lyndon Samuel, Alburn Samuel and Veronica Samuel. These Defendants argue that the Claimant bank is in breach of the agreement in their failure to discharge the charge on parcel 185. The defendant denies that the creation of precisely six acres of land was a condition of the agreement but rather just an approximate estimate.
- [17] They allege that the Notice to Pay Off issued by the Claimant was invalid and a breach of the agreement between the parties. This is on the basis that the condition for discharge of charge #RL-201003292 had been fulfilled, that being the subdivision of parcel 100, and that there had been no amount due by the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants pursuant to the said charge.
- [18] Furthermore, the Defendants assert that there has been an unlawful sale of parcel 185 according to the laws of Antigua and Barbuda under the Registered Land Act. Moreover, the Defendants have brought a counterclaim for defamation for the publishing of auction notices in the Daily Observer newspaper with the understanding that said publication implied delinquency and unsound financial standing on the part of the defendants.

Trial

- [19] Trial of this matter was initially scheduled for four days from 16th to 20th October 2023. Ultimately the trial only lasted for two days namely the 16th and 17th October 2023. Mr. Mark Gomez was the only witness for the claimant. Mr. Alden Samuel gave evidence on behalf of the 1st, 6th and 7th defendants. On behalf of the other defendants Ms. Megan Samuel-Fields, Mr. Clement Samuel, Ms. Indra Walker, Ms. Lisa Francis and Mr. Henderson Fields all attended trial and gave evidence. Mr. Huburn Edwards a Civil Engineer/Property Appraiser gave evidence as an expert witness primarily on the issues of valuation.
- [20] The parties all filed closing submissions by 29th November 2023 after an extension had been granted. On 26th January 2024 the court requested the parties to file supplemental

submissions on the rule in **Holme v. Brunskill**¹ which will be outlined later in this judgment. These were duly filed by 8th March 2024.

Findings

[21] Except for some matters there are no major factual disputes between the parties. This is primarily as much the evidence tendered is documentary. Accordingly, the court will outline the following findings of fact.

1. The 1st Defendant obtained a loan of \$3,000,000.00 from the claimant evidenced by agreement dated 30th April 2010. This agreement was signed by all the Defendants.
2. This agreement was superseded by one dated 1st July 2010 and another dated 10th August 2010. The latter agreements varied the 30th April 2010 and in particular provided for an overdraft facility of \$500,000.00.
3. The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants did not sign the agreements of 1st July and 10th August 2010.
4. The 6th and 7th Defendants signed personal guarantees of \$800,000.00 on 14th June 2010.
5. The loans were secured by a charge over parcels Parcels 105, 106, 121,122, and 233 of Block 56 2084A in South East Registration Section and owned by the 1st defendant.
6. Another charge was registered over Parcel 100 Block 51 1984A in Bendals Registration Section which was owned by all the Defendants in undivided ownership.
7. The charges were consolidated in 2013.
8. By 2014 the 1st Defendant had defaulted on the loans.
9. Parcels 105, 106, 121,122, and 233 were sold in the exercise of the Claimant's power of sale for \$1,501,000.00 on 5th January 2017.
10. Parcel 100 was subdivided creating parcels 182,183, 184,185, 186 and 187.
11. The charge was discharged in respect of parcels 182, 184 and 186 but not parcel 185.

¹ (1878) 3 QBD 495

12. The Claimant in the exercise of its powers of sale sold parcels 183, 185 and 187 and advertised said parcels for sale by publication in Observer Newspaper during the period December 2017 to February 2018.
13. Parcels 183, 185 and 187 were sold by public auction for \$355,000.00 on 22nd February 2018.
14. The Claimant and Mr. Alden Samuel engaged in discussions and correspondence concerning settling the outstanding loan during 2018. However, no agreement was reached.
15. These proceedings commenced on 29th October 2018.

Discussion

Applicable Procedural Rules

- [22] It should be noted the **Civil Procedure Rules (Revised Edition) 2023** do not apply to this claim. This is as pursuant to **Rule 75.3(1)** these rules do not apply to proceedings where a trial date had been set before the rules came into force. All references will therefore be to the **Civil Procedure Rules 2000**.

The Claim

- [23] The starting point in this matter is the Claimant's claim against the Defendants. The Defendants all complain that the particulars of the claim are not sufficiently pleaded. In the regard the following omissions are noted:

1. The Statement of Claim does not mention the loan agreements of 1st July and 10th August 2010.
2. The Statement of Claim does not disclose that the personal guarantees of the 6th and 7th Defendants were limited to \$800,000.000.
3. The Statement of Claim does not specify how the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants are liable for the entire debt when the charge they signed was limited to \$800,000.00.

[24] The Claimant does not deny these omissions but relies on the case of **Caribbean Banking Corporation v. Alpheus Jacobs**² where the Court of Appeal stated:

“In *East Caribbean Flour Mills Limited v. Ormiston Ken Boyea*³ this court analysed the application of the Civil Procedure Rules 2000 (CPR 2000) part 10.7(1), on which this submission is impliedly based, and concluded that the function of pleadings is to make clear the general nature of the case to be advanced by the party so that the other side knows the case it has to meet and will not be surprised at the trial. Particulars of such case can be supplied in the witness statements in support of that party’s case.

[25] The Claimant states that the loan agreements were disclosed at the stage of standard disclosure and referred to in witness statements. I also note that all parties utilized the procedure in **CPR Part 34** where Requests for Information were made. It is trite that disclosure and witness statements do not replace pleadings. However, in this particular case by the date of trial the matter had been underway for five years with much of the information having been disclosed years prior. I therefore do not believe that the Defendants did not know what case they had to meet at trial. Further, any alleged defects in the pleadings should have been raised at the Case Management Conference or Pre Trial Review.

Inaccuracy of Loan Balance

[26] The details of the loan facilities extended to the 1st Defendant have already been outlined and do not require repetition. The 1st, 6th and 7th Defendants in their joint Defence have not denied defaulting on the loans. Instead at paragraph 36 of their Defence they state that the particulars of the alleged debt are inaccurate and that they never agreed to pay debt, commission, legal fees and interest as pleaded in the Statement of Claim. In terms of the loan balances being inaccurate, the Defendants have brought no evidence to contradict what has been tendered by the Claimant. I therefore find that this ground of their defence has no merit.

Properties Sold at an Undervalue

² ANUHCVP2004/0014 decided 6th October 2008 at paragraph 20 per Carrington JA (unreported)

³ Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006

- [27] The 1st Defendant further argues that Parcels 105, 106, 121, 122, and 233 were sold at an undervalue. In this regard they rely upon two valuation reports which were disclosed by the Claimant in response to a request for information.
- [28] The valuation reports were both prepared by appraiser Mr. Wayne Martin. The summary of the first report dated 8th January 2013 provides three possible valuations for the properties. The first using the cost approach is EC\$2,795,000.00 with a forced sale value of EC\$2,236,000.00. Finally, using an income capitalization approach Mr. Martin submits a value of EC\$2,236,000.00. The second valuation report dated 3rd September 2015 using the income capitalization approach states that the properties are valued at EC\$1,764,000.00 with a forced sale value of EC\$1,410,000.00. It must be recalled that the properties were eventually sold for \$1,501,000.00.
- [29] In closing submissions, the 1st Defendant argues that report was based on the Claimant's "specific instructions to produce a valuation based on the income capitalization approach." This is referred to as "an unlawful and unconscionable interference by the Claimant bank with the Valuer allowed the bank to sell off the said lands of the Defendants cheaply at more than a million dollars less than their actual value using the usual cost approach and comparable sales."⁴
- [30] Firstly, it must be noted that there is no evidence that the Claimant bank specifically requested that income capitalization method be used. The instructions to Mr. Martin dated 31st August 2015 make no mention of this. Further the report itself also makes it clear that Mr. Martin also assessed the value using a cost approach. It is only in his valuation summary that he emphasizes the income capitalization approach.
- [31] Thus, in the absence of any evidence that the Claimant unlawfully sought to influence the valuation, the issue is whether the bank acted wrongly in selling the properties based on the value obtained via the income capitalization approach? In order to the answer this, regard must be had to **section 72** of the **Registered Land Act**⁵ pursuant to which the Claimant has acted. **Section 72(1) and (2)** of the Act provides as follows:

⁴ 1st, 6th and 7th Defendants Closing Submissions paragraphs 13 to 16

⁵ Cap. 374

“72. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply with a notice served on him under subsection (1) within three months of the date of such service, the chargee may-

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property;”

[32] **Section 72(3)** provides the circumstances in which a chargee may sue for the money secured by the charge. This includes where the charger is bound to repay the same. This is of the course true where the 1st Defendant is concerned as the 1st Defendant is contractually obliged to repay the loans granted.

[33] In terms of the exercise of the power of sale **section 75(1)** of the **Registered Land Act** provides as follows:

“75. (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby.”

[34] Thus, the issue is whether the Claimant acted in good faith and had regard to the interests of the chargor in the exercise of its power of sale in the present circumstances. **Sections 72 and 75** of the **Registered Land Act** have been considered by the courts in several cases. In **Caribbean Banking Corporation v. Alpheus Jacobs** Carrington JA giving the judgment of the Court of Appeal stated:

“The statute does not create an absolute obligation on the part of the chargee. It does not require the chargee to sacrifice his own interests in favour of the interests of the charger, but he is required to be aware that the chargor has an interest in the outcome

of the exercise of his power of sale and would be affected by the chargee's acts in the exercise of the power of sale. This section therefore, recognises the relationship of proximity between the chargee and the chargor in the circumstances and imposes on the chargee a duty to take reasonable care to obtain the true market value of the property at the time of sale. This is the most that could be expected of him when selling the property."

[35] In **Gerald Barnes v CIBC First Caribbean International Bank**⁶ Justice Actie outlined the approach to be adopted in ascertaining the market value of the property to be sold. The learned judge stated:

"9. The bank, in exercising its power of sale, owes a duty of care to a debtor and is required to obtain the true market value or if this is not attainable, the best price reasonably available of the mortgaged property. The duty of the bank is not to get the best price but the true market value at the time of the sale acting in good faith.

10. The market value of property is usually informed by valuations reports from qualified valuation surveyors. Various recognised approaches and methodologies are used in arriving at the open market value of a property.

11. Lord Salmon in **Cuckmere Brick Co**⁷ states that:

"Valuation is not an exact science. Equally careful and competent valuers may differ within fairly wide limits about the value of any piece of land. But there are limits. When there is conflict, it is for the judge to decide which evidence is to be preferred."

[36] In **Gerald Barnes** the court accepted a valuation based on the income capitalization approach despite the fact that a cost-based approach may have yielded a higher valuation. At paragraph 20 of the decision Justice Actie stated:

"The fact that the two valuations differed significantly or were at great disparity did not make the valuations erroneous. As was indicated in **Cuckmere**, a valuation not an exact science. What is required is for the bank to act reasonably in obtaining the best market value at the time of sale. The onus is on the claimant to prove the breach of duty of the bank.

⁶ ANUHCv2017/0041 decided 5th December 2019

⁷ [1971] Ch. D 949 at 959D

- [37] The case law emphasizes that an onerous burden on the claimant to prove that the bank through its agents acted with negligent disregard to the claimant's interests when exercising its power of sale. In this case apart from proving the disparity between the valuations, the 1st Defendant has not proved that the Claimant bank did not act in good faith. The 1st Defendant has also not brought forward any expert evidence of its own to demonstrate that methodology used by Mr. Martin was wrong or that he failed to take material considerations into account. Accordingly, the court finds that Parcels 105, 106, 121, 122, and 233 were not sold at an undervalue.
- [38] The Claimant's substantive claim will now be examined. In this regards I found the Claimant's witness Mr. Gomez to be forthright and knowledgeable although he was not involved when the loans were negotiated and when they first went into default. The Claimant has also disclosed the relevant loan agreements and loan statements which largely substantiate its pleaded case.
- [39] However, there is one aspect of the claim which causes some concern which is the claim for collection commission on both loan accounts at the rate of 10% together with 15% Antigua and Barbuda Sales Tax. This collection commission is stated to be pursuant to contract. The court has examined the loan agreements as well as the Standard Credit Terms and has found no terms which authorize this collection commission.
- [40] A collection commission is however mentioned in the various charge documents. Further, based on documents disclosed to 1st Defendant pursuant to a Request for Information, it appears that a 10% commission was collected by Claimant's attorneys-at-law as part of the expenses of the sale of the charged properties. The Claimant is now acting pursuant to **section 72(3) of the Registered Land Act** to recover the balance of the sums secured by the charges. Thus, having already recovered the collection commission on the sale of the properties, the Claimant cannot seek to recover it yet again. This would be a double recovery. Therefore, this aspect of the claim will not be granted. Any legal fees incurred by the Claimant will be covered by the appropriate order for Prescribed Costs.
- [41] Judgment will therefore be entered for the Claimant as sought in the Statement of Claim with the exception of the claim for collection commission. Interest at the contractually specified default rate of 12% per annum will be awarded from the date of service of the

Claim Form until Judgment. Interest is awarded at the statutory rate of 5% per annum from the date of judgment until payment. The Claimant is also awarded Prescribed Costs on the loan balances sought to be recovered. The full details of the order to be made will be outlined at the end of this decision.

Defence of the 6th and 7th Defendants-Undue Influence

[42] The 6th and 7th Defendants are the parents of Alden and Lyndon Samuel who in turn are two of the partners that comprise the 1st Defendant. They each signed a personal guarantee on 14th June 2010 guaranteeing the sum of \$800,000.00. Their defence alleges that the Claimant failed in its duty to advise them to seek independent legal advice prior to signing the guarantees and charge in respect of the loans to the first defendant. The Defence also notes that the 6th and 7th Defendants did not obtain any benefit from the proceeds of the loan. In its Reply to the said Defence, the Claimant denies being under an obligation to advise the 6th and 7th defendants to seek independent legal advice before signing the said documents.

[43] It is noteworthy that the Claimant does not deny that the 6th and 7th Defendants are the elderly parents of Alden and Lyndon Samuel. The Claimant also does not deny that they received no benefit from the loan proceeds. This is not surprising as the documents in evidence demonstrate that the loan was for the sole purpose of the 1st Defendant's commercial operations.

[44] Therefore, the issue of undue influence clearly arises on the pleaded case. The Defendants in their closing submissions rely on the case of **Royal Bank of Canada v. Mervin Andrew**⁸ where the principle of undue influence was briefly outlined. The Privy Council in its recent decision in **Nolan v. Jude**⁹ has restated the principles of undue influence as follows:

"The law on undue influence was rigorously and helpfully analysed by the House of Lords in the leading modern case of *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 ("*Etridge*"). In *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] UKPC 10, [2022] 1 WLR 2788 ("*Nature Resorts*"), on an appeal from Trinidad and Tobago, the Board (Lords Briggs and Burrows giving the judgment) recently summarised the modern law as laid down in *Etridge*. The Board therefore makes no excuse for citing what was said in *Nature Resorts* at paras 10 -13:

⁸ DOMHCV2016/0257 decided 7th April 2017 (unreported)

⁹ [2024] UKPC 22 at paragraph 22 per Lord Burrows

"10. Putting to one side illegitimate threats (which are nowadays better viewed as falling within the doctrine of duress: see *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] 3 WLR 727, paras 8-9 and 89-90) undue influence is concerned with a situation where, by reason of the relationship between them, one party (B) has such influence over the other (A) that A does not exercise a free judgment, independent of B, in relation to the making of a transaction between A and B (or, in a three-party situation, between A and a third party, C).

11. Ever since *Allcard v Skinner* (1887) 36 Ch D 145, it has been commonplace to divide undue influence into two categories: actual and presumed. But in *Etridge* the House of Lords made clear that undue influence is a single concept. It does not have two different forms. The correct analysis of the two categories is that they refer to different ways of *proving* undue influence. Presumed undue influence refers to where the person alleging undue influence relies on an evidential presumption. Actual undue influence refers to where the person alleging undue influence relies on direct proof (of A's conduct ... which led to B not exercising a free and independent judgment).

12. As *Etridge* also made clear, there are two requirements for establishing the (rebuttable) presumption of undue influence. First, there must be a relationship of influence. This may be established on the facts. But in respect of some relationships there is what is commonly referred to as an irrebuttable legal presumption (but is more appropriately referred to as a legal rule) that the relationship is one of influence (but note not *undue* influence). Examples of such relationships are doctor and patient (*Mitchell v Homfray* (1881) 8 QBD 587), spiritual adviser and follower (*Allcard v Skinner*), parent and young child (*Lancashire Loans Ltd v Black* [1934] 1 KB 380) and, of direct relevance to the facts of this case, solicitor and client (*Wright v Carter* [1903] 1 Ch 27). The second requirement is that the transaction must not be readily explicable on ordinary motives. The House of Lords preferred this test, which uses the words of Lindley LJ in *Allcard v Skinner*, to a test of whether the transaction was manifestly disadvantageous which had been put forward by Lord Scarman in *National Westminster Bank plc v Morgan* [1985] AC 686, 703-707. The underlying idea behind the test is that the nature and/or contents of the transaction must make one conclude, in the context of the relationship of influence, that, absent evidence to the contrary, undue influence has been exercised. ...

13. If those two requirements are satisfied, so that there is a presumption of undue influence, the burden of proof shifts and it is for the party seeking to uphold the transaction to rebut the presumption by showing that A was not acting under undue influence (ie that A exercised free and independent judgment) when entering into the transaction. Although neither necessary nor conclusive, the main method of rebuttal is to show that A obtained the fully informed and competent independent advice of a qualified person, most obviously a lawyer: see *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 and *Etridge*."

[45] The Defence will now be examined in accordance with the above guidance. The first issue being whether there was a relationship of influence? The 6th and 7th defendants are described as “elderly” in the Defence although their age was not disclosed. However, they must necessarily be of advanced age to be parents of Alden and Lyndon Samuel who at court appeared to be middle aged.

[46] The relationship of child and elderly parents is one of the categories which could be categorized as a relationship of influence as outlined in the case of **Avon Finance v. Bridger**.¹⁰ In that case a son procured the execution of a legal charge by his parents over their property. Brandon LJ stated as follows:

“It seems to me that, while the relationship between husband and wife may be one in which it is more obvious that the husband will have influence over the wife, the relationship between a son in the prime of life and parents in the evening of life is equally a relationship in which it should be appreciated that the possibility of influence exists.”

[47] The transaction was set aside as the parents had not obtained independent legal advice before execution of the charge. In **Royal Bank of Scotland v. Etridge (No. 2)**¹¹ the House of Lords observed that “relationships in which undue influence can be exercised are infinitely various.” The court further stated at paragraph 87 of the judgment that:

“These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the *O'Brien* principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as 'put on inquiry' in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety.

[48] In this case the relationship between Alden and Lyndon Samuel and their parents is clearly non-commercial. It is noted in this regards that they are not part of the partnership. Accordingly, the Claimant should have been put on inquiry before when considering them as suitable guarantors. In the circumstances I find that there was a relationship of influence between Alden and Lyndon Samuel and the 6th and 7th Defendants.

[49] The second issue to be examined is whether the transaction is readily explicable on ordinary motives? In this case it is clear that the 6th and 7th Defendants did not benefit at all from the

¹⁰ [1985] 2 All ER 281 at 288 per Brandon LJ

¹¹ [2001] 4 All ER 449

loan transactions. Despite this, they signed documents which purported to hold them each liable for \$800,000.00 in the event of the 1st Defendants default. Therefore, the two factors namely the relationship of influence and the fact that the transaction did not benefit these defendants leads to a presumption of undue influence.

- [50] Accordingly, the burden has now shifted to the Claimant to rebut this presumption by demonstrating that the 6th and 7th defendants had exercised free and independent judgment in entering into these transactions. In **Nolan v. Jude**¹² the Privy Council held that the main method of rebuttal is to show that the individual “obtained the fully informed and competent independent advice of a qualified person, most obviously a lawyer: *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 and *Etridge*.” However, the court also emphasized that:

“While establishing that independent advice was taken and acted on is often the easiest way of rebutting the presumption, it is not the only way.”

- [51] Unfortunately, the Claimant has provided no evidence at all to rebut the presumption of undue influence. In **Royal Bank v. Etridge (No.2)**¹³ the House of Lords proposed that the guarantor could be invited to a private meeting with a representative of the creditor where the intended guarantor is advised of the risks involved. In this case there is no evidence at all that the Claimant recommended independent legal advice or that a private meeting with the 6th and 7th Defendants was held.

- [52] Accordingly, the personal guarantees signed by the 6th and 7th Defendants on 14th June 2010 are declared to have been obtained by undue influence and declared void. In terms of the charge documents signed by the 6th and 7th Defendants slightly different considerations apply. This is as the relevant properties have been sold. Accordingly, the appropriate order is simply that the claim against these defendants is dismissed. The 6th and 7th Defendants will be awarded prescribed costs of \$7,500.00 jointly based on Rule 65.5 of the Civil Procedure Rules 2000. This takes into account the fact that defendants were jointly represented by the same counsel. The terms of the order will be outlined at the end of this decision.

¹² [2024] UKPC 22 at paragraphs 13 and 26

¹³ [2001] 4 All ER 449 at paragraph 50

Rule in Holme v. Brunskill

[53] The aspects of the claim which concern the 2nd, 3rd, 4th, 5th, 8th 9th and 10th defendants must now be considered. In this case the original loan agreement of 30th April, 2010 was signed by all the defendants. This was in turn replaced by a loan agreement dated 1st July 2010 which was signed by the Claimant, the 1st defendant as borrower and the 6th and 7th defendants as guarantors. This agreement was also then superseded by a loan agreement dated 10th August 2010. Again, that agreement was only signed by the Claimant, the 1st Defendant as borrower and the 6th and 7th Defendants as guarantors. The 2nd, 3rd, 4th, 5th, 8th 9th and 10th Defendants did not sign either the agreement of 1st July 2010 or 10th August 2010. Accordingly, this raises the issue of whether the rule in **Holme v. Brunskill**¹⁴ might be applicable.

[54] The rule in **Holme v. Brunskill** was summarized by the Court of Appeal in **Noel Barnes v. Courts (Antigua and Barbuda) Ltd.**¹⁵ where Sir Dennis Byron stated:

“The basic rule was expressed in **Holme v Brunskill** QBD (1877-79) 495 where it was held that a guarantor was absolved from liability where the principals had entered into a varied agreement without the consent of the guarantor.”

[55] In **Noel Barnes** the Court of Appeal stated that the above principle has been established for over a century. In **Holme v. Brunskill**¹⁶ itself Cotton L.J. giving the judgment of the Court of Appeal of England and Wales stated as follows:

“the true rule in my opinion is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is insubstantial, or that it cannot otherwise than be beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the findings of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.”

¹⁴ (1878) 3 QBD 495

¹⁵ Magisterial Civil Appeal No. 2 of 2003 decided 31st March 2003 (unreported) at para. 7

¹⁶ (1878) 3 QBD 495, 505

- [56] Thus, a guarantor will not be discharged if the alteration to the original agreement is “unsubstantial” or “cannot be prejudicial to the surety.” Also, the principle only applies to a variation of the obligations guaranteed and is not therefore engaged by variations to the obligations in the main contract which are not covered by the guarantee.
- [57] It is therefore necessary to broadly examine the terms of the agreements of 1st July and 10th August 2010. The Claimant’s witness Mr. Gomez in his witness statement outlines that the loan agreement of 1st July 2010 granted the 1st Defendant a \$500,000.00 overdraft facility. Mr. Gomes further states that: “There was a further amendment to the loan agreement to change the conditions precedent and that loan agreement of 10th July 2010 was replaced by loan agreement dated 10th August 2010.”¹⁷
- [58] The increased borrowing by the 1st Defendant was obviously a substantial variation to the original loan agreement of 30th April 2010. The \$500,000.00 overdraft increased the overall borrowing to \$3,500,000.00 up from \$3,000,000.00. Further since the charges were consolidated in 2013 meaning that the charge over Parcel 100 was now applicable to the entire debt. Therefore, according to the rule in **Holme v Brunskill** this substantial variation to the original loan agreement required the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendant’s consent. Thus, in the absence of this consent the guarantors are discharged from any liability under the loan agreement of 30th April 2010.
- [59] In their supplemental submissions counsel for these Defendants agree that the rule in **Holme v. Brunskill** applies as they did not sign either the agreement of 1st July 2010 or the one dated 10th August 2010. Counsel for the Claimant however argues that the principle is not applicable on the basis that “they were chargors or owners of the properties and are liable to repay the debt as stipulated in section 72(3) of the Registered Land Act Cap. 374. Those defendants were not served as sureties but the with statutory demand notices as chargors/owners as is required by section 72(1) of the Registered Land Act.”¹⁸
- [60] The Claimant’s submissions must therefore be examined in the context of the charge over Parcel 100 before it was subdivided. This charge was signed by the claimant and the defendants. The document itself describes the 2nd, 3rd, 4th 5th, 6th, 7th, 8th, 9th and 10th

¹⁷ Mark Gomez Witness Statement paragraphs 5 to 7

¹⁸ Claimant’s Supplemental Submissions Page 2

Defendants as “the Chargors” whilst the 1st Defendant is described as “the Borrower.” Further the said charge instrument states that the property was charged “to secure the repayment by Alden Samuel, Christophene Samuel and Lyndon Samuel trading as Tyrell’s A1 Building Centre.” The document therefore makes it clear that the loan was only made to the 1st Defendant. Accordingly, the charge could only be regarded as giving effect to the obligation contained in the loan agreement of 30th April 2010 to provide a charge over parcel 100. Accordingly, the Claimant’s submission is not supported by the evidence as it apparent that 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants only signed the charge as guarantors.

- [61] It should be noted that the rule in **Holme v. Brunskill** extends to security given by the guarantor and is not limited to personal liability.¹⁹ In this case this means that the charge over Parcel 185 was also discharged by the variation of the original agreement. This of course leads to the conclusion that the Claimant could not have exercised its statutory power of sale over the said parcel. However, that parcel was sold to Anrab Ltd. in 2018. The appropriate remedy in the circumstances will now be considered.
- [62] Parcels 183, 185 and 187 were transferred to Anrab Ltd in 2018 after a public auction. It is not disputed that Parcel 185 is an access road which was intended to service all the newly created parcels after Parcel 100 was subdivided.
- [63] In his expert report filed in these proceedings, Mr. Huburn Edwards states that Parcel 185 is the only access to Parcels 182, 183 and 184. Mr. Edwards states that if the owner of Parcel 185 restricted access the values of Parcels 182, 183 and 184 would drop by as much as 50%. Parcel 182 which he values at \$680,411.60 would fall to \$340,205.80 whilst Parcel 184 would see a reduction in value from \$413,828.80 to \$206,914.40.
- [64] The court observes that Mr. Edwards has not stated that the owners of Parcel 185 have restricted access to Parcels 182 and 184 in any way. Furthermore, if Mr. Edwards is correct in stating that Parcel 185 is the only means of access to those parcels, it is open to the Defendants to claim an easement of necessity. The principles governing easements of necessity in this jurisdiction have been recently outlined by the Privy Council in **Joseph Horsford v. Geoffrey Croft**²⁰ and do not require repetition here. Accordingly, no damages

¹⁹ Bolton v. Samuel [1891] 2 Ch. 48

²⁰ [2022] UKPC 4

for the alleged diminution in the value of Parcels 182 and 184 can be awarded unless it can be proven that access to these parcels has been restricted. This aspect of the counterclaim must therefore be dismissed.

[65] As previously stated, Parcel 185 should not have been sold by the Claimant since the guarantors had been absolved from liability due to the variations to the loan agreement of 30th April 2010. In the circumstances damages should be awarded for the unlawful sale of Parcel 185. Mr. Edward's report ascribes a value of \$96,049.80 to Parcel 185. This is based on a value of \$4.50 per square foot. In his report and in response to questions from counsel for the claimant, Mr. Edwards has outlined his methodology referring to comparable sales of land in the area.

[66] In **Kennedy v Cordia**²¹ Lord Reed and Lord Hodge giving the judgment of the UK Supreme Court stated:

“48. An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or ‘bare ipse dixit’ carries little weight, as the Lord President (Cooper) famously stated in *Davie v Magistrates of Edinburgh* 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352, 371:

‘an expert’s opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert’s bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.’

As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604: ‘As with judicial or other opinions, what carries weight is the reasoning, not the conclusion.’

²¹ [2016] 1 WLR 597 at para 43

- [67] In this case Mr. Edwards has discharged his duty to the court in accordance with the principles outlined in **Kennedy v. Cordia** outlined above by clearly outlining his methodology. Accordingly, damages of \$96,049.80 will be awarded to the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants for the unlawful sale of Parcel 185.

Defamation Claim

- [68] The Further Amended Defence and Counterclaim filed on behalf of the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants on 2nd March 2020 includes a claim for defamation. The alleged defamation is contained in auction notices which were published in the Daily Observer newspaper between December 2017 and February 2018. These auction notices relate to Parcels 183, 185 and 187.

- [69] The notices of auction all read as follows as recited at paragraph 13 of the Further Amended Counterclaim:

“AUCTION NOTICE

Instructed by First Caribbean International Bank (Barbados) Limited I shall sell by public auction on site Thursday 22nd February, 2018 at 3 pm the under-mentioned property

Registration Section: Bendals

Block: 51 1984A

Parcels: 183, 185 and 187

The property consists of three (3) parcels of land. Parcels 183 and 87 are owned by Alburn Samuel, Veronica Samuel, Alden Samuel and Lyndon Samuel. Parcel 185 is owned by Clement Samuel and Megan Samuel-Fields as personal representatives of the Estate of Charlesworth T. Samuel, deceased, Miriam Samuel, Clement Samuel, Megan Samuel-Fields, Henderson Fields, Alburn Samuel, Veronica Samuel, Alden Samuel, Lyndon Samuel, Ruthlyn Marcella Samuel, Lisa Francis and Indra Walker. Parcel 183 is approximately 1.85 acres (or 80,460 sq. ft.), Parcel 187 is approximately 3.85 acres (or 167,857 sq. ft.) and Parcel 185 is approximately 0.49 acres (or 21, 344 sq. ft.) The property is located in Foleys and is 10 miles south east of the capital city of St. John's. The property has a building with a communication antennae thereon. The property has gentle to moderate slopes and forms part of a residential neighbourhood. The service lines for potable water, telephone and electricity are accessible to the property.

Further particulars may be obtained from

Clarke & Clarke Chambers
Temple & Nevis Streets
Attorney-at-Law for First Caribbean International Bank
(Barbados) Limited
At telephone Nos 462-0732, 460-8852 Or 562-5815 or
Nathaniel "Paddy" James Esq, OM
Licensed Auctioneer
Marble Hill Main Road
Telephone Nos. 462-3530"

[70] These defendants complain that the Daily Observer had a wide circulation in Antigua and Barbuda and an even larger circulation online. Paragraph 15 of the Amended Defence and Counterclaim states:

"The said words in their natural and ordinary meaning meant and were understood to mean that the Second, Third, Fourth, Fifth, Eighth, Ninth and Tenth Defendants had been delinquent in the repayment of a loan to the Claimant which was secured by a charge on parcel 185 and further that this delinquency had necessitated the forced sale by auction of Parcel 185 by the Claimant. Further, by those words the Claimant meant and was understood to mean that the Second, Third, Fourth, Fifth, Eighth, Ninth and Tenth Defendants were persons whose financial standing was unsound to whom credit should therefore not be given as they had failed to meet financial obligations to a creditor."

[71] At paragraph 16 of the Further Amended Counterclaim it is alleged that between March 2017 to November, 2018 the Claimant represented to other financial institutions in response to credit checks that 2nd and 9th defendants were delinquent in their repayment obligations to the claimant. At paragraph 17 it was further alleged that these representations were understood to mean that the 2nd and 9th defendants were persons whose financial standing was unsound and to whom credit should not therefore be given.

[72] In response to a Request for Information by the Claimant the 2nd and 9th defendants provided more details as to the alleged representations by the Claimant and the effects that these had on them. The 2nd Defendant alleged that in July 2018 he and his wife had applied to refinance their mortgage with Caribbean Union Bank. However, the Claimant has represented that he was the guarantor of a non-performing loan facility.

[73] The 9th defendant alleges that in February 2017 she applied to Caribbean Union Bank for a loan to purchase motor vehicle. She had stated on her application that she had no loans

with other financial institutions. However, the claimant had represented to Caribbean Union Bank that the 9th Defendant had a joint loan. The 9th defendant states that the imputation was that she had withheld pertinent information from Caribbean Union Bank.

[74] In terms of particulars of delay and complications, the 2nd Defendant alleges that his application with Caribbean Union Bank was never approved. He was able to obtain refinancing from another institution but this was not until September 2019. The 9th Defendant's loan application was not resolved until she had escalated her complaint to the Claimant's head office in Barbados. Her loan application was eventually granted in late March 2017 and during the intervening period she did not have use of a motor vehicle. In its further amended Defence to Counterclaim filed on 11th August 2020 the Claimant denies making the representations as alleged.

[75] These assertions were mirrored in the actual evidence of the parties with the 2nd and 9th defendants outlining the difficulties encountered in obtaining financing. Mr. Gomez on behalf of the claimant denies that the bank has made any misrepresentations to any financial institutions regarding the 2nd and 9th defendants.

[76] Pursuant to Antigua and Barbuda's **Defamation Act**,²² as well as at common law, defamation is defined as the publication of a statement that diminishes a person's reputation in the eyes of reasonable members of society. To establish a claim for defamation, the claimant must demonstrate that the defendant made and published a statement to a third party, which would reasonably lower the claimant's standing among right-thinking individuals. The words in question should be interpreted according to their natural and ordinary meaning, reflecting how an average, reasonable person would understand them.

[77] In **Jones v. Skelton**²³ it was held that:

"The ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words ... The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not filtered by any strict legal rules of construction would draw from the words."

²² Act No. 7 of 2015

²³ Jones v Skelton [1963] 1 W.L.R 1363, 1370-1371

[78] The published auction notices will now be considered. The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants argue that the published notices mean that their financial standing was unsound and that credit should not be extended to them. The question is whether the ordinary, reasonable person in Antigua and Barbuda ascribe the same meaning to these words. In **Bonnick v Morris & others**²⁴ the Privy Council stated:

“The ordinary reasonable reader is not naive; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis, and, also, too literal an approach. The intention of the publisher is not relevant”

[79] Although the notices do not expressly mention the defendants’ financial standing, the fact of publication would lead reasonable persons to infer that a breach of a loan agreement has taken place. A reasonable person could not know whether the Defendants actually borrowed from the Claimant or were merely guarantors. Most persons seeing the notices would reasonably infer that they have either jointly or severally defaulted on a loan. This would of course diminish their reputation in the eyes of the public.

[80] Had these defendants been still liable under the loan agreement and the charge which was originally registered over Parcel 100 the Claimant would have been able to justify publication on the basis that it was merely giving notice of the exercise of its statutory power of sale. However, having found that the defendants were no longer liable, it follows that notices were defamatory. The Claimant therefore cannot rely on the statutory defence of the truth pursuant to **section 20** of the **Defamation Act** as the information contained in auction notices could not be regarded as true or substantially true in circumstances where these defendants were already discharged of any liability to the claimant. Accordingly, the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants are entitled to a declaration that publication of auction notices were defamatory and damages for defamation.

Damages for Defamation

[81] The 3rd, 4th, 5th, 8th and 10th Defendants submit that they should be awarded \$15,000.00 each for defamation. The 2nd and 9th Defendants submit that they should be awarded

²⁴ [2002] UKPC 31 at paragraph 9

\$25,000.00 each as the incorrect information was communicated to financial institutions in response to their loan applications.

[82] **Section 27** of the **Defamation Act** states as follows:

“In determining the amount of damages to be awarded in any defamation proceedings, the court shall ensure that there is an appropriate and rational relationship between the harm sustained by the claimant and the amount of damages awarded.”

[83] **Section 29** lists several factors which the court should consider in determining an award of damages for defamation. One of these is whether “the claimant has suffered no harm and is unlikely to suffer harm.” This factor will be of particular relevance in the circumstances of this counterclaim.

[84] In **John v MGN**²⁵ Sir Thomas Bingham stated as follows:

“The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, *honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.* A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way.”

[85] In defamation cases, the claimant is not required to demonstrate special damage, as the law assumes that some harm to reputation will result from a defamatory statement. The assessment of damages depends on the claimant's existing reputation and the degree to which it has been affected by the alleged defamation.

²⁵ [1997] QB 586 (at 607)

[86] In this case although the publication of the auction notices was widespread none of these defendants have given any evidence of any particular loss or damage. In **Edmond Mansoor v. Eugene Silcott**²⁶ the sum of \$10,000.00 was awarded in similar circumstances where the claimant did not prove any special damage. In that case the offending words were part of a calypso. In **Geffrey Telesford v. Sholto Agard**²⁷ the sum of \$5000.00 was awarded where the defamatory words were uttered to only a few people. In this case the auction notices were published in the Daily Observer on different occasions between December 2017 and February 2018. In terms of circulation this case is closer to what occurred in **Edmond Mansoor v. Eugene Silcott**. Therefore, damages of \$10,000.00 will be awarded to each of these defendants.

Claim by 2nd And 9th Defendants

[87] A brief mention must be made of the 2nd and 9th defendants' allegations that the Claimant gave inaccurate information to Caribbean Union Bank as part of a credit check. They allege that this in turn affected their standing with that institution. In the case of the 2nd defendant this led to his loan application being denied whilst the 9th defendant's loan application was delayed. The claimant denies providing any misleading information concerning these defendants to any financial institutions.

[88] In terms of evidence the 2nd and 9th defendants have indicated what they were allegedly told by unidentified persons from Caribbean Union Bank concerning information allegedly transmitted by the claimant. There is also no written evidence from Caribbean Union Bank which confirms the substance of what information was provided. **CPR Rule 29.5(1)(e)** provides that a witness statement must "not include any matters or information or belief which are inadmissible or where admissible, must state the source of any information or belief."

[89] Having failed to identify the persons at Caribbean Union Bank who they spoke to, the 2nd and 9th defendant's evidence in this regard is inadmissible hearsay and cannot be relied upon. Accordingly, the 2nd and 9th Defendants will receive the same \$10,000.00 which has been awarded to the other Defendants.

²⁶ ANUHCv2010/0209 decided 1st March 2012 (unreported)

²⁷ GDAHCv2018/0149 decided 25th March 2024 (unreported)

Interest

[90] The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants seek interest pursuant to **section 27** of the **Eastern Caribbean Supreme Court Act**. In **Asot Micheal v. Astra Holdings**²⁸ where the court stated as follows:

“The High Court has discretion in proceedings for the recovery of a debt or damages, to award simple interest on any sum for which judgment is given. Interest may be awarded with respect to all or part of the period between the date of the judgment or prior payment. The rate of interest and the period for which it runs are discretionary.”

[91] The rate of interest and the period for which it is awarded are discretionary. In the case of the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendant’s Counterclaim is it appropriate to award interest at the rate of 3% per annum from the date of service of the Counterclaim.

Costs on the Counterclaim

[92] The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants have been successful overall on their Counterclaim and are therefore entitled to costs. In accordance with **Rule 65.5(2)(a)** of the **Civil Procedure Rules 2000** they are entitled to prescribed costs in the “amount agreed or ordered to be paid.” These defendants will therefore be awarded full prescribed costs calculated on the sum of \$166,049.80 which is the total sum of damages awarded to them. This consists of the sum awarded in respect of the unlawful sale of Parcel 185 and the total damages awarded for defamation.

Order

[93] The court therefore orders as follows:

1. Judgment is entered against the 1st Defendant as follows:
 - a. The sum of \$3,533,081.65 in respect of loan number 10695618.
 - b. The sum of \$279,014.24 in respect of loan number 106975466.
 - c. Interest on the loan balances at the rate of 12% per annum from the date of service of the Claim Form trial.
 - d. Interest at the rate of 5% per annum from the date of judgment until

²⁸ Antigua & Barbuda Civil Appeal No. 17 of 2004 (decided 23rd May 2005, unreported) at paragraph 73

payment.

- e. Prescribed Costs calculated on the combined loan balances of \$3,812,095.89.

2. The claim against 6th and 7th Defendants is dismissed and the personal guarantees signed by these Defendants are declared void.
3. The Claimant shall pay prescribed costs of \$7500.00 to the 6th and 7th Defendants.
4. It is hereby declared that the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants are discharged from all liability to the claimant in relation to the loan agreement dated 30th April 2010 and charge instrument RL#2013020931 which was originally registered in respect of land registered as Registration Section: Bendals, Block: 51-1984A, Parcel: 185.
5. The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants are awarded damages of \$96,049.80 for the unlawful sale of the parcel of land registered as Registration Section: Bendals, Block: 51-1984A, Parcel: 185.
6. The auction notices caused to be published in the Daily Observer between December 2017 and February 2017 which mention the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants is declared to be defamatory to the said Defendants.
7. The 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants are awarded damages of \$10,000.00 each in respect of the defamatory auction notices published by the Claimant between December 2017 and February 2018.
8. All other aspects of the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th Defendants claim are dismissed with no order as to costs.
9. The Claimant shall pay interest at the rate of 3% per annum on the sum of \$166,049.80 to the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants from the date of service of the Counterclaim until judgment.
10. Interest pursuant to the Judgments Act on all damages awarded to 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants at the rate of 5% per annum from the date of judgment until payment.
11. Prescribed Costs to the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th defendants calculated on the sum of \$166,049.80.

[94] The court apologizes for the delay in delivery of this decision this was due to the court being engaged in multi-day trials immediately after the supplemental submissions were filed.

Rene Williams

High Court Judge

By The Court

Registrar