

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA & BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUCV 2013/0773

BETWEEN:

**[1] EDWARD HADEED
[2] SIMONE HADEED
[3] CAROL SANGUINETTE
[4] NEXT LEVEL LTD.**

Claimants

-AND-

[1] EASTERN CARIBBEAN AMALGAMATED BANK LIMITED

Defendant

Appearances:

Mr. Kendrickson Kentish for the Claimants
Mrs. Stacy Richards Roach for the Defendant

**2021: June 14th
2023: September 29th**

DECISION

[1] **Drysdale, J.:** On 13th December 2013, the claimants in this matter filed a Claim Form along with its particulars claiming against the defendant bank, Eastern Caribbean Amalgamated Bank Limited (hereinafter "ECAB"), and seeking the following declarations, inter alia:

- (1) A declaration that the intended sale, by the defendant, of the properties described as Registration Section McKinnons Block 45 1696B Parcel 525 and Registration Section Cedar Grove & Crosbies Block 44 1897B Parcel 165 respectively is unlawful, null and void.
- (2) A declaration that the purported variation of the rates of the interest contained in two Charges registered in favour of the Defendant on or about 27th April 2005 and 16th

September 2008 in respect of the properties registered as Registration Section Mckinnons Block 45 1696B Parcel 525 and Registration Section Cedar Grove & Crosbies Block 44 1897B Parcel 165 respectively is unlawful, null and void.

- (3) A declaration that the defendant, in failing to take reasonable steps to sell the lands described as Registration Section Mckinnons Block 45 1696B Parcel 525 and Registration Section Cedar Grove & Crosbies Block 44 1897B Parcel 165 respectively for the best possible price, breached its duty to act in good faith to the claimants.
- (4) An injunction restraining the defendant, whether by itself, its servants or agents from selling, transferring or in any way alienating the second and third claimants' land registered as Registration Section Mckinnons Block 45 1696B Parcel 525 and Registration Section Cedar Grove & Crosbies Block 44 1897B Parcel 165.

Background

- [2] These are the facts as this court finds them.
- [3] The first and second claimants are husband and wife, the third claimant is the mother of the second claimant, thus, the mother-in-law of the first claimant. The fourth claimant is a company owned wholly by the first claimant and incorporated under the laws of Antigua and Barbuda. The first claimant is the director of the fourth claimant company and the second claimant is the secretary of the fourth claimant.
- [4] The defendant is a commercial bank carrying on business in Antigua and Barbuda and provided banking services to the claimants at all material times.
- [5] The second and third claimants are the registered proprietor of land better described as Registration Section Mckinnons Block 45 1696B Parcel 525 (hereinafter "the Mckinnons property"/Paradise view) which is occupied by the third claimant. The third claimant is the registered proprietor of property better described as Registration Section Cedar Grove & Crosbies Block 44 1897B Parcel 165 (hereinafter "the Blue Waters property") which, at the time of these proceedings, were occupied by the first and second claimants as their matrimonial home.
- [6] Sometime in April 2005, August 2008 and September 2008, the first and fourth claimants obtained loan facilities from the defendant bank. A legal charge was placed on the aforementioned properties to secure the payment of the loans.
- [7] The first loan was obtained by the first claimant in the sum of \$400,000.00 XCD. The loan is said to be for the purposes of liquidating a loan at another bank, Antigua Commercial Bank ("ACB"), clearing overdraft checking accounts on the bank's books, assisting with legal fees, and home repairs of his matrimonial home¹. In relation to this loan, the legal charge was placed on Mckinnons or as stated in the Charged document the Paradise View property, for repayment to be made over 180 months thereafter at

¹ See pg 6 of bundle 3.

an interest rate of 9.5% per annum. Interestingly however, there is a facility letter and promissory note signed by the first claimant to the effect that in default of repayment and legal action instituted for recovery interest will be applied at a rate of 18% per annum.

[8] The sum of \$249,027.97 was paid by the defendant to ACB to satisfy the amount secured under charges filed on 28th June 1996 and 31st August 2001, the overdraft checking account was cleared in the sum of \$116,000.00 and the remainder was to assist with legal fees and home repairs.

[9] The fourth claimant had an overdraft facility in the sum of \$50,000.00 with the defendant's bank. In 2008, that sum was increased to \$150,000.00 with a further increase in its overdraft facility to \$550,000.00. The last increase is said to assist in the construction of the home of the third claimant. The first claimant signed the loan on behalf of the fourth claimant under the same terms of an increased interest rate to 18% in the event of default from 10.5% per annum on the sum of \$400,000.00. The Blue Waters property was charged to secure the loan repayment and the charging document was executed by the third and fourth claimant with the defendant bank.

Notice to pay off.

[10] The claimants defaulted on the repayment of their loans and were in substantial default by 2011. Consequently, the defendant instructed their attorneys to issue demands for the outstanding debts and Notices to Pay on 19th April and 26th November 2012. These demands required the claimants to pay off the whole of the outstanding amounts and further advises that the interest will continue to accrue at the rate of 18% and the repayment in default will cause the defendant to auction the properties.

[11] Seemingly, the claimants had failed to satisfy their loan debts pursuant to the Notice to Pay off and the defendant subsequently auctioned the properties for sale. The defendant obtained a valuation report from one Mr. Huburn Edwards, Head of Edwards Management Group Limited to ascertain the true market value and the forced sale value of the two properties. The valuations of the said properties were obtained from Mr. Edwards on 28th May 2013. The Mckinnons' property estimated open market value per the report of Mr. Edwards stood at \$754,329.20, the estimated force sale value was \$603,463.36, and its insurable value was \$379,293.20. The Blue Waters property estimated open market value per the report of Mr. Edwards stood at \$3,401,714.86, the estimated force sale value was \$2,721,371.88, and its insurable value was \$1,970,922.86.

[12] The gravamen of the dispute between the parties is that the claimants took issue with the valuation report of the two properties done by Mr. Edwards, arguing that the properties were undervalued, in particular, the claimants argued that the Blue Waters property has a larger square footage than what was represented on the report, and the inadequacy of the advertising the property thus acting in bad faith, among other allegations. The claimants further took issue with the increased interest rate arguing it is a penalty and thus the Notice to Pay Off is null and void. The defendant does not share that view and retort

that despite being served with the demand letters, the claimants refused to settle their debts thus have not displayed good faith and up to present continues to enjoy the benefits of the properties.

The submissions

- [13] Essentially, the claimants argued three main points before this court, those being (i) the properties owned by the second and third claimants were used as security for loans granted to the first and fourth claimants; however, the third claimant did not benefit from these loans nor was she offered any independent legal advice before executing the securities;... (ii) the Charge Document provided that there would be a default rate of 18%, is a penalty and therefore unlawful; (iii) the price at which the defendant was purporting to auction the property was at an undervalue therefore the defendant breached its obligation to act in good faith.

ISSUE 1 Default interest rate - the interest rate and notice to pay off

Issue: Whether the interest clause contains a secondary obligation and therefore, in law, capable of being classified as a penal contractual clause; if in the affirmative, does it impose a burden on the claimants that is disproportionately severe in comparison to the legitimate interests pursued by the defendant in upholding its principal contractual duties?

The claimant's submission

- [14] Counsel for the claimants vehemently argued that the increased interest rate to 18% in the instance of a default in repayment of the monies borrowed as stated in the Charged documents is a penalty and thus unlawful. Consequently, the Notice to Pay Off debt as served on the claimants by the defendant is null and void.
- [15] To lend support to her argument, counsel cited section 72 (1) of the Registered Land Act ("RLA"), which effectively states, so far as is necessary to these proceedings, that a default payment that persists for more than one month empowers the chargee to serve on the chargor notice in writing to pay the money owing. Counsel further highlighted subsection (3) which provides for instances in which a chargee is entitled to sue for the money secured by the charge, to include instances where the chargor is bound to repay the same. Counsel underscored the proviso to ss (3) which states the following:

Provided that:

- (1) In the case specified in paragraph (a) of this subsection-
 - (a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and
 - (b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;

(2) the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b) of this subsection, notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property.

- [16] Counsel cited section 151 of the RLA which deals with notice to pay off and underscored subsection (a) which stated that the notice shall be deemed to have been served if served on him personally. It is counsel's averment that the default interest rate was agreed upon in the facility letter and relied upon in the Notice to Pay Off. Counsel submits that the increased interest rate is a penalty and is unenforceable. Counsel relied upon the learning in **Recovery of Interest by Peter KJ Thompson, Butterworth, 1985**, page 14 para. 2.07. Where it states the following:

Where a provision is made for a contractual rate of interest and the contract provides in addition that the interest will accrue at a specified higher rate in the case of a default, the latter provision will be struck down as a penalty.

- [17] It is the claimants' position that if any item claimed in the Notice to Pay Off is invalid, the Notice is ineffectual and void. To bolster her argument, counsel for the claimant relied on the authority of **Marshall v Swiss American National Bank**² that interpreted sections 72 and section 151 of the RLA, where the court opined briefly that the procedure laid down in the legislation ought to be followed and not to be ignored and given that the natural following step is the sale of the property, then it is in the court's view incumbent on the chargee to include in such notice the exact sum that is owing at the time when it was served.

- [18] Counsel states that the witness for the defendant gave evidence in court that there was no evidence produced that the third claimant had been served with a Notice to Pay Off. Pursuant to section 151 of the RLA the bank ought to have served her and provided proof of same. Counsel avers that given that an unlawful default rate was stated in the Notice to Pay Off and that the third defendant was not served with the notice in breach of section 151 of the Act, it is submitted that the Notice to Pay Off is ineffectual and that as a consequence, no right to sue the claimants has arisen. It is the counsel's argument that this should be sufficient to dispose of the matter. If the court is not so minded, counsel went on to consider the other issues which will be addressed below.

The defendant's submission

- [19] Counsel for the defendant argues to the contrary and states that clause 1 of the Legal Charge document requires payment of interest 9.5% and 10.5% with respect to the two properties as agreed between the parties. The facility letter executed as between the bank and the relevant parties agree a default interest rate of 18% in both letters. Counsel states that the claimants defaulted and the default interest rate of

² Suit 274 of 1997

18% was applied from the date of default. The interest rate was not varied as averred by the claimants but was an uplift in the default amount already agreed by the parties that was applied in calculating the balance owed. **Lordsdale Finance Plc v. Bank of Zambia**³ applied.

[20] Counsel states further that an uplift or default interest rate is not a penalty and can be properly charged by the bank so long as the increased interest rate operates from the date of default and not retrospectively. Furthermore, the amount payable ought not to exceed the legitimate interest of the innocent party and should not be unconscionable considering the interest of the bank in having the claimants perform the contract. There is nothing before the court on which the court can conclude that the uplift interest rate is unreasonable or unconscionable. Counsel posits that in all circumstances the uplift interest amount charged by the defendant bank was reasonably justifiable, was not unconscionable and met the legitimate interest of the bank in having the facilities paid by the claimants.

[21] Counsel did not proffer any arguments in relation to the notice to pay off.

Law and Analysis

[22] The fundamental principles of contract law underscore the autonomy of parties to negotiate and establish contractual terms freely. This principle grants contracting parties latitude to shape their own agreements without undue interference, which includes financial consequences for breaches. It is a well-established rule that the courts are slow to interfere with clear terms of a contract, and only opt to assist an aggrieved party who freely negotiates contractual terms where there is some element of “illegality, misrepresentation, mistake, incapacity, duress, and frustration. The penalty rule is an admitted common law abrogation of freedom of contract⁴”.

[23] A default interest rate can be punitive, acting as a penalty for late or missed payments, or protective, serving to offset higher risks for lenders. A contractual obligation is a penalty where it serves as a secondary requirement, becoming enforceable only where a primary contractual obligation has been breached and the court has determined that it imposes a detriment which is out of proportion to any legitimate interest of the innocent party in the enforcement of the primary obligations under the contract.

[24] The seminal authority of **Cavendish Square Holding BV v El Makdessi**⁵ refined the law regarding penalty clauses. It established that a clause in a contract will not automatically be considered unenforceable as a penalty just because it requires a party to pay a sum of money upon breach. Instead, the court should focus on whether the clause is a genuine pre-estimate of the loss suffered by the innocent party due to the breach, or if it serves another legitimate purpose (such as deterrence or protection of a

³ [1996] 3 All ER 156

⁴ Pereira CJ in *Reniston Limited v Nedlands Overseas Inc* ⁴ BVIHCMAP2020/0016

⁵ [2015] UKSC 67, [2016] AC 1172.

legitimate interest). If the clause is extravagant or unconscionable in relation to the actual loss suffered, it might be considered a penalty and therefore unenforceable.

- [25] The principle in **Cavendish** has been applied in subsequent authorities in the jurisdiction. In the authority of **Reniston Limited v Nedlands Overseas Inc**⁶ a Court of Appeal decision emanating from the BVI, Pereira CJ applied **Cavendish Square Holding BV** and the learning in **Chitty on Contracts** to expose, quite eloquently, the application of the penalty rule. The court discussed broadly the considerations of the penalty rule where the CJ cited the authority of **Cavendish Square Holding BV v Talal El Mkdessi** and in paragraph 18 stated the following:

‘Firstly, and importantly, a contractual provision will not fall within the purview of the penalty rule if it is a primary or core contractual obligation under a contract. This is because the court under the penalty rule is not concerned with examining the parties’ core obligations under the contract, but is only concerned with the remedies for breaches of those core or primary obligations, which remedies it is asked to enforce.’

- [26] It is pellucid that the penalty rule only concerns those obligations which are secondary. Thus, a term of a contract cannot be a penalty if it is a primary liability. There are some cases where it is not clear from the questioned provision whether the obligation is a conditional primary obligation or a secondary obligation. A conditional primary obligation can be nuanced from secondary obligations; however, the distinguishing feature is whether the obligation is occasioned by a breach of a primary obligation.
- [27] Learned CJ considered the authority of **Lewison on Contracts**, and paragraph 14 of **Cavendish** and stated that primary obligations are those obligations which are conditional upon the happening of some event other than a breach of contract and secondary obligations which are engaged only by a breach of contract⁷. The learned CJ went on to state that ‘the *secondary obligation will usually require the breaching party to take some steps or impose some burden on the breaching party with a view to remedying the breach, including the transfer of property, the payment of a sum as liquidated damages, the payment of interest on a sum owing under a contract, and forfeiture clauses.*’⁸
- [28] Whether a clause is a secondary obligation is usually a question of construction, and the clause must be viewed within the context of the wider provision. Secondary obligations emerge as ancillary commitments that come into effect upon the breach of primary obligations. The Court of Appeal cautioned that the courts should carefully examine the relevant provision and determine its true nature before engaging in the

⁶ BVIHCPMAP2020/0016

⁷ See paragraph [19] of the judgment.

⁸ *Jobson v Jobson* [1989] 1 WLR 1026, CA., *Dunlop Pneumatic Tyre Co. Ltd v New Garage and Motor Co. Ltd* [1915] AC 79., *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752. See *Cavendish* at paragraphs 170, 226 and 227.

penalty rule. The true distinction between primary and secondary obligation is consequential, and the authorities cautioned that the substance of the provision is more relevant than its form.

- [29] Secondary obligations often involve the imposition of certain consequences such as financial penalties and additional actions. These penalties may or may not be enforceable. The rationale is found within the core principles of contract law as parties can agree penalties. The penalty rule pertains to the enforceability of these secondary obligations. It stipulates that secondary obligations, which serve as penalties, must be proportionate to the harm caused by the breach of primary obligations. If a secondary obligation is deemed disproportionate or excessive, it could be unenforceable as a penalty.
- [30] Therefore, the penalty rule safeguards against the imposition of unjust or unreasonable penalties that go beyond what is necessary to compensate for the breach. This principle upholds the equitable balance between the parties' freedom of contract and the prevention of unfair terms.
- [31] In paragraph 23 CJ Pereira states that once the contractual obligation is a secondary obligation capable of being engaged only upon a breach of contract, the court will then examine the secondary obligation in the context of its operation as a remedy for the breach of contract to which it is pegged, and makes a determination on whether the remedy afforded by the clause is proportionate to the breach, justifiable and fair in the circumstances. This is an evaluative exercise to be carried out by the judge having regard to the circumstances of the case.

The Test

- [32] **Chitty on Contracts**⁹ suggests that the true test following **Cavendish Square** is:

‘Whether the party to whom the sum is payable had a legitimate interest in ensuring performance by the other party and the sum payable in the event of a breach is not extravagant or unconscionable in comparison to that interest.’

- [33] Pereira CJ commented on the reformulation of the test to be applied in assessing whether the secondary obligation is a penalty. The learned CJ referred **Halsbury Laws of England** which summarized the Supreme Court reformulation in **Cavendish**, and in paragraphs 26 and 27 stated the following:

‘The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. The correct test for a penalty is whether the sum or remedy stipulated as a

⁹ 33rd Ed, 2019 at para 26-190

consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract.'

[34] The CJ at paragraphs 26- 28 rationalizes the following:

‘26. the question under the second consideration is therefore, whether the secondary obligation imposes a detriment which is exorbitant or unconscionable in the sense that it is out of proportion to any legitimate interest of the innocent party in the enforcement of the primary obligations under the contract.

27. A secondary obligation will not be deemed an unenforceable penalty where its existence can be reasonably justified by the innocent party.

28. An innocent party therefore has the opportunity to justify the imposition of a secondary obligation as a remedy for a breach of contract with evidence of the proportionality of the consequence engaged by the relevant obligation, to the interests of the innocent party in receiving the benefit of that consequence.’

[35] It is not uncommon for loan agreements to provide for a specified default interest rate which surpasses the standard rate and applies when the borrower defaults. The question of whether this elevated default interest rate qualifies as a penalty has been deliberated. The prevailing understanding is that such a default rate does not constitute a penalty, as long as the increased rate reasonably aligns with the heightened credit risk arising from the default. Conversely, however, if the dominant purpose of the uplift in interest is to deter the other party from a breach then this interest rate is an unenforceable penalty¹⁰.

[36] The default interest rate as contracted between the parties is found in the facility letters adduced in evidence by the defendant. Both facility letters are similarly constructed bearing dates 1st April 2005 and 26th August 2008. In the facility letter on 1st April 2005, the interest provision reads as follows:

Interest will be applied at the rate of 9.5% p.a. for the time being, but this is subject to variation in line with the general level of interest rates. In the event of default and legal action instituted for recovery, interest will be applied at the default rate of 18% p.a. for the time being.

The facility letter of August 2008 has an increase in the interest rate from 10.5% p.a. to 18% p.a.

[37] Upon careful analysis of the interest provisions outlined in the two facility letters, in viewing the letters in the wider context of their provisions, and in observing that the interest clause is clear and unambiguous, it is evident that the interest clauses delineate a primary obligation linked to standard interest rates during the loan term and a secondary obligation upon default, triggering an escalated default interest rate of 18%

¹⁰ *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752 *per* Coleman J at pp 763-764.

per annum. This court is entrusted with the pivotal task of scrutinizing whether these secondary obligations, encapsulated within the default interest rates, constitute penalties.

[38] Central to this analysis is the principle of proportionality, the requirement for justification of secondary obligations, and the potential existence of a deterrence motive. The landmark case of **Cavendish Square Holding BV** serves as a guiding precedent, stipulating that courts must ascertain if the secondary obligation imposes an exorbitant or unconscionable detriment in relation to the innocent party's legitimate interest in enforcing primary obligations. Furthermore, the court must determine if the secondary obligation's consequences are proportionate and justifiable within the contextual framework.

[39] Significantly, this examination unveils the absence of credible evidence substantiating an increase in credit risk stemming from default. Additionally, the creditor has not presented any or any adequate justification for imposing the default interest rate. Counsel aside from merely stating that the uplift interest amount was reasonably justifiable, not unconscionable also stated that the interest rate met the legitimate interest of the bank in having the facilities paid by the claimants. This glaring absence of substantiation and justification diminishes the secondary obligation's potential for proportionality and legitimacy. The court underscores that secondary obligations should primarily serve the goal of securing performance or appropriate alternatives, rather than solely deterring breaches. Based on the sparsity of evidence, and the wording of the interest provision especially in the wider context of the instrument, this court is of the considered opinion that the default interest rate of 18% per annum is a penalty. Consistent with the overarching intent of the penalty rule to prevent unreasonable and unjust penalties, this court firmly determines that the imposition of the default interest rate, under the circumstances presented, unequivocally constitutes an unenforceable penalty.

Notice to Pay Off

[40] Counsel for the claimant argues that the defendant company failed to serve the third claimant with a Notice to Pay Off in contravention of the RLA thus invalidating the notice. Section 72 of the RLA instructs the Chargee on the measures to be adopted when a chargor falls in default of payment. The section, so far as is relevant, provides as follows:

“(1) If the 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;”

- [41] Based on the interpretive section of the Act, a "charge" means an interest in land securing the payment of money or money's worth or the fulfilment of any conditions and includes a sub-charge and the instrument creating a charge. A "chargee" means the proprietor of a charge. A "chargor" means the proprietor of charged land or of a lease or charge.
- [42] Based on the evidence, the third claimant is a joint proprietor to McKinnon's property, she is also the sole proprietor of the Blue Waters property and acts as surety in respect of both loans. There is no evidence before this court that the third claimant was served with a notice to Pay Off. Mr Antonio exhibit the Notices to Pay which were served on Mr Edward Hadeed, Next Level Limited and one addressed to both Mr and Mrs Hadeed. For these reasons, the court finds favour with counsel for the claimant that the Notice to Pay Off is invalid.

ISSUE 2 Independent legal advice

Whether in the circumstances the bank was put on inquiry; if in the affirmative, what are the consequential implications concerning the transactions?

Claimant's submissions

- [43] Counsel for the claimants cited **section 64 and section 108** of the RLA to bolster her position that the bank had an obligation to ensure that the second claimant, as a chargor understood the effect of section 72 of the RLA. Counsel stated further that the legislative provisions have significantly altered the common law and do not depend on a plea of Undue influence for its existence.
- [44] So far as is necessary to these proceedings, **section 64** states in part that "*the instrument shall contain a special acknowledgement that the chargor understands the effect of section 72 of this Act and the acknowledgement shall be signed by the chargor*". **Section 108** states that a person executing an instrument shall appear before a prescribed person and the prescribed person shall satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed the instrument and shall complete thereon a certificate to that effect.
- [45] Counsel avers that the conjoin effect of **sections 64, 72 and 108** of the RLA is that a Chargor must be fully informed of the consequences and attendant risk of signing the Charge. The duty was on the Chargee to give independent legal advice to the Chargor.
- [46] Counsel relied on the authority of **George v Daisley et al**¹¹, wherein Mitchel J held the following in para 27 of his judgment:

¹¹ VC 2002 HC 10

'It would have been the duty of the bank to have explained to the common-law wife in the circumstances the implications of the husband giving the bank a legal mortgage over the property. It would further have been the duty of the Bank to recommend to the claimant that she take independent advice before she consented to the granting of the security of the first defendant. It would have been necessary for the bank to ensure that the wife give her informed consent to the granting of security by the husband. To do otherwise than to make such enquiries and to take such care is for the bank to take a great risk.'

- [47] Counsel states that though the execution of the Charge was verified, the Chargee, by its counsel conceded at trial that no independent legal advice was given to the second claimant. Counsel argues that in light of the aforementioned authorities, it was incumbent on the bank to ensure that the second claimant, as a chargor, understood the effect of section 72 of the RLA. This was clearly not done. Counsel is of the opinion that in the absence of independent legal advice, the Charge instrument is ineffectual and void.

Defendant's submission

- [48] Counsel for the defendant opines that the claimant failed to proffer the true consideration for the issue at bar, and the court ought to consider whether there were allegations of undue influence either actual or implied. Counsel argues that the Statement of Claim does not disclose any known cause of action against the defendant. There must be the preceding occasion where the bank was put on enquiry of undue influence, and having constructive knowledge of same has subsequently failed to give independent legal advice to the client.
- [49] Counsel states further that the law of undue influence is well-known and falls into two categories, actual and presumed. "*Presumed undue influence arises out of a relationship between two persons where one person has acquired over another a measure of influence or ascendancy of which the ascendant person takes unfair advantage.*"¹² Counsel argues further that the Statement of Claim appears to allege that the first and fourth claimant exerted presumed undue influence over the second and third claimant, therefore the first and fourth claimant should be the defendants in this matter or at the very least the averment that the legal charges were obtained by their undue influence ought to be alleged and pleaded. It is counsel's view that the claimants' claim cannot stand against the defendant in so far as any purported claim of undue influence and it being fixed with constructive notice is concerned and no relief should be given there.
- [50] Counsel also proffered arguments in the alternative that the bank must be put on inquiry and after the bank is put on inquiry then the onus is on the bank to produce evidence that the vulnerable party has

¹² Halsbury's Laws of England, volume 49 (2021)/4. Para 633.

obtained independent legal advice in order to avoid the security transaction being set aside. Counsel cited the authority of **Barclays Bank plc v O'Brien**¹³ and highlighted the following:

“ ... a creditor is put on enquiry when a wife offers to stand surety for her husband's debts by the combination of two factors; (a) the transaction is on its face not to the financial advantage of the wife, (b) there is a substantial risk in transactions of that kind that in procuring the wife to act as surety the husband has committed a legal or equitable wrong which entitles the wife to set aside the transaction.”

- [51] Counsel also relied on the authority of **Royal Bank of Scotland plc v Etridge**¹⁴, which confirmed O'Brien and elucidated that the category of husband-and-wife transactions as a class is not prima facie evidence of the exercise of undue influence. Lord Nicholls approved the test in O'Brian as to when a bank has constructive knowledge that the husband improperly obtained a wife's concurrence and to outline the steps a bank should take if it were put on enquiry.
- [52] Counsel further cited the authority of **Mahon and Another v. FBN Bank**¹⁵ stating that the court gave examples of a bank being put on enquiry when a loan is made to a husband with the wife acting as a guarantor. One such example can be found in para [51] “... where the loan is to or for the benefit of the husband or his business as distinct from a joint loan to or for the benefit of both the husband and the wife the bank is put on enquiry.” Counsel states that the facts in the instant case do not give rise to a presumption of undue influence.
- [53] Counsel for the defendant argues that both loan facilities which led rise to the legal charge over both properties were to the financial advantage of the second and third claimants on their face, hence the bank was not put on enquiry and there was no presumption of undue influence. It was therefore not necessary to ensure that any independent legal advice was given to the second and third claimants. The said claimants had also confirmed in cross-examination that they were aware that the properties were to be used as security for the loans, for the claimant in relation to the Blue Waters Property which served as the matrimonial home for the first and second claimant and legally owned by the third claimant and had given express approval.
- [54] Counsel underscored the point of the third claimant that she did not expect her properties to be sold as she expected the first claimant to pay the loans. Counsel states that the only complaint of the first and second claimants is that they were not given independent legal advice in relation to the transactions which set of circumstances cannot by themselves form the basis of a cause of action against the defendant.
- [55] Counsel also enjoins this court to take note that the 2008 facility of \$550,000.00 was advanced to the fourth claimant, a construction company that performed the construction work on the Blue Waters

¹³ [1994] 1 AC 180

¹⁴ (No. 2) 2001 UKHL 44

¹⁵ (UK) Ltd 2011 EWHC 1432

property. The principals of the fourth claimant are the first and second claimants and the fourth claimant was not paid for services by any other claimant. Counsel argued that the evidence elicited in cross-examination from Mr. Norris Antonio, witness for the defendant, that the overdraft facility of the fourth claimant was an easy way to advance the facility to allow the completion of the home, that it is necessary to conclude that the fourth claimant was used as a convenient vehicle by the first and second claimants to obtain the loan to improve the property which the claimants owned/resided in. This was done by the first claimant all for the benefit of himself as well as the second and third claimant.

[56] Counsel advances the argument that the 2005 loan was to clear off a balance owed in relation to a previous loan at ACB bank which was secured by the second and third claimant's property located at McKinnon's. The claimants' property at McKinnon's was already encumbered through a legal charge placed on their property by ACB and the monies from the defendant's loan to the first claimant were paid to ACB in satisfaction of the charge securing the debts there.

[57] Counsel concludes that based on the aforementioned, the bank was not put on enquiry and the presumption of undue influence never arose requiring the defendant to ensure that the second and third claimants obtained independent legal advice.

Law and Analysis

[58] The court having carefully considered the submissions put forth by both learned counsel, expresses its gratitude for the insightful arguments and useful authorities presented by the parties. In determining this issue, the court will begin by addressing the preliminary point of disagreement between the parties which has been raised by counsel for the claimant, i.e., whether the language of sections 64, 72 and 108 of the RLA imposes a mandatory requirement on Chargees to provide independent legal advice to Chargors as a precondition for valid transactions. If this view is adopted, then indeed the legislation would have ushered in a transformative change from the common law principle as laid down in **Barclays Bank Plc v O'Brien**.

[59] This question can be sufficiently answered by a close examination of the wording and intent of the legislative provision and their potential interplay in relation to independent legal advice. This court now turns to an interpretation of the sections in question. Section 64 allows a proprietor to charge their land or lease to secure the payment of a debt or other obligations. It requires the instrument to contain a special acknowledgement that the chargor understands the effect of section 72. Section 72 outlines the procedures and remedies available to the chargee when a default occurs. It gives the chargee the right to serve notice for payment or performance and provides for actions such as appointing a receiver or selling the charged property. It also addresses when the chargee is entitled to sue for the money secured by the charge. Section 108 relates to the execution of instruments and emphasizes verification of identity and voluntary execution by a prescribed person.

- [60] The legislative framework in sections 64, 72, and 108 of the Registered Land Act introduces procedural guidelines and safeguards pertinent to the execution, enforcement, and verification of charges. While the provisions underscore the significance of procedural accuracy, acknowledgement of understanding, and verification of identity, this court is not of the opinion that the provisions impose a mandatory requirement on Chargees to ensure the guarantor's receipt of independent legal advice as a precondition for a valid charged instrument. Therefore, the provisions do not depart from the common law principles, thus the common law continues to guide the assessment of transactions involving charges and guarantees. Accordingly, on this preliminary point, the court accepts the assessment of the defence counsel that the legality of the charged instrument is to be assessed by common law principles.
- [61] Interestingly too, counsel for the claimant offered the case law authority of **George v Daisley**, a judgment emanating from St Kitts and the Grenadines in support of her averment of the need for independent legal advice, as is her argument, mandated by the legislation. It is worth mentioning that learned Mitchell J in assessing the legality of the charged instrument in that case, placed no reliance on the legislative provision in this regard but on common law in a dissection of the issues. Thus, this authority does not lend support to her argument, as posited, for independent legal advice.
- [62] In that case, a couple had lived in a common law union as husband and wife. The husband operated a company and desired to increase the company's overdraft facility with the defendant bank. To secure funding, he obtained a mortgage on their jointly occupied property, unbeknown to his wife. The property was solely registered in the name of the husband. The bank did not check whether there were other beneficiaries to the house and only checked the property to assess its economic value and the registry to assess whether it was free from encumbrances. The house was mortgaged with the sole intention of facilitating the husband's company to stay afloat. The company's fortune continued to decline, and the bank extended a further loan to the company thus increasing the mortgage from \$75,000.00 to \$175,000.00. The wife had not been informed of the intention to mortgage the property, had not consented to the granting of the mortgage and had not benefitted from the loaned funds secured by the mortgage. The company exceeded its agreed facility, and the bank exercised its option of sale to recover monies owed. The wife challenged the sale of the property.
- [63] The learned judge had considered and applied replete case law authorities including Barclays Bank plc v O'Brien and it was in those circumstances the court made its pronouncement in paragraph 27 as stated previously. Suffice it to say, the paragraph elicited by counsel does not assist in the case at bar. Whether or not the transaction is valid must be assessed in the circumstances of each case.

Common law

- [64] The seminal authority of **Barclays Bank plc v O'Brien**¹⁶ instructs on the circumstances wherein a creditor has a duty to advise parties on obtaining independent legal advice when entering into a loan agreement secured by a jointly owned property and the potential consequences when the creditor fails to fulfil this duty. In this case, the House of Lords held the following:

'Where a cohabitee entered into an obligation to stand as surety for the debts of the other cohabitee, including the debts of a company in which the other cohabitee (but not the surety) had a direct financial interest, and the creditor was aware that they were cohabitees, the surety obligation was valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor.

If there had been undue influence, misrepresentation or other legal wrongs by the principal debtor, then, unless the creditor had taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor would be unable to enforce the surety obligation because he would be fixed with constructive notice of the surety's right to set aside the transaction.'

- [65] The court indicates that a surety right to set aside a transaction arises when the bank has been put on inquiry, actual or constructive, based on the relationship between the principal debtor and the surety, there has been wrongdoing on the part of the principal debtor which has incited the surety to execute the transaction and the bank failed to fulfil its duty of instructing the vulnerable party to seek independent legal advice or ensure the vulnerable party appreciates the true nature of the transaction. These are the ingredients to be satisfied in order to set aside the transaction.
- [66] In **Barclays Bank**, the House of Lords curated an open list of wrongdoings to include undue influence and misrepresentation. Misrepresentation on the face of it, may often be clear in instances where it occurs. On the other hand, undue influence may pose more problematic. For this reason, the court went on to list the two categories of undue influence, those being actual or presumed, and the classes of relationships wherein undue influence is presumed, consequently causing the bank to be put on inquiry.
- [67] In the case at bar, there is no allegation of misrepresentation or actual undue influence by any of the parties to these proceedings. Thus, the court will embark on an analysis as to whether there was the presence of presumed undue influence in the circumstances, thus putting the bank on inquiry.

Undue influence

¹⁶ 1993 4 All E.R. 417

[68] On page 423 of the judgment, Lord Browne-Wilkinson delineated the category of classes as, class 1 actual undue influence and class 2 presumed undue influence. As it relates to presumed undue influence Lord Brown-Wilkinson stated the following:

‘...In these cases, the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction...’

[69] Lord Browne-Wilkinson went on to state that in class 2 there are two categories of presumed undue influence, class 2A and class 2B. In class 2A there are certain relationships for example (solicitor and client, medical advisor and patient) that as a matter of law raise the presumption that undue influence has been exercised. In class 2B the court pronounces that even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence.

[70] This court accepts the submission of counsel for the defendant that the bank must first be put on inquiry for the duty to arise in the creditor instructing the parties to obtain independent legal advice. This court also accepts the defendant's counsel submission, with necessary qualifications, that the category of husband and wife does not raise the presumption of undue influence. **Etridge** applied. Reason for which will become pellucid in the following.

[71] In **Barclays Bank plc** the House of Lords pronounces on page 423 that “... the relationship of husband and wife did not as a matter of law raise a presumption of undue influence within class 2A ...” The court stated further:

‘Although there is no class 2A presumption of undue influence as between husband and wife, it should be emphasised that in any particular case a wife may well be able to demonstrate that de facto she did leave decisions on financial affairs to her husband thereby bringing herself within class 2B, i.e. that the relationship between husband and wife in the particular case was such that the wife reposed confidence and trust in her husband in relation to their financial affairs and therefore undue influence is to be presumed. Thus, in those cases which still occur where the wife relies in all financial matters on her husband and simply does what he suggests, a presumption of undue influence within Class 2B can be established solely from the proof of such trust and confidence without proof of actual undue influence.’

[72] It is clear from the pronouncement of the court that there are instances where undue influence can be presumed in a husband-and-wife category. This presumptive application is not without more as on the face of it, it must be evident that there is an imbalance in power and the transaction is for the benefit of

the husband alone as opposed to both parties. The House of Lords in **Etridge** did not overturn this principle as stated in **O'Brien** but instead confirmed it. This is evidenced by the court holding:

'(2)(i) A bank is put on inquiry whenever a wife offers to stand surety for her husband's debts (or vice versa). On its face, such a transaction is not to the financial advantage of the wife and there is a substantial risk in such transaction that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction. Although these two factors provide the rationale for the bank being put on inquiry, they do not have to be proved in each case before the bank is put on inquiry.'

[73] In the case law authority of **Mohan and another v FBN Bank (UK) Ltd**, it was also held in part:

' .. whenever a wife is a guarantor of a loan from a bank for her husband's business or she offered to stand surety for her husband's debts and the loan was to or for the benefit of her husband as distinct from a joint loan to or for the benefit of both the husband and the wife, the bank was put on inquiry, all the more so when she was not known to the bank and was volunteered by her husband. If the wife played no part in negotiating financial arrangements with the bank but was asked to become surety for her husband's debts or business the bank ought to be aware of her vulnerability and the risk that her agreement might be procured by undue influence or misrepresentation by the husband. In such circumstances, the bank was put on inquiry even if she was a shareholder and/or director or secretary.'

[74] As intimated earlier, undue influence and misrepresentation also encompass interactions with other parties. The presumptive element is present where the relationship, on its face, has been fostered through commercial ties, such as doctor and patient, solicitor and clients, there exists a fiduciary relationship between the parties. There are certain instances however where the relationship between the debtor and surety is not primarily based on business or financial transactions. Instead, their interaction suggests a relationship that is characterized by personal ties, trust, or some form of non-financial connection between the parties. In these cases, the guarantee has the burden of proving the actual presence of a relationship where the complainant commonly placed trust and reliance on the party who committed the wrongdoing. As a general rule as it relates to 'other persons' the House of Lords in **Etridge** held the following:

"(f) ... bank should regulate their affairs on the basis that they are 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 that he is running by standing as surety. That constitutes a modest burden for banks and other lenders, being no more than is reasonable to be expected of a creditor who is taking a guarantee from an individual. If the bank or other creditor does not take those steps, it will be deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor.

Whether the bank was put on inquiry

- [75] In assessing whether the bank was put on inquiry it is necessary to assess the relationships between the parties and the principal debtors, the purpose of the loan facilities and the level of involvement of each individual in obtaining the loan.
- [76] Evidence for the claimants was given by Mr Edward Hadeed, Mrs Simone Hadeed and Ms Carol Sanguinette who are all parties to the proceedings. The evidence particularly found in their witness statements are all similarly stated, hence there is no need to state the evidence of all claimants.
- [77] The evidence as this court finds it, is that at the time of the challenged transactions Mr and Mrs Heeded were residing together.
- [78] As it relates to the 2005 transaction in question, Mr Hadeed approached the bank for a loan and stand as the principal debtor for the sum of \$400,000.00 plus interest at a rate of 9.5% per annum. The loan was secured by placing a charge on McKinnon's property which is jointly owned by Mrs Hadeed and Ms Carol Sanguinette. The facility letter of 1st April 2005 indicates that this loan was for the purpose of liquidating a loan at ACB in the amount of \$232,000.00. In paragraph [9] Mr Antonio's witness statement, Mr Antonio stated that the McKinnon property was previously charged to ACB as security for loan of \$242,000.00 and that is what was being liquidated. Consequently, the charge of \$898,284.00 was discharged and a fresh charge was drawn up in favour of the respondent bank in the amount of \$400,000.00. This court finds no difficulty in accepting this evidence.
- [79] The further purposes were to clear overdrawn chequing account on the books of the defendant bank in the amount of \$116,000.00, to assist with legal fees in the amount of \$12,000.00, to assist with home repairs in the amount of \$30,000.00, all totalling the sum of \$400,000.00. The court accepts the evidence that the home repairs are for the development of the family home at Blue Waters where the Hadeeds were residing, for which the McKinnon's property was charged.
- [80] This facility letter was singularly executed by Mr Hadeed, though the Charged Instrument was executed by all parties on 27th April 2005. Based on Mr Hadeed's evidence, particularly paragraph [6] of his witness statement, he stated that he negotiated the loan in particular with one Mr Norris Antonio. It is also the evidence of the parties that the Blue Waters property is solely owned by Ms Carol Sanguinette, which the court accepts.

- [81] Mr and Mrs Hadeed's marital relationship is of paramount importance. As spouses, they share a close personal and financial connection. However, their relationship does not inherently raise the presumption of undue influence, as established in *Barclays Bank v. O'Brien*. However, the court notes that Mr Hadeed unilaterally negotiated the 2005 loan and there was limited involvement of Mrs. Hadeed which raises questions about her comprehension and consent. Further in this regard, it also raises the question of Ms Sanguinette's understanding of the loan transactions. The fact that Mr. Hadeed singularly negotiated the loan while Mrs. Hadeed and Ms Sanguinette signed the Charged Instrument suggests a potential disparity in their roles within the transaction.
- [82] On the face of it, in relation to the previous charge on the McKinnon property, there is no evidence as to the purpose of that loan, the only evidence is that it was secured by the McKinnon property. The present loan satisfied this loan debt. What is clear from the evidence is that the defendant's bank did pay the loan amount as stated in order to recharge the property under the new loan of \$400,000.00. No party led any evidence as to who incurred the charges on the overdrawn chequing account with the defendant bank or the purpose of the legal fees and the beneficiary of said fees.
- [83] The repairs being for their family home at Blue Waters underscores the shared interest in the property's development. This is a clear benefit which can be ascribed to both the 2nd and 3rd claimant alike. The court notes however the comparatively nominal sum attributed towards home repairs, the substantially large balance in relation to other matters which on the face of it, unclear to this court as to the true beneficiaries of this arrangement.
- [84] The joint ownership of McKinnon's property by Mrs Hadeed and Ms Carol Sanguinette is noteworthy. It signifies a shared interest in the property's value and raises questions about the true understanding of Ms Sanguinette and Mrs Hadeed's true appreciation of the loan arrangement. The court wishes to indicate its reluctance to ascribe the clearance of the charge at ACB banks to all parties involved as it is one charge being substituted for another charge on the property. For these reasons, the court is of the opinion that it is the bank's duty to ensure both parties understanding and consent when securing the loan with this property. The bank should have been cautious about protecting the interests of both joint owners. For these reasons, the court finds that the bank was put on inquiry in relation to the 2005 loan agreement.
- [85] As it relates to the 2008 transaction in question, Mr Hadeed approached the bank on behalf of Next Level Limited for an increase in its loan facility and borrowed a loan where the fourth claimant stands as the principal debtor for the sum of \$400,000.00 plus interest at a rate of 10.5% per annum. The facility letter of August 26, 2008, stated that the purpose of the loan is to assist with the construction of home located at Blue Waters. Mr Hadeed gave evidence that he had the expressed permission of Ms Sanguinette to charge the property. The third claimant gave evidence that she personally visited the bank to make the arrangements and handed over all relevant documents. The facility letter was signed by Edward Hadeed only. The Charged Instrument was executed on 15th September 2008 by Ms Sanguinette and Mr Hadeed.

- [86] In paragraph [12] of Mr Antonio's Witness Statement, the witness deponed that Next Level Limited was offered an increase in its overdraft facility from \$150,000.00 to \$550,000.00 to assist in the construction of the home of Carol Sanguinette. In paragraph [15] the witness states that the third claimant's property was significantly enhanced by the construction and renovation which was effected using the proceeds of the increased overdraft facility, in particular this increase. The proceeds of the increase were therefore manifestly advantageous to the 3rd claimant as she would have benefitted by way of home or property improvement as a result therefrom.
- [87] It is axiomatic that this transaction was done for the benefit of both parties involved and accordingly, this court finds no difficulty in accepting the position of the defendant that this transaction did not raise the presumption of undue influence. Consequently, the bank was not put on inquiry regarding the 2008 loan facility in question.
- [88] The court finds that there was a duty on the defendant bank to instruct the parties to obtain independent legal advice in relation to the 2005 loan. It is the admitted evidence that the bank failed to bring the 2nd and 3rd claimants' attention to the risk of standing as surety and to ensure they were properly advised. Thus, the bank had breached its duty in this regard.

Consequences of failure to instruct independent legal advice

- [89] It is worth mentioning that the mere absence of procuring independent legal advice does not give a right to a complainant to set aside a transaction without more. There has to be some element of impropriety, or wrongdoing which incited the surety to enter into the arrangement. The bank's lapse in providing guidance and ensuring the surety obtains independent legal advice where needed introduces an element of risk on the bank's part and a complainant, in the appropriate circumstances, may have the equitable right to set aside the transaction.
- [90] In *Mohan and another v FBN Bank (UK) Ltd*, held the following:
- “(3) where the bank was put on inquiry because the wife had offered to stand surety for her husband's debts, the bank was required to take the appropriate steps to bring to the wife's attention the risks of standing as surety and to ensure that she was properly advised. The bank would satisfy its obligation if it insisted that the wife attend a private meeting with a representative of the bank and was told the extent of her liability as surety warned of the risk she was running and urged or, in exceptional cases, required to take independent legal advice. The burden of showing that her consent was procured by undue influence lay on the wife, but if the bank was treated as being put on inquiry the issue for the court was whether there was evidence that the bank had complied with its obligation to warn the wife.”

- [91] Additionally, **O'Brien** on pg. 425 states that “[A]part from this, if the creditor bank has notice, actual or constructive, of the undue influence exercised by the husband (and consequentially of the wife's equity to set aside the transaction) the creditor will take subject to that equity and the wife can set aside the transaction against the creditor (albeit a purchaser for value) ...”
- [92] Based on the foregoing authorities, the second and third claimant has the burden of proving that their acceptance of the liability was procured by the wrongdoing of the first claimant or there is a level of misunderstanding of the loan agreement. The burden would then shift to the defendant bank to state that the bank had done its due diligence in instructing the complainants to obtain independent legal advice.
- [93] Interestingly, neither claimant has alleged any wrongdoing on the part of the first claimant or even misinterpretation of the loan agreements, or any breach of trust to obtain the signature of Ms Sanguinette on the part of Mr Hadeed. The claimants' case in this regard seemingly hinges on the absence of independent legal advice.
- [94] The only argument which has been proffered to this court aside from lack of independent legal advice is that the first and third claimants challenge the charge on the Blue Waters property by arguing that they did not give permission to the bank to charge property in 2008 and were surprised that the bank charged the property in Charge Instrument.
- [95] This court does not find favour in their arguments. The third claimant gave evidence that she personally visited the bank to make the arrangements and handed over all relevant documents. There is no evidence as to what the relevant documents are¹⁷. This court has had the benefit to view the charged instruments and on the first page of the instrument, at the heading directly under the word “Charge” is a description of the Blue Waters property. The court notes however that the execution page of the instrument is on a separate page from that of the rest of the document. There is also a sparsity of evidence as to how the bank had acquired the requisite information of the Blue Waters Property if the claimants' averment are to be believed.
- [96] However, the court places significant weight on the fact that the Blue Waters the Charged Instrument for the 2008 loan was executed by Ms Sanguinette and Mr Hadeed for the Blue Waters property to which Ms Sanguinette is the sole proprietor. The court juxtaposes this Instrument from the 2005 Charged Instrument executed over McKinnon's property which warranted the signature of all three parties namely Mr Hadeed, Mrs Hadeed and Ms Sanguinette. On this premise, this court finds that it is more likely than not that Mr Hadeed and Ms Sanguinette were aware that the property to be charged in relation to the 2008 loan was that of Blue Waters.
- [97] The debts under this heading are not disputed on substantial grounds, namely that the guarantee was procured by the undue influence of Mr Hadeed. In the circumstances and for the reasons stated above,

this court does not find that the second and third claimant has an equitable right to set aside the 2005 and 2008 loan facilities.

ISSUE 3 Obligation to act in good faith in auctioning the property.

Whether the defendant breached its obligation to act in good faith in auctioning the properties?

- [98] The claimants' argument on this issue was rather succinct. Counsel argues that the defendant was in breach of its duty of good faith. Counsel states that it is common ground that in selling a charged property, the defendant has a duty to act in good faith. The claimants contended that the square footage used by the defendant's expert was not accurate and that the property was not adequately described. The defendant's expert also failed to explain the alleged discrepancies adequately or conclusively in the measurements of the property.
- [99] Although the Blue Waters Property was advertised, the advertisement failed to indicate that the property was overlooked or was in close proximity to the Blue Waters Hotel. Counsel avers that the defendant has a duty to state the marketable features of the property. Counsel states further that the defendant did not lead any evidence that the auctioneer received any enquiries or expressions of interest in the property. counsel submits that there should be no sale until a fresh advertisement appropriately advertises the property.

The defendant submission

- [100] In retort counsel for the defendant states that the first claimant gave evidence that the defendant did mention in the advertisement an infinity pool and the fact that the property overlooked the Blue Waters Hotel in Blue Waters St. John Antigua. The defendant denies that there is a flawed report or that there was insufficient advertisement such that the defendant breached its duty to the claimants.
- [101] Counsel argues that the chargee has a duty to obtain the true market value¹⁸ which duty includes ensuring that the property and its attributes were properly described for the purpose of the sale Valuation is not an exact science and in the event of conflict it is for the judge to determine which evidence is preferred. Counsel states that the parties were permitted by order of the Court dated 16th June 2016 to file individual expert reports which the claimant did not comply.
- [102] The expert report filed by the defendant outlines the methodology used in arriving at the square footage of both houses and offers the value of each property. In particular, Mr. Edwards refers to the unfinished state of Blue Waters house and the swimming pools¹⁹. There is no other expert report to contradict any of the evidence in the report of Mr. Edwards. Counsel states that in the final analysis, the valuations of

¹⁸ Caribbean Banking Corporation v Alpheus Jacobs CA 10 of 2004

¹⁹ Cuckmere Brick Co. Ltd and Another v Mutual Finance Ltd. [1971] 2 All ER 633

the property were not flawed and are sufficient for the purposes of guiding an auctioneer on a starting auction price. There had also been mention of porcelain and travertine tiles in the advertisement of the Blue Waters property. In all respect, the advertisement gave a good description of the Blue Waters house for the purpose of obtaining a fair price. There were three (3) advertisements of each property over a period of 3 weeks which was adequate in terms of the period of advertisement and the number of advertisements. Further, there was no sale of the properties so the plea for damages cannot be proved.

Analysis

- [103] Based on the information provided and the court's analysis of the evidence, the court is satisfied with the methodology employed by the expert and accepts that the property valuation was accurate. The court observes that the claimants' opposition to the accuracy of the property's square footage is primarily a mere denial, lacking substantive evidence. On the other hand, the expert's testimony stands uncontroverted, strengthening the reliability of the valuation. In any event the case of **Caribbean Banking Cooperation v Jacobs**²⁰ establishes that valuation is not an exact science but rather a complex matter and therefore establishing negligence requires more than disagreement.
- [104] Despite the claimants' allegations of discrepancies, the court remains unaware of the specifics of these alleged disparities, as they have not been clearly presented. The court is left unconvinced by these general assertions.
- [105] The court determines that, based on the evidence provided and having had sight of the advertisement, the properties were indeed adequately advertised, and concludes that the defendant did not breach their duty in this regard. The arguments put forth by the defendant's counsel are deemed convincing and are embraced by the court.
- [106] However, considering the passage of time and the aforementioned ruling that the Notice to Pay Off should be served on all parties, including the third claimant, the court issues a directive. The defendant is instructed to issue the necessary notice to pay off, re-evaluate the properties, and re-advertise them.
- [107] Accordingly for the foregoing reasons it is hereby ordered as follows:
- i. The notices to pay off issued by the Defendant on 19th April and 26th November 2012 are declared to be invalid.
 - ii. The default penalty rate of 18% per annum contained in the loan facility issued by the Defendant is declared to be an unlawful penalty and void.
 - iii. The Defendant is at liberty to re-issue notices to pay off calculated solely on the interest rates of 9% and 10.5% respectively and to conduct an updated valuation of the properties.
 - iv. All other terms and conditions of the loan facilities remain in full effect.

²⁰ ANUHCv2010/0010

v. Prescribed costs awarded to the Claimants.

Jan Drysdale
High Court Judge

By The Court

Registrar