

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

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2017/0434

BETWEEN:

- [1] TONY HADEED**
- [2] NICHOLAS HADEED**
- [3] JEFFREY HADEED**
- [4] EDWARD HADEED**

Intended Claimants/Applicants

and

ROYAL BANK OF CANADA

Intended Defendant/Respondent

Appearances:

Mr. Kendrickson Kentish for the Intended Claimants/Applicants

Mr. Hugh Marshall Jr. and with him Ms. Andrea Smitten for the Intended Defendant/Respondent

2017: August 21st
October 4th

JUDGMENT

- [1] **WILKINSON, J.:** On 17th August 2017, the Intended Claimants/Applicants (“the Hadeeds”) filed their application for an interim injunction supported by the affidavit of Mr. Tony Hadeed. There was

a certificate of urgency filed and the reason stated therein was that the Intended Defendant/Respondent Royal Bank of Canada ("RBC") intended to sell the Hadeeds' land by public auction on 21st August 2017, i.e. within 4 days of the application.

[2] The Hadeeds by their application sought the following orders:-

1. An interim injunction be granted to the Hadeeds restraining RBC whether by itself, its servants or agents from selling, transferring or in any way alienating the Hadeeds' land registered as Registration Section Cedar Grove & Crosbies Block 44 1897B Parcels No. 471 and No. 472 until further order;
2. The intended auction scheduled for August 21st 2017 be stayed pending the outcome of the trial;
3. The Hadeeds must undertake to file and serve a claim form by ... (sentence incomplete);
4. The Hadeeds are to file an undertaking in damages within 10 days hereof;
5. The return date be set by the Court.
6. Such further and/ or other relief as this Court deems fit.

The grounds of the application were:-

1. Pursuant to Rule 17.2 of the Civil Procedure Rules 2000, the Hadeeds can apply for an interim remedy at any time including before a claim has been made.
2. The Hadeeds have a serious issue to be tried.
3. Damages would not be an adequate remedy for the Hadeeds due to the fact that the intended auction is unlawful and the charged properties should not be sold as the Hadeeds have fully satisfied their indebtedness to RBC.
4. The balance of convenience lies in favour of granting such relief and the Hadeeds are able to compensate RBC for any loss which such injunction may cause in the event that it is later adjudged that the injunction ought not to have been granted.
5. The Hadeeds are brothers and the registered proprietors of land recorded as Registration Section Cedar Grove & Crosbies Block 44 1897B Parcels No. 471 and No. 472 respectively.

6. RBC is a commercial bank duly registered under the Laws of Antigua and Barbuda, with its registered office located at the corner of High and Market Streets.
7. RBC holds a statutory charge pursuant to the Registered Land Act Cap 374, over the aforementioned two parcels of land.
8. The aforesaid statutory charge was registered on or about 18th July 1990 to secure the indebtedness of the mother (Mrs. Omya Hadeed) and predecessor in title of the Hadeeds to RBC.
9. The aforesaid indebtedness was satisfied in full on or about 28th March 2014, however, a discharge of charge has not been prepared and executed.
10. On or about 12th day of February 2015 RBC caused to be served on the Intended Claimants a statutory Notice to Pay off pursuant to section 72(1) of the Registered Land Act Cap 374.
11. By Notices in the Caribbean Times Newspaper dated 11th, 19th and 27th July 2017, RBC advertised the aforementioned land of the Hadeeds for sale by public auction to be held on 21st August 2017.
12. RBC has acted in breach of its legal obligation to act in good faith pursuant to section 75 of the Registered Land Act, and has damaged the commercial reputation of the Hadeeds.
13. RBC intends, unless restrained by this Court, to unlawfully sell the Hadeeds' aforesaid land on 21st August 2017.
14. The Hadeeds fear that their land will be sold in circumstances which are unlawful unless such a sale is restrained.
15. The Hadeeds are seeking an urgent hearing for injunctive relief because of the imminent sale of the property.

The Issues

1. Whether the Court ought to consider the Hadeeds' application for an interim injunction notwithstanding them having failed to file a claim form and statement of claim.
2. Whether the Hadeeds have satisfied the requirements for an interim injunction.

The Evidence

- [3] The application was brought to the Court's attention on the said 17th August 2017, the day filed. Upon reviewing the application the Court ordered that it be served and fixed the inter partes hearing for 21st August 2017, at 9.30a.m. When the matter came on at 9.30a.m, Counsel for RBC informed the Court that RBC opposed the application and asked for the matter to be stood down for 2 hours for RBC to file an affidavit in response. The matter was stood down and resumed 2 hours later. Ms. Patrice Gardner filed an affidavit on behalf of RBC. Submissions by Counsel for the Parties were incomplete by the time fixed for the auction i.e. 1p.m. Counsel for RBC then undertook after receiving an oral undertaking in damages from the Hadeeds to ask the auctioneer to withdraw the parcels of land in contention from the auction. Counsel for RBC pointed out that the auction could not be simply pushed back but would have to be re-advertised. The net result was that the immediate threat of the auction of Block 44 1897B Parcels No.471 and No.472 dissolved. It is agreed that the possibility of an auction of the property is still very much alive as RBC could issue instructions for same at any time if there is no interim injunction.
- [4] The primary facts are not contested. Mrs. Omya Hadeed, mother of the Hadeeds and a business woman who operated an unincorporated business called Ankido Store, at 17th October 1989, by an instrument registered as No.1485/1989 pursuant to the **Registered Land Act** Cap. 374 became the proprietor/owner of Block 44 1897B Parcel No.471 and Block 44 1897B Parcel No. 472 ("Parcels No.471 and No.472") being land situate in the Registration section of Cedar Grove & Crosbies in the parish of Saint John. Each parcel measures 0.35 acre.
- [5] On 18th May 1990, Mrs. Hadeed executed a charge registered as No. 3278/1990 pursuant to the **Registered Land Act** in favour of RBC over Parcels No.471 and No.472 to secure the payment of a principal sum of EC\$750,000.00. The charge contained 6 conditions:- (a) the requirement of comprehensive insurance against loss of whatever kind and as described, (b) against removal or demolition of any building, (c) consent of RBC required to lease the parcels, (d) undertaking to pay all monies due including legal costs and all other charges and expenses, (e) RBC could pursuant to the **Registered Land Act** exercise immediately all powers described therein if Mrs. Hadeed

became bankrupt or made assignment or entered into liquidation, (f) that RBC would not be liable for any involuntary loss which happened in the execution of its rights under the charge, and (g) the right to consolidate charges and tack advances, was reserved to RBC.

- [6] On the incumbrance section of the land registers for Parcels No.471 and No.472, there is recorded for RBC one (1) charge at 18th July 1990 and it was described as being to secure \$790,000.00 (the description is of matters in the charge executed by Mrs. Hadeed). A further charge recorded as a second charge, was in favour of the Antigua Barbuda Investment Bank. This charge is now struck off. There are no other endorsements in the incumbrance section of the registers.
- [7] There was incorporated K.F Hadeed Holdings Ltd ("KFH") on a date not disclosed.
- [8] On 16th April 1994, by an instrument registered as No.11676/1994 pursuant to the **Registered Land Act** KFH became the proprietor/owner of Block 41/2294A Parcel 16 (hereinafter "Parcel No.16") being land situate in the Registration Section of Barnes Hill & Coolidge in the parish of Saint John and measuring 31/2 acres. There is recorded in the incumbrance section of the register 2 charges, the first on 31st October 1994, No.4808/1994 in favour of RBC to secure \$800,000.00, and the second on 15th January 1997, No.213/97 also in favour of RBC to secure \$450,000.00.
- [9] On 17th January 1995, the Hadeeds together with their mother, Mrs. Hadeed, executed a Guarantee and Postponement of Claim ("the guarantee") in favour of RBC to support liabilities up to the sum of \$800,000.00. The guarantee was in standard form. It provided that for valuable consideration, which the borrowers acknowledged, each of them jointly and severally guaranteed payment on demand to RBC of all debts and liabilities present or future, direct or indirect, absolute or contingent, matured or not and owing by KFH. There was provision for demand, the rate of interest, renewal and extension, continuance, that RBC was not bound to exhaust its recourse against others or other security before making claim under the guarantee and so forth. There was nothing in the guarantee attaching it specifically to Parcels No.471 and No.472.

[10] Mrs. Omyma Hadeed died, the Court was not informed of date of death. However, by registered instrument No.507/2000 made on 10th February 2000, Parcels No.471 and No.472 were transferred to the Hadeeds with title as tenants-in-common.

[11] On 9th September 2013, Messrs. Marshall & Co. attorneys-at-law for RBC wrote to Messrs. Lake & Kentish, attorneys-at-law for KFH as follows:

“09th September, 2013

Lake & Kentish
Barristers & Attorneys-at-Law
Long Street
St. John's, Antigua

Attn: Mr. Kendrickson Kentish

Dear Colleague,

Re: K. F. Hadeed Holdings Ltd - Sale of Property

Your fax of 30th July, 2013 is acknowledged. Please accept our apology for the late response as we have just returned to office.

Firstly, we must point out that we have never received the original letter and enclosures. Accordingly, we would not be able to seek the exercise of our Client's further patience as we have no basis upon which to do so.

We now turn to the issue of the Charge on Parcels 471 and 472. The original Chargor was Omyma Hadeed who covenanted with our Client, the Bank, to apply the Charge in respect of “all money which then and subsequently any money which was owing to the Bank”. Omyma Hadeed also executed a Guarantee and Postponement of Claim on the 17th

January, 1996. This is in respect of a facility in favour of K.F. Hadeed Holdings Ltd., which at the time of our Notice to Pay Off stood at \$1,017,077.79.

Our Client is seeking to realize its interest in pursuing its lawful right to enforce that guarantee. Notwithstanding, the death of Omyma Hadeed the current registered proprietors, hold subject to that Charge. It is not an oversight that this Charge has not been discharged, it remains as valid security for debts as aforesaid.

Our Client is moving to sell the property on these lands now. If your Clients do not confirm access within three (3) days the appropriate application will be made to Court.

As always we remain open to any dialogue that will alleviate the need for litigation, but assure you of our intention to realize our Client's interest.

Respectfully,

(signed)

Hugh C. Marshall

Marshall & Co.

Attorneys at Law

cc. RBC Royal Bank of Canada

- [12] The Hadeeds on 28th March 2014, on the letterhead of Tony F. Hadeed and H. Nicholas Hadeed wrote to RBC as follows:-

"March 28, 2014

Royal Bank of Canada

High and Market Streets

St. John's, Antigua

Attn: Ms. Patrice Gardner

Dear Ms. Gardner,

In our letter of February 3, 2014, we had proposed to pay you a lump sum amount of EC\$500,000.00, upon the sale of our property in Trinidad. In our meeting of February 18, 2014 you requested that the lump sum payment be EC\$600,000.00. We agreed to this, however it should be noted that in the letter from Marshall & Co. dated October 16, 2013, the pay-off balance on Ocean View Place Account No. 207-110-8 was EC\$30,426.38. We have since pre-paid EC\$25,600.74 towards this account. Now we are enclosing FCIB cheque No. 00103 in the amount of EC\$4,825.64 to clear this account balance. Therefore, this amount of EC\$30,426.38 must be subtracted from the EC\$600,000.00.

The amount remaining from the EC\$600,000.00 payment is therefore EC\$569,573.62. We are presently enclosing payments today as follows:

1. FCIB cheque No. 00104 in the amount of EC\$419,114.89, for Ankido Store Account No. 100-170-0, as full settlement for the principal amount of EC\$377,794.40 and reduced interest in the amount of EC\$41,320.49.
2. FCIB cheque No. 00105 in the amount of EC\$126,650.82, for K.F. Hadeed Holdings Overdraft Account No. 107-111-7 principal amount of EC\$111,479.39 and reduced interest in the amount of EC\$15,171.43.
3. FCIB cheque No. 00106 in the amount of EC\$23,807.91, to be paid on the K.F. Hadeed Holdings principal Loan Account No. 3303897 with a principal amount listed as EC\$752,004.79.

(3.a) The principal balance of EC\$728,196.88, plus the reduced interest of EC\$157,974.91 with the total of EC\$886,171.79 will be paid as a restatement of the Loan Account No. 3303897 at 9% reducing balance, over 15 years with a maximum monthly repayment of EC\$10,000.00, EC\$4,000.00 monthly rent from Ocean View Place and EC\$6,000.00 per month from the Directors' Businesses.

(3.b) We would like to include Marshall & Co.'s collection fees in the amount of EC\$60,000.00 plus the auditioneer fees once presented to us for approval and payment.

In consideration of the above payments, we require the following:

- a. Full release of the charge on the property listed a Block 44 1897B
Parcels No.471 and No.472.
- b. Maintain as active the operating accounts for Ocean View Properties
Account No. 207-110-8, Ankido Store Account No. 100-170-0 and K.F.
Hadeed Holdings Account No. 107-111-7.

Both parties agreed to the above amounts, terms and conditions.

Sincerely yours,

K.F. Hadeed Holdings Ltd.

(signed)

Tony F. Hadeed
Director

(signed)

H. Nicholas Hadeed
Director

(signed)

Witness

Royal Bank of Canada

(unsigned)

Acting Country Manager

Patrice Gardner (signed)

Acting Loans Manager

(signed)

Witness

[13] The cheques referred to at items 1, 2 and 3 were disclosed together with another cheque No.103 dated 25/3/14 for \$4,825.64. It is not contested that RBC received the payments described.

[14] Approximately 10 months later, on 3rd December 2014, Messrs. Marshall & Co. issued a demand letter to the Hadeeds which stated:

"3rd December, 2014.

To: Tony Hadeed, of Crosbies
Nicholas Hadeed
Jeffrey Hadeed
Edward Hadeed
The Estate of Omyma Hadeed

Dear Sirs,

**Re: Guarantee of Facilities Overdraft: 1071117 and Loan Account
3303897 i.n.o KF Hadeed Holdings Ltd**

We confirm our representation of RBC Royal Bank of Canada of High and Market Streets in the City of Saint John, in the State of Antigua and Barbuda. This demand is made following our earlier demand of 18th June 2012 and your subsequent part payment.

Under a deed of Guarantee dated 17th January 1995 you all guaranteed the repayments of advances made to K.F. Hadeed Holdings Limited to the principal amount of \$800,000.00.

Under a further deed of Guarantee dated 12th December 1996 you, Tony Hadeed, Nicholas Hadeed, Jeffery Hadeed and Edward Hadeed further guaranteed the repayment of advances to the K.F. Holdings for the further principal sum of \$450,000.00.

At your request our Client extended to the Company certain facilities namely;

- An overdraft on Account 1071117 which currently stands at **\$61,001.73** with a daily interest accrual rate at **\$7.39**.
- A loan on account 3303897 which currently stands at **\$1,158,833.88** with a daily interest accrual rate at **\$226.63**

Further in accordance with the terms of the advances and the security instruments our Clients have incurred cost in pursuing the recovery of these advances currently at **\$13,056.11.**

In spite of your previous undertaking to pay **\$10,000.00** monthly no sums have been paid and these accounts remain in significant default. The obligations under the guarantees are joint and severable, accordingly each of you has an obligation to settle or cause the entire debt to be settled in full.

At this time, and in view of the above, we now **DEMAND** payment of the said combined outstanding amounts of **\$1,232,891.72** together with a collection fee of 10% being **\$123,289.17** being a total of **\$1,356,180.89** respectively on or before **Friday 19th day of December 2014.**

Should you not have liquidated these amounts by the stated date, please be advised that we will be forced to commence foreclosure proceedings resulting in the sale of your property to liquidate your total outstanding debts.

We trust such action will not become necessary.

Yours sincerely,

(signed)

Hugh C. Marshall

Marshall & Co.

Attorneys-at-Law

- [15] At 12th February 2015, Messrs. Marshall & Co. on behalf of RBC issued pursuant to the **Registered Land Act** a NOTICE TO PAY OFF DEBT and which referred to Parcels No.471 and No.472. The notice was addressed to the Hadeeds and the Estate of Omyma Hadeed. The notice stated:

'WE, ROYAL BANK OF CANADA require you Tony Hadeed, Nicholas Hadeed, Jeffrey Hadeed, Edward Hadeed and the Estate of Omyma Hadeed jointly or individually as guarantors of the debt of K.F. Hadeed Holdings LTD to pay us forthwith the sum of \$1,375,230.12 owing at the 16th February, 2015, being ...

AND WE GIVE YOU NOTICE that if such sum is not paid within three (3) months of the service on you of the NOTICE hereof or within three (3) months of the first date of publication in a local newspaper of the Notice hereof we shall SELL the above-named property presently registered in your names by virtue of the said Charge and Section 72(2) (b) of the Registered Land Act, Cap. 374, default having been made on the Demand made under the Guarantee dated the 12th December 1996 and subsisting for more than 30 days.

Dated the 12th day of February 2015.

(signed)

Marshall & Co.

Solicitors for and on behalf of

The Royal Bank of Canada.”

- [16] RBC published an auction notice by way of 3 consecutive weekly advertisements on 11th, 19th and 27th July 2017 in the Caribbean Times newspaper, property to be auctioned was described as Parcels No.471 and No.472 together with the buildings thereon.
- [17] Aside from the documentary evidence cited above, the Hadeeds deposed that Mrs. Omyma Hadeed obtained a business loan on 18th July 1990, from RBC and it was this loan that was secured by the charge over Parcels No.471 and No.472. On her death, they inherited her business and assumed responsibility for her loan. Over the years further loans by RBC were tacked onto the original loan but they were never recorded in further or supplemental charges on the Land Registers.
- [18] According to the Hadeeds, “family property” situate at the Republic of Trinidad & Tobago was sold and utilizing those funds the Hadeeds satisfied the loans secured by the charge of Mrs. Omyma

Hadeed over Parcels No.471 and No. 472 in full on or about 28th March 2014. The release of the charge was not prepared by RBC and so the 2 parcels remained charged.

- [19] Mr. Hadeed deposed that all of the Hadeeds who are parties to the suit have a beneficial interest in KFH and that the debts of KFH were secured by Parcel No.16 which is owned by KFH.
- [20] Mr. Hadeed deposed that the Hadeeds ignored the Notice to Pay Off Debt issued at 12th February 2015, because they were of the view that the loan which was secured by the charge over Parcels No.471 and No.472 had been paid off, and that the KFH loans had nothing to do with Parcels No.471 and No. 472.
- [21] Mr. Hadeed further deposed that they had received legal advice and were advised that since in excess of 2 years had elapsed between service of the Notice to Pay Off Debt, and the proposed auction, that RBC would be acting in bad faith if it attempted to exercise its power of sale without issuing a fresh notice.
- [22] Mr. Hadeed also deposed that RBC also breached its duties to act in good faith when it sought to exercise its power of sale in a situation where no money was owed in relation to the security of Parcels No.471 and No.472.
- [23] Mr. Hadeed deposed that the advertisements damaged the Hadeeds' commercial reputation as the notices in the newspaper imputed that they were persons who did not pay their debts and or were not creditworthy.
- [24] Ms. Patrice Gardner in her affidavit on behalf of RBC deposed that she is the manager of special loans in the Eastern Caribbean. She is based at RBC's main branch at High Street branch, St. John's, Antigua.
- [25] Ms. Gardner recited that Mrs. Omya Hadeed had executed a guarantee in support of the loan facility to KFH and that the guarantee was supported by the charge on Parcels No.471 and No.472.
- [26] Ms. Gardner further deposed that although Mrs. Hadeed was deceased the charge executed by her remained in force and more recently, after persistent delinquency a notice of demand on the guarantors was made and remained unanswered. She says that it was only after the Hadeeds failed to respond in any manner whatsoever to the notice of demand was a Notice to Pay Off issued against the Estate of Mrs. Omya Hadeed.

- [27] Ms. Gardner also deposed that she had observed in the Hadeeds' affidavit the assertion that there was an agreement to release the charge. This she says is untrue as it was clearly expressed to the Hadeeds via their attorneys-at-law that Mrs. Hadeed had executed a guarantee under which RBC intended to proceed. She said that it was noteworthy that the Hadeeds had made no mention of this.
- [28] Ms. Gardner deposed she had been informed by RBC's attorneys-at-law that subsequent debts were tacked on and consolidated under the charge as expressly provided for by clause 7 in charge.

The Law

- [29] A preliminary issue raised by Counsel for RBC was whether the Court ought to consider the Hadeeds application for interim injunction notwithstanding them having failed to file a claim form and statement of claim. Counsel says in effect that the Hadeeds had notice of RBC's intention to pursue its rights for recovery of payment over time because of letters exchanged between Counsel for the Parties, a notice to pay off having been issued and ignored, and notices of the auction published in the newspaper, the first such publication being in excess of 31/2 weeks before the filing of the application.
- [30] The **Civil Procedure Rules 2000 ("CPR 2000")** rule 17.2 (1) provides that an order for an interim remedy may be made at any time including after judgment or before a claim has been made. Rule 17.2(3) prescribes the circumstances as to when the Court may grant an interim remedy before a claim is made and it is only if (a) the matter is urgent, or (b) it is otherwise necessary to do so in the interests of justice. **CPR 2000** further provides at rule 17.2(5) that where the Court grants an interim remedy before a claim has been issued, it must require an undertaking from the claimant to issue and serve a claim form by a specified date
- [31] **The Caribbean Civil Court Practice 2011** at Note 14.29¹ on the matter of seeking an interim remedy before a claim has been made states:

¹ Pages 175 and 176

“Generally the court will consider that it is desirable to grant this relief before a claim has been made in circumstances where there is an appreciable risk that the party who was to be restrained from doing a forbidden act would, if put on notice, do that act before any appropriate relief could be obtained. In such circumstances, not only would the court be prepared to grant an interim remedy before a claim has been made but would be prepared to do so without the party to be restrained having been given notice of the proceedings or the application.”

[32] At England the relevant rule on the possibility of an interim order before the claim is filed is rule 25.2(2)(b). **The White Book Service 2013** Vol. 1 at paragraph 25.2.4 it is stated:

“The general rule is that an order for an interim remedy may be made at any time; but the court may grant an interim remedy before proceedings have been started only if (i) the matter is urgent, or (ii) it is otherwise necessary to do so in the interest of justice (r.25.2(2)(b))....

Strictly speaking, timing and urgency are quite separate matters (and both are separate, from the question whether application should be made on notice or not). However, it is not surprising that, at least in relation to some interim remedies, they should be mixed.

Circumstances can arise when it is in the interests of justice that a person should be able to obtain an order for an interim remedy before beginning their claim, even though that remedy is not specifically designed for use before a claim has been made.

In terms, a finding of urgency is no longer essential for the granting on an interim injunction. Further, other forms of interim relief can be denied on the ground that they are not urgent. It could be argued that no harm would be done if the urgency rule were deleted entirely from r.25.2 (2) (b), since if the claims are urgent, it is in the interests of justice that they should be granted....When an application for an injunction is made before the claim form has been issued, the applicant will be required to undertake to the court to issue a claim immediately....”

[33] In regard to the substantive matter of the interim injunction, **CPR 2000** rule 17.1(b) provides the Court with the authority to grant an interim injunction. The applicable principles to be applied in assessing whether or not to grant an interim injunction are still to be found in the case of **American**

Cyanamid Co. v. Ethicon Ltd². At this juncture the Court is not justified on embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of anyone of the Party's case. The matters to which the Court is to have regard, must confine itself and must be satisfactorily answered are:

- i. the applicant has established a serious issue to be tried;
- ii. damages are not an adequate remedy;
- iii. the balance of convenience lies in favour of granting such relief (that is, the grant of an injunction will do more good than harm); and
- iv. the applicant is able to compensate the respondent for any loss which such injunction may cause him in the event that it is later adjudged that the injunction ought not to have been granted.

[34] On questions raised by the Court to Counsel for RBC, section 81 and 82 of the **Registered Land Act** on tacking are relevant. They provide:-

"81 (1) Provisions may be made in the charge for a chargee to make further advances or give credit to the chargor on a current or continuing account, but unless that provision is noted in the register, further advances shall not rank in priority to any subsequent charge except with the consent in writing of the proprietor of the subsequent charge.

(2) Except as provided in this section, there is no right to tack."

82. A chargee has no right to consolidate his charge or any other charge unless the right is expressly reserved in the charges or in one of them and is noted in the register against all the charges so consolidated."

Findings and analysis

² [1975] 1 AER 504.

- [35] In regard to the preliminary issue raised by Counsel for RBC, the Hadeeds' failure to file their claim form and statement of claim together with their application, as the Court understands Rule 17. 2, the learning cited from **The Caribbean Civil Court Practice 2011**, and the **White Book Service 2013**, the Court is required to not only look at the matter of what would qualify as a matter of urgency but also what it ought to do in the interest of justice. It appears therefore, that even if the Court were to agree with Counsel for RBC that the Hadeeds ought to have known based on the letters exchanged between Counsel for the Parties, the notice to pay off, and notices of the auction published in the newspaper, the first being in excess of 31/2 weeks before the filing of the application, that the Court nevertheless has to look at the matter in the round in the interest of justice and not simply whether there has been an abuse of process in not issuing the claim form and statement of claim prior to or at the same time as the application.
- [36] The Court having considered all the evidence before it, is of the view that in the interest of justice, that it will not strike out the application because the Hadeeds failed to file their claim form and statement of claim either prior to or simultaneously with their application. The Court's view is elaborated on in its discussion of the substantive issue of the application.
- [37] In regard to the second and substantive issue, the Court believes that the starting point is setting out its position on the charge over Parcels No.471 and No.472 executed solely by Mrs. Omyma Hadeed on 18th May 1990, and the guarantee executed by Mrs. Omyma Hadeed together with the Hadeeds on 17th January 1995, that being almost 5 years later.
- [38] RBC's Counsel strenuously urged and argued that the guarantee was supported by the charge and this was so notwithstanding that (a) the charge was executed by Mrs. Omyma Hadeed almost 5 years prior to the guarantee, (b) the guarantee made almost 5 years post the charge did not include any reference to the charge so as to incorporate it and show that the guarantee was supported by the charge, and not merely an "open" guarantee, (c) the guarantee could stand on its own as good and viable security without the charge, and (d) KFH for which the guarantee was made, did not exist at the time the charge was made and there was no evidence that KFH was even being contemplated when the charge was made.
- [39] RBC's Counsel said that RBC relied on clause 7 of the charge which provided expressly for tacking, and that tacking would be in relation to any existing and future liability.

- [40] On RBC's Counsel's submission of tacking on the charge made by Mrs. Omyma Hadeed 5 years prior to the existence of KFH for the benefit of KFH, the Court inquired of Counsel if RBC had any document to show that tacking on the charge could occur for the benefit of KFH, a company that did not exist at the time of the charge? His response was that RBC relied on the guarantee.
- [41] Counsel further submitted that in order to further tack based on the charge, there was no specific requirement other than the express provision in the charge and everything else would rest upon what the Parties intended at the time and in the scheme of things, this was what made commercial sense.
- [42] While the Court agrees with Counsel for RBC on the basic premise of tacking of existing and future liabilities, the Court must disagree with Counsel for RBC that the charge in the instant case can be in any way viewed as somehow in support of the guarantee which was for the sole benefit of KFH. The Court is of the view that Mrs. Omyma Hadeed's charge being made first in time and when only Mrs. Omyma Hadeed was operating the unincorporated business of Ankido Store, then any tacking pursuant to section 81 of the **Registered Land Act** could only be in relation to a current or continuing account held by Mrs. Omyma Hadeed unless there was something in writing providing for tacking of Mrs. Hadeed's charge for the benefit of the later incorporated entity, KFH.
- [43] Secondly, as the Court sees it, even if the Court is wrong on its interpretation of section 81, RBC's position must fail because the charge was made 5 years prior to the guarantee and there was no reference in the later guarantee to incorporate the charge. The Court feels supported in its view that if the charge was to support the guarantee then it ought to have been recorded therein by referring to **The Encyclopedia of Forms and Precedents**³ Form 9, a precedent about a guarantee regarding money lent or advanced with a charge as security. Form 9 amongst its other recitals provides the following:

"2. I will deposit immediately in your hands the [security or securities referred to in the Schedule to this Guarantee, ('the [Security or Securities]')] as collateral security for the loan until the repayment or satisfaction of it with interest at the rate of ...% a year.

3. The [Security or Securities] are charged by me with the payment of the loan and interest and shall not be sold or further charged or otherwise disposed of by me in any way without

³ Butterworths London, 5th edition 2000 Reissue, Vol. 17(2) p. 364-365.

your consent in writing first obtained so long as anything shall remain due to you in respect of the loan or from me under this Guarantee.”

4. I will whenever required by you to do so execute at my own expense [a proper transfer or proper transfers] to you of [so much or so many] of the [Security or Securities] as [is or are] capable of being transferred together with the power of sale and all other necessary powers for securing and enforcing the repayment of the loan and interest.”

- [44] There is also the matter of legal identity and entity. The Court bearing in mind the legal identity of Mrs. Hadeed for the purpose of conducting business, and the legal entity of KFH for the same purpose, believes that if one legal entity wishes to support another legal entity then same must be spelt out in writing. RBC is not naïve in its dealings, it is an international bank of global reach and experience.
- [45] The Court relying on (a) its interpretation of section 81 and that being namely that a charge for Mrs. Omyma Hadeed in her personal capacity could not be tacked for the benefit of KFH unless it was provided for in writing, (b) on the precedent in Form 9, which would require the guarantee to state that it was supported by the charge of Mrs. Omyma Hadeed, and (c) the simple fact that the charge was executed approximately 5 years before KFH was even incorporated, is of the view and holds that the guarantee is not supported by Mrs. Omyma Hadeed’s charge. There can be no implied “cross fertilization”.
- [46] The next matter for its consideration under the second issue is the letter of 28th March 2014. What is its effect? Based on RBC’s Counsel’s letter dated 9th September 2013, there was dialogue between Counsel for both Parties. Then approximately 6 1/2 months later, there was the letter of 28th March 2014.
- [47] The letter of 28th March 2014, which was written by the Hadeeds suggest that first, the Hadeeds had proposed to pay EC\$500,000.00 against their various debts and that of the Ankido Store and then RBC counter proposed the sum of EC\$600,000.00 and the Hadeeds agreed to pay the \$600,000.00. The letter breaks down how the \$600,000.00 was to be applied to the various loans and states that:

“In consideration of the payments, we require the following:

(a) Full release of the charge on the property listed a(s) Block No.44 1897B
Parcels No.471 and No.472.

(b) Maintain as active the operating accounts for Ocean View Properties

Both parties agree to the above amounts, terms and conditions.”

[48] The terms of the letter were clear and some specified action was required on the part the Hadeeds and RBC.

[49] The letter was signed off by 2 of the Hadeeds, Mr. Tony Hadeed and Mr. H. Nicholas Hadeed and Ms. Gardner for RBC. At this juncture it appears to the Court that the matters set out in the letter became a contract between the Parties awaiting execution and so was to be enforceable by either Party.

[50] One of the fundamental rules about a contract is that there must be consideration, this is necessary for there to be the formation of a valid contract. And the consideration must be valuable consideration, a benefit to the promisor or a detriment to the promisee. It is the price for which the promise in the contract is bought. In **Chitty on Contracts**⁴ it is stated:

“**182. Promisee must provide consideration.** The rule that “consideration must move from the promisee” means that a person can only enforce a promise if he himself provided consideration for it.

183. Illustrations. The requirement that consideration must move from the promisee is generally satisfied where some detriment is suffered by him: e.g. where he parts with money or goods, or renders services, in exchange for the promise.”

[51] The Hadeeds say they executed their part of the contract by paying the \$600,000.00, the price of the contract. There is no denying from RBC that the payments set out in the contract between the Parties were received and made in or about 28th March 2014. RBC has not and or refuses to release Parcels No.471 and No.472 pursuant to the contract.

[52] Returning to the requirements and threshold that must be reached as laid out in **American Cyanamid Co.**, and having regard to the Court’s position and view on the guarantee and the

⁴ Sweet & Maxwell, 26th edition Vol.1

charge, and it being that they are not inextricably tied together nor does charge supports the guarantee, and having regard to the Court's view that the letter of 28th March 2014, is a binding contract between the Parties and of which the Hadeeds have provided consideration by way of the payment of \$600,000.00 and so executed their part of the contract and RBC has yet to do so, the Court believes that the Hadeeds have established the first requirement, that there is a serious issue to be tried.

[53] The Court now moves to the second consideration of whether or not damages would be an adequate remedy. In this regard the Court reflects on Lord Hoffman's statement in **National Commercial Bank Jamaica Ltd. v. Olint Corp Ltd.**⁵:-

"17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irreparable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other....

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is, the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

[54] The Court having decided that the Hadeeds raised a serious question to be tried, then bearing in mind the learning cited, and weighing the special consideration usually given to land and its uniqueness, the Court is minded to grant the interim injunction. As the Court sees it, if on trial RBC succeeds, then while its option to sell Parcels No.471 and No.472 may have been delayed, the

⁵ Privy Council Appeal No.61 of 2008.

option to propose another auction would not be lost to RBC. Whereas if the Court were to consider damages a satisfactory remedy, the Hadeeds' option to continue own Parcels No. 471 and No. 472 and acquire income from same would be loss to the Hadeeds forever.

[55] Moving on to the consideration of whether the balance of convenience lies in favour of granting the interim injunction, the Court having taken the view, that there is a serious issue to be tried, and that damages is not an adequate remedy, is of the view that the balance of convenience lies in granting the interim injunction.

[56] As to the consideration of whether or not the Hadeeds will be able to compensate RBC, should the Court be wrong in granting the interim injunction, the option to auction may be delayed by the grant of the interim injunction but it remains a viable option for RBC. In addition RBC still has a charge on KFH's Parcel 16 to support the KFH loan. It appears to the Court that there is little chance of RBC not being fully compensated.

[57] Having regards to the matters addressed by the Court, the Court is of the view that it ought to exercise its discretion in favour of granting the Hadeeds the interim injunction sought. The usual undertaking as to damages by the Hadeeds will be recited in the recitals of the perfected order.

[58] Court's order:

1. It is hereby ordered and directed that RBC by its directors, officers, servants or agents or howsoever otherwise be restrained, and an injunction is hereby granted restraining RBC from in any way alienating the Hadeeds land registered as Registration Section Cedar Grove & Crosbies Block 44 1897B Parcels No.471 and No.472 until after trial of this action or until further order.

2. The Hadeeds are to file their claim form and statement of claim within 7 days from date of this judgment.

3. The suit is to now follow its usual course pursuant to CPR 2000 and proceed to case management before the Master.

4. The costs of this application is reserved.

Rosalyn E. Wilkinson
High Court Judge

CLAIM NO: ANUHCV 2017/0434

By the Court

Registrar