EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: AXAHCV2026/0008

BETWEEN:

CONCH BAY DEVELOPMENT LIMITED
First Claimant/ Applicant

GEORGE LAKE
(in his capacity as Executor of the Estate of Dame Bernice Lake KC, deceased)
Second Claimant/ Applicant

GEORGE LAKE
(in his capacity as Lawful Attorney for Cuthwin Lake OBE)
Third Claimant/ Applicant

LUCINDA LAKE-MICHAEL
Fourth Claimant/ Applicant

LORNA ROGERS
Fifth Claimant/ Applicant

-and-

NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED
Defendant/ Respondent

Before: His Lordship, The Honourable Justice Ermin Moise

Appearances:

Mr. Mr. Kendrickson Kentish KC, with him Mr. Kerith T. Kentish, for the Applicants.
Mr. Thomas Astaphan KC, with him Mrs. Tonae Simpson-Whyte for the Rrespondent

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2026: March 4
May 29

JUDGMENT

[1] **MOISE, J**.: This is an application for an interim injunction. On 27th February 2026 the court granted a temporary injunction against the auction by the respondent of various parcels of land belonging to the claimants. With a truncated timetable, the matter came on for a full hearing on 4th March 2026, at which point the court heard and considered extensive submissions from counsel for both sides on whether the injunction should continue.

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[2] Before addressing the facts of this case, it is important to highlight a number of issues raised by the court and the parties in relation to the nature of such applications. The first is that it has become relatively common for owners of mortgaged property to seek injunctive relief from the court against a bank on the eve of an auction, with little time for the court to properly and adequately address the substance of the issues raised. As will be observed in my assessment of the legislation later on in this judgment, there is a notice period required prior to the mortgaged property being placed on auction. In addition to this, the auction is often advertised publicly. Yet, a practice is emerging where the court is being called upon to interfere with the mortgagee's right to pursue the sale of the property on the day before the auction and, at times, even the morning of the auction itself.

[3] Given that the jurisdiction which the court is called upon to exercise is discretionary and based on equity, something must be said about the delay in bringing such applications before the court and the very basis upon which such applications are made in the first place. In fact, it is perhaps equally important for the court to be circumspect in ensuring that the approach taken to such matters does not interfere with sound commercial principles and that clarity is brought to a critical area in our financial markets. I echo the sentiments of Gonsalves-Sabola CJ in the case of **American British Canadian Motors Ltd et al v Imperial Life Assurance Company of Canada**[1] where the following was noted:

> ***"A mortgagor, fat with the mortgagee's funds, who seeks to avoid the mortgage instrument when the power of sale it confers is sought to be exercised, has no right to come empty-handed to court to restrain the mortgagee. Had the rule been otherwise, it requires but little imagination to foresee how a succession of defaulting mortgagors, temporizing with technical objections, could employ the interlocutory injunction to constipate the cash flow in the mortgagee's business and frustrate its normal course, with all the serious implications that that entails."***

[4] In my view, access to the courts should never be fettered for those who are at risk of injustice against financial and other institutions who are acting in bad faith. However, in equal measure, the courts

[1] (1990 -1991) Carib Comm LR 258, 261

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should not operate as an obstacle to sound commercial efficacy as there are broad implications for financial institutions if they face an uphill and insurmountable battle in exercising the power of sale in relation to debts that are unlikely to be recovered otherwise.

[5] As was noted and acknowledged in this case, not only has there been a breach of the terms of the various loans, in that they have, for the most part, not been paid for a considerable amount of time, but the bank also has incurred the costs of serving notice and advertising the auction. All of this takes place in circumstances where it is clear, on the face of it, that the bank has suffered a loss in the lending of funds to the borrowers. In fact, one can take judicial notice of the fact that the two institutions which initially granted these loans are now in receivership due partly to the high level of non-performing loans during their operations.

[6] The second issue which I wish to raise is that of the time it has taken to deliver this decision. I appreciate the fact that the loans which are the subject of this dispute have long been in default. However, the parties, as well as the court, have raised a number of issues which need at least some measure of clarification from the court, even at this interlocutory stage. These have broader implications for the process involved in the auction of properties under section 72 of the **Registered Land Act**[2] **(RLA)**. I have therefore taken the time to consider the issues, inclusive of the question of delay, in order to bring clarity to the wider issues at stake. I apologise, therefore, for any inconvenience which the delay has caused to any of the parties.

The Facts

[7] The first applicant, Conch Bay Development Limited (CBDL), is a limited liability company which is beneficially owned by members of the Lake and Kentish families in Anguilla. CBDL is essentially a holding company and is the registered proprietor of a number of parcels of land. It is my understanding that these lands, along with other parcels which are relevant to the matter, have been held by the Kentish and Lake families for over 130 years.

[2] R.S.A. c. R30

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[8] The second applicant, Mr. George Lake, is the executor in the estate of the late Bernice Lake and therefore filed this application in that capacity. He also holds a power of attorney for Cuthwin Lake, who is his father and the third applicant in this matter. The fourth and fifth applicants are also members of the family.

[9] In his affidavit in support of this application Mr. Lake states that the first, second and third applicants are registered proprietors of various parcels of land registered in the Land Registry of Anguilla as Registration Section South East 790138 Parcels 160-257 and Registration Section West End 180118 Parcel 9 and 35. Between 2010 and 2012 the properties were used as security for a number of separate loans amounting to a principal sum of USD $11,315,000.00. These loan facilities are particularized as follows:

(a) On 24th March 2009 a loan was granted by the National Bank of Anguilla (NBA) as Loan Number 3334724. On that date a principal of US $3,300,000.00 was advanced by the bank. This was to mature on 28th February 2010. The loan was charged on Parcels 160-257 and was repayable on demand at Prime minus 3.5% with fees. I note that NBA is now in receivership and this loan was taken over by the National Commercial Bank of Anguilla (NCBA), which is the respondent in this case. Loan Number 3301978 has now been assigned to this facility.

(b) On 18th August 2009 NBA advanced the sum of US$4,015,000.00 as Loan Number 3335013. This loan was to mature in six months and was repayable on demand at Prime minus 3% together with fees. Similar to the first loan, this facility was taken over by NCBA and has been assigned Loan Number 3301980. The facility was charged on Parcel 257.

(c) On 31st October 2012 the principal sum of US$4,000,000.00 was advanced by The Caribbean Commercial Bank (CCB) as Loan Number 3454062. This facility was to mature on 30th October 2014 and was repayable on demand at a rate of 9% per annum together with fees. CCB is also in receivership, and the loan has now been taken over by NCBA and given Loan Number 3301953.

(d) On 31st October 2012 CCB advanced the principal sum of US$873,500.00 to the fourth applicant as Loan Number 3301954. This facility was to mature on 30th October 2014 and was payable on

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demand at a rate of 9% per annum with fees. This loan facility was charged on Parcel 257. This loan was also taken over by NCBA.

(e) On 31st October 2012 CCB advanced the principal sum of US$668,100.00 to the second, third and fourth applicants in Loan Number 3301952. This facility was to mature on 30th October 2014 and was payable on demand at an interest rate of 9% per annum. The loan was charged on Parcels 9 and 35.

[10] There is no dispute that neither loan facility was repaid as agreed. In fact, the last time any payment was made to the first two of these facilities was October 2012. No payments were made towards the remaining 3 of the facilities at any point. Based on the evidence presented, it would seem that not only was there no payments towards the loans for an extended period of time, but there was equally little to no significant attempt at enforcement of the terms of the loan agreements for that same period. Whilst various letters and notices had been served on the applicants over that period of time, no further enforcement action had ever been taken.

[11] On or about 10th, 11th, 17th, and 30th October 2024, NCBA served statutory notices pursuant to section 72(1) of the RLA. These notices made requests for payment of the money due and owing together with interest which had accrued on each facility as calculated to 2nd September 2024.The total aggregate amount demanded across all notices, including any amounts claimed in respect of legal, collection, and service fees amount to between US$29,927,779.70 and US$30,856,027.00 as at 2nd September 2024. Of this, approximately US $14,461,573.60 consists of accrued interest. It will be observed that the interest on each loan continued to accrue throughout the period of default. This is approximately 14 to 15 years.

[12] The applicants have raised a number of concerns regarding the continued accrual of interest over the entire period as well as certain collection costs associated with the loans. It is not necessary to detail these issues in relation to each loan. However, in his affidavit in support of the injunction application, Mr. George Lake states that he was unable to determine with certainty the precise sum required to cure the default and prevent the exercise of the statutory power of sale.

[13] It will be readily observed that a period of 1 year and 4 months elapsed between the dates on the notices and the actual date set for this particular auction. It is also not in dispute that the applicants

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were informed of the auction on 13th January 2026. The auction was set for 27th February 2026 and was also advertised on social and other forms of media in Anguilla for a number of weeks.

[14] An important feature in this application is the Anguilla Government's airport expansion project. As was noted by Mr. George Lake in his affidavit, the Government announced its intention to expand the runway of the Clayton J Lloyd International Airport in June 2022. Mr. George Lake states that on 4th April 2024, the Director/Chief Valuation Officer for the Department of Lands and Surveys, Leslie Jason Hodge wrote to him seeking permission to enter the land to conduct valuations and geotechnical surveys, as the land has been identified for possible acquisition to facilitate the airport expansion. On 10th October 2024, the Executive Council made a determination that 30 acres of the property registered as Registration Section South East Block 790138 Parcel 257, were to be compulsorily acquired.

[15] One issue raised by the applicants is that the Executive Council appointed an acquisition team to pursue this issue. One of the members on that team was Mr. Aidan Harrigan, who happened to also be the Chief Executive Officer of NCBA. Mr. George Lake also points out that the Executive Council's direction was made on 10th October 2024. That was the same date NCBA served the first of the section 72(1) notices on the Applicants. He notes that the second and third notices followed on 11th and 17th October 2024. Mr. Lake therefore points out that the Government's direction to acquire the charged properties, and the Bank's initiation of enforcement against the same properties occurred on the same day and a few days thereafter. It is also noted that the area of land which the Government was interested in acquiring had increased from 30 acres to 43 acres. Mr. Lake insists that of the 225.37 acres of land charged against the loans taken by the applicants, it was unclear as to precisely which portions the Government was seeking to acquire.

[16] Mr. Lake continues in his affidavit to state that a meeting was held on 24th January 2025. During that meeting, he met with a number of Government Officials, including Mr. Harrigan. At that meeting, Mr. Lake requested inclusion in all further correspondence between the relevant stakeholders. It was also pleaded that on 28th January 2025, private treaty negotiations commenced between CBDL and Government technocrats, including representatives from Lands and Surveys, the Attorney General's Chambers, and the Ministry of Infrastructure. On 8th April 2025, NCBA's solicitors advised CBDL that

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the lands exhibited would be sold by public auction on 30th April 2025. That auction did not take place. It is alleged that enquiries were made by the applicants as to the reasons for the delay of the auction.

[17] I pause here to make just one observation. In light of the evidence presented so far, it is difficult to ignore the fact that by 30th April 2025 the notices containing the amounts payable on the various accounts had already been served on the applicants. Mr. Harrigan's role in the airport expansion process had also already been known. All of the issues raised in the current proceedings already existed. Yet, the applicants engaged in enquiries as to why the auction did not take place as originally planned as opposed to objecting to the auction in the first place. There is no evidence presented to show that the applicants were objecting to the amount of accrued interest and costs on the notices or to Mr. Harrigan's role at that point.

[18] It is also asserted that on 9th May 2025, Orion Credit Management and The Anguillian Newspaper re-listed the same parcels for public auction on 29th May 2025. This was allegedly made without prior notice to CBDL. By letter dated 12th May 2025 the applicants objected to this auction. However, it is important to note that 4 objections were raised in that letter. None of these objections related to the accrual of interest and costs. The issues raised were as follows:

(a) Misrepresentation of Parcel 257: Orton's advertisement included adjacent unencumbered Farrington parcels within "Parcel 257" and featured an incorrect subdivision-approval claim;

(b) Insufficient Disclosure of Development Rights: The notice understates the scope of CBDL's 2009 planning permission for a luxury resort/golf/residential project (application 09/0499);

(c) Failure to Maximise Market Exposure: No targeted marketing in channels frequented by high-net-worth or institutional bidders, contrary to ECCB prudential standards;

(d) Concealment of Government's Overriding Interest: The auction adverts made no mention of the December 2024 compulsory-acquisition notice, misleading bidders as to the true amount of land available for auction.

[19] Again, it is difficult to ignore here that many of the salient issues raised in the injunction application were apparent from October 2024. Even as late as May 2025 no attempts were made to move the

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court to address those issues and the formal letters written to NCBA did not raise the accrual of interest and costs or Mr. Harrigan's role as factors to delay the auction of the property. Whilst I appreciate that there were ongoing negotiations with all stakeholders at that point, it does not appear to the court that an objection was being raised regarding the auction of the property. Rather, there were concerns regarding the procedure being adopted in the exercise of NCBA's right to place the property on auction, as well as the effectiveness of the marketing strategy used to highlight the potential value of the land.

[20] Mr. George Lake goes on to state that in a series of correspondence between 19th and 22nd May 2025 the parties agreed to tri-partite negotiations which included government officials. The auction was therefore re-scheduled to 29th July 2025. This auction did not take place. However, Mr. Lake states that CBDL received correspondence from NCBA on 5th August 2025 which also stated that the bank was *"also in discussions with the Government of Anguilla with a view to ensuring that the views of all interested parties are understood and considered by the Bank."* On 14th August 2025, CBDL provided a signed Limited Authorisation Disclosure and Confidentiality Agreement which gave permission to NCBA to disclose to the Government of Anguilla information in relation to the loan accounts which were relevant to those discussions. Mr. Lake states that despite these assurances and agreements, no tri-partite meeting was ever held.

[21] Mr. Lake states further that on 13th January 2026, he received correspondence from the NCBA's solicitors indicating that the charged properties would be sold by public auction by Orion Credit Management on 27th February 2026. He submits that he had received no notification that the tripartite negotiations were abandoned. He goes on to state that on 28th January 2026, he received unauthenticated survey plans demarcating the precise extent and dimensions of the 43.5 acres subject to acquisition within the 225.37 acres of Parcel 257. On 28th January 2026, he also received from Orion Credit Management a copy of the advertisement for the intended auction. On 10th February 2026, Mr. Lake was made aware of the Government's Expressions of Interest sent out to contractors in relation to the runway extension.

[22] Mr. Lake states that the advertisement contained the same deficiencies as prior notices. These were brought to the attention of the solicitors acting on behalf of NCBA. Mr. Lake has also submitted that a conflict of interest arose regarding the dual role of Mr. Harrigan in his capacity of chairman of NCBA

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and a member of the acquisition team set up by the government. Concern was also expressed regarding an allegation that there were bilateral discussions between the government and NCBA to the exclusion of the applicants. These discussions allegedly took place between June 2025 and February 2026.

[23] In a second affidavit filed in support of the application. Mr. Lake states that he was informed and believes that licensed financial institutions in Anguilla are required to comply with Prudential Standards issued by the Eastern Caribbean Central Bank (ECCB) pursuant to the Banking Act. He states that paragraph 10.2(2)(b) of the Prudential Standard provides that an asset which is 90 days or more past due must, at a minimum, be regarded as impaired. As such, he submits that the Prudential Standards prohibit the charging of interest on impaired loans. Given the length of time which the current loans have been outstanding, it is submitted that NCBA ought to be prohibited from charging interest beyond that 90 day period.

[24] In response to the application, Ms. Shellice Niles, on behalf of NCBA, notes that between 2011 and 2014 a number of demand notices were served on the applicants. She stated in her affidavit that whenever the applicants were notified of an intention by the bank to proceed with realizing the securities, CBDL would respond by indicating that there was some process or venture which would result in the debt being satisfied. On one occasion, it was stated that on 29th January 2014, CBDL informed the Bank that it was "currently holding extensive dialogue with Arambsy Group with a view to an equity partnership for extending the current airport on Anguilla" and that they "met with the Chief Minister Hubert Hughes and other Government officials and laid out their proposal' which included the privatization of the airport. It was expected that this would generate revenue with a view to satisfying the outstanding debts. This did not materialize.

[25] In my understanding of the evidence provided, there was also a prospect of the applicants paying off the outstanding debts by reason of the "Board of Assessment Tribunal between Dame Bernice Lake (deceased) and Conch Bay Development verses the Government of Anguilla" which commenced sitting on Monday 18th November 2013. I also understand that this is related to the compulsory acquisition of various lands belonging to the estate of the late Dame Bernice Lake. This was subject to years of litigation in the courts which resulted in a decision of the Privy Council. This, however, did not lead to the satisfaction of the outstanding debts. In fact, Ms. Niles points out that the decision of

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the Privy Council went against the estate. The effect of this decision was that the family and/or CBDL is indebted to the Government, given that certain sums of money were paid to the estate upfront. The amounts paid amounted to more than was assessed by the Assessment Board.

[26] Ms. Niles points out that CBDL owns no other assets and generates no revenue. Therefore, the only way to satisfy these outstanding debts is to sell the property. Statutory notices were again sent in 2021 and were ignored. Ms. Niles noted that in October and November 2024, further notices were served on the applicants. None of them responded and no payments were made to any of the loans. She states that it was not until NCBA listed the properties for auction in April 2025, and issued, by way of counsel, notices indicating the date of the auction, did CBDL correspond with the bank. No responses were received from Lorna Rogers and Lucinda Lake Michael, and none of the parties made a payment towards the debt.

[27] Ms. Niles also refers to the letter of 12th May 2025, served on behalf of CBDL in which it objected to the sale of Parcel 257. The letter noted that there wasn't sufficient transparency and that CBDL was served by NCBA’s solicitors on 8th April 2025 with a notice indicating that the property would be sold by public auction on 30th April 2025. It was noted in the letter that this constituted short notice. Amongst the complaints was that the auctioneer publication showed parcels belonging to CBDL, which were not being auctioned. Ms. Niles states that what was outlined in the advertisement was a general map of the area. There was no intention, neither was it stated that any property other than those subject to the charges, were being sold.

[28] Ms. Niles states in her affidavit that it was through that very correspondence of 12th May 2025 and the accompanying email, that NCBA become aware that CBDL was having private treaty negotiations with the government. This was notwithstanding the fact that CBDL agreed in the Business Loan Agreements not to sell or assign the secured property or part with possession of the said property without prior written consent from the Bank. Ms. Niles therefore states that although by way of letter dated 15th May 2025 NCBA indicated a willingness to hear CBDL's representations, that was without prejudice to the steps taken by NCBA to realise the securities thus far. It was stated that the price offered for 43.5 acres of parcel 257 was US$1,522,500.00. This is way below the current balance due on the loans.

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[29] As it relates to the discussions which took place between the parties and the government, Ms. Niles states that on 21st May 2025, Mr. Leslie Hodge, on behalf of the government, requested a postponement of the auction for a period of 8 weeks. This was to allow the Government to finalise its decision on (i) the acquisition of land for the Airport expansion; and (ii) whether the government would be able to entertain discussion on acquiring the entire 225 acres of land. She noted that the second issue was never raised by NCBA, and it was assumed that those discussions were taking place between CBDL and the government, as NCBA had no information as to what those discussions entailed.

[30] Ms. Niles went on to state that it was the government who requested a meeting with NCBA, as the mortgagor with interest in the land pursuant to the RLA. The government, therefore, wished to ascertain what that interest was. That meeting took place on 23rd May 2025. Those present at the meeting discussed what parcels were vested in NCBA, and which parcels were encumbered and being auctioned. The government also requested information about the loans in order to ascertain the extent of NCBA's interest in the properties. NCBA did not provide that information but rather undertook to obtain the written authorization of CBDL to disclose the relevant information. This was due to confidentiality concerns. Permission was subsequently requested from CBDL, and this was received by NCBA.

[31] Ms. Niles states that it was through correspondence dated 23rd May 2025 that NCBA became aware of correspondence sent to CBDL by Mr. Leslie Hodge on behalf of the government which revealed that there was an offer made by the government to CBDL. She states that the existence of an offer was never disclosed to NCBA by CBDL previously and only came to NCBA's attention because of the April 2025 scheduled auction which the government sought to delay. She also stated that the correspondence revealed that if the offer of US$1,522,500.00 was not accepted by CBDL, the government would go ahead and compulsorily acquire the land.

[32] Ms. Niles noted that NCBA was concerned about the fact that it was not made aware of those discussions. When the auction was slated for July 2025, the government requested a further delay in order to finalise negotiations. NCBA obliged. However, Ms. Niles indicates that much information was not forthcoming from the government after the July 2025 auction was postponed. It was on 24th December 2025, that the government indicated that it had an interest in acquiring Parcels 160-257

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but that it had to satisfy the Crown that there was a public purpose to be served by acquiring those lands. A further request was made by government to NCBA to once again delay the auction to at least early February 2026. With no further communication from the government the lands were listed for auction on 27th February 2026. I note however, that notification of this auction was provided to the applicants on 13th January 2026.

[33] Ms. Niles notes that despite being aware of the auction, CBDL never raised any issues in respect of the Statutory Notices served in 2024, or the interest claimed therein. She states that thus far, NCBA has incurred costs in the sum of US$24,081.88 in advertising the auction. She also points out that the numerous correspondences between CBDL and solicitors for NCBA come at a cost to the bank. She estimates that so far, the bank has incurred approximately $60,000.00 in expenses in pursuing this debt.

[34] It is noted that on 26th February 2026 the government passed a resolution "for the acquisition of those lands at Registration Section South East, Bock 79013 B, Parcel 257 (Part of) being 43.50 acres registered to Conch Bay Development Ltd. During the hearing of the application before me, it was also submitted by the respondent that, given the value offered by the government, it was unlikely that the sum paid for the 43.5 acres would come remotely close to satisfying the outstanding debt.

[35] Insofar as it relates to the injunction application, Ms. Niles complains that the application was filed at the last minute. The auction was slated to take place on 27th February 2026 and notice of the injunction application was served on 26th February 2026 at 2pm. This took place in circumstances where the applicants were aware of the date of the auction as far back as 13th January 2026. As it relates to Lucinda Lake Michael and Lorna Rogers, it is stated that these two debtors have never responded to any notice served on them. All of this takes place in circumstances where it had been in excess of a decade since the bank had been trying to recover this debt.

[36] Ms. Niles points out in her affidavit that unpaid loans were one of the main reasons CCB and NBA were placed in receivership in the first place. She states that the loans which had been granted in this case were substantial and have remained unpaid for a substantial period of time. She denies that the prudential standards of the ECCB have any relevance to the accrual of interest and states that what governs the calculation of interest in respect of these loans are the respective clauses in

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each of the loan agreements entered into by the borrowers at the time they were given depositor's funds to use for their own personal reasons.

[37] Ms. Niles also states that the applicants failed to disclose that NCBA had published another advertisement in which it was indicated that the government was seeking to acquire 43.5 acres of parcel 257. She also states that the fact that private negotiations between CBDL and the government did not result in an offer for the sale of the land is testament to the fact that this compulsory acquisition may be protracted, and result in further delay in the bank acquiring what is outstanding on the debts.

[38] I have read in full the affidavit of Myriam Augustin-Caine. She is the Chief Risk Officer of NCBA and outlines, in her affidavit, her understanding of the relevance of the Prudential Standards established by the ECCB. I will assess the substance and legal effect of these standards later on in this decision and will therefore not repeat much of what Mrs. Augustin-Caine has stated in her affidavit. It would suffice to say that I have considered the content of this affidavit and the additional affidavits of Mr. George Lake.

The Law

[39] In substance this application calls for the court to consider the broad principles upon which an interim injunction should be granted. These principles are well known. However, it is important to also point out that the court is not here embarking on a mini-trial. The role at this stage is not to decide on disputed issues of fact and the law applicable to them. As counsel for the applicants have themselves pointed out, ***"[t]he purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result…"***[3]

[40] Ultimately it is a question of fairness and equity. However, in the peculiar circumstances of this case, it is important to give due consideration to the legislative framework within which the respondent bank is empowered to enforce the loan agreement by placing the charged property up for auction. In those circumstances, it is also important to consider the ECCB's Prudential Standards and their relevance

[3] National Commercial Bank of Jamaica Ltd v Olint Corpn Ltd [2009] 1 WLR 1405

to the exercise of this power. The court will also find it necessary to consider the broad principles of injunctive relief and, in particular, whether there is a real prospect of success, whether the balance of convenience weighs in favour of the applicants and whether damages would be an adequate remedy. Also, it is important to consider the broad question of the impact of the delay in bringing such an application and whether it would be just and equitable to grant this interlocutory remedy.

The Power of Sale

[41] Section 72(1) of the RLA states that **"if default is made in payment of the principal sum or of any interest or any other periodic payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for 1 month, the chargee may serve on the charger notice in writing to pay the money owing or to perform and observe the agreement, as the case may be".** Subsection (2) goes on to state that:

> **"(2) If the chargor does not comply, within 3 months of the date of service, with a notice served on him under subsection (1), the chargee may—**
>
> **(a) appoint a receiver of the income of the charged property; or**
>
> **(b) sell the charged property;**
>
> **but a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within 3 months of the date of service, with a further notice served on him under that subsection."**

[42] The legislation therefore provides that where a chargor is in default of payment, the bank reserves a right to sell the charged property, but only after notice has been provided to the chargor in writing at least 3 months prior to the date of the sale. It is submitted by counsel for the applicants that the notice which is required under section 72(1) is for the chargor to pay the money owing or to perform and observe the agreement, as the case may be. Counsel states that emphasis should be placed on the words **"the money owing".** It is therefore argued that if the notice contains sums due and owing which are inaccurate, then the notice is defective. In support of that proposition, counsel relies on the

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case of **Marshall v. Swiss American National Bank**[4] **where the court granted an injunction until such time as the notice served on the mortgagor conformed with the procedures outlined in the legislation**. The substance of counsel's submission is that if the notice is defective, then the power of sale is defeated, and the auction ought not to take place on a defective notice. For my part, I must say, with the greatest respect, that the decision in **Marshall v. Swiss American National Bank** is devoid of any analysis as to whether the broad principles of injunctive relief are appropriate in such cases. That is especially the case if there is little to no other prospect of repaying the loan and that damages would be an adequate remedy for any breach of the statutory requirements of the notice.

[43] Counsel for the applicants submit that the Statutory Notices dated 11th and 30th October 2024 in relation to the First and Fourth Applicants, did not state a clear and certain sum due and owing to NCBA. It is submitted that two different sums were demanded on the Statutory Notices. As such it was unclear as to which sums must be paid to remedy the default, or which amount extinguishes the Respondent Chargee's right to sell. Counsel submits that section 72(1) does not permit alternative sums, approximations or internally inconsistent demands. As such, the notice fails to identify *"the money owing"* within the meaning of Section 72(1) of the RLA. It is submitted that this is not a mere technical breach of the Act but is rather substantive in nature.

[44] I do note, however, that the respondents deny that this was the effect of the notice. In any event, as I will examine later on, the issue is not for the court to reconcile this dispute at this stage. It seems to me that, in substance, one significant question is why were these issues not raised at the point when the notices were served in the first place?

[45] It is submitted further that across the five loan facilities, NCBA is claiming to be owed US$2,059,989.75 in collection costs to its attorney in circumstances where there is no evidence of what collection steps were taken by the attorney to justify this demand. Counsel submits that the only identified legal work undertaken by the chargee's attorney is the issuance of a demand letter, for which fees of US$2,500.00 have been quoted. It is argued that the applicants have received no explanation, breakdown, or account demonstrating what steps were undertaken in that regard.

[4] Suit No. 274 of 1997, Antigua

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Therefore, it is submitted that sums incurred is not *"money owing"* within the meaning of section 72(1) of the RLA, which renders all five statutory notices invalid.

[46] It is also submitted on behalf of the applicants that section 70 of the RLA preserves the right of the chargor to redeem the charged property at any time before the sale. Section 70(1) of the Act states that **"… a chargor, on payment of all money due and owing under the charge at the time of payment or on fulfilment of any condition secured thereby and on payment of any costs or expenses properly incurred by the chargee in exercising any power conferred on him by section 72, may redeem the charged land or lease or charge at any time before it has been sold under section 75, and any agreement or provision that purports to deprive the chargor of this right of redemption is void, and, for the purposes of this subsection, land, a lease or a charge is deemed to have been sold when a bid has been accepted at the auction sale."** It is argued that the applicants cannot redeem unless they know the exact sum required to redeem. Counsel goes on to submit that in stating two competing figures, an uncertainty is created by the chargee and exposes the applicants to risk of underpayment and effectively frustrates the right of redemption. These factors render the statutory notices invalid.

[47] Insofar as it relates to those submissions, it is important for the court to properly and adequately assess the legislative framework so as not to unnecessarily obfuscate the issues. Firstly, it must be observed that the legislature sought to provide a method of enforcement of debts charged against property which did not, at least initially, necessitate court action. By providing an avenue for the chargee to place the property on auction, the legislature was providing a simpler and less expensive way of debt enforcement than the need to seek judgment from the court, which can in and of itself be a rather time-consuming and expensive process. It is no longer necessary to place such a right to sell in the mortgage contract itself. This is now a right which exists by way of statute.

[48] In doing so, however, the legislature also sought to protect the interest of property owners by including what I would consider to be a number of pre-requisites to the sale of the property within the RLA itself. The first is that notice ought to be provided to the chargor. Whilst the legislation uses the word "may" in relation to the notice obligation, it is a reasonable inference that if the chargee is to act in good faith he would allow for this notice period to provided to the chargor. As has been noted by counsel for the applicants, the notice must state what is due and owing to the chargee. It is also

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important to note that the law has placed a moratorium of 3 months after the notice is provided before the property can in fact be sold. All of these are designed to give effect to the equity or right of redemption and to provide an opportunity, up to the point of sale, for the chargor to redeem the debt. Very importantly, is the duty on the part of the chargee to act in good faith in the exercise of that right.

[49] In addition to what I have mentioned above, section 75(3) of the RLA states that **"[a] transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power."**

[50] A number of points must therefore be made in relation to this specific regime. The first is that it is reasonably foreseeable that a dispute may arise between the chargee and the chargor as to the amounts which are due and owing on the debt. It is a reasonable implication therefore, that where a notice is served on the chargor, he has 3 months within which to challenge the accuracy of what is stated as due and owing on the notice. To my mind, this is indeed one of the bases for the legislature placing the 3-month moratorium on the sale of the property in the first place. In direct response to this issue, counsel for NCBA refers the court to the statement of Patterson J in the Jamaican case of **Zachariah Sharief v National Commercial Bank Jamaica Ltd**[5] where he states as follows:

> **"The general object and paramount importance of the provisions of ss 105 and 106 of the Act must be, in my mind, to ensure that the mortgagor is notified of the mortgagee's intention to exercise his power of sale, and to allow the mortgagor time to forestall the sale."**

[51] Counsel point to the case of **Diane Jobson v Capital and Credit Merchant Limited et al**[6] where the Privy Council appears to endorse this statement at paragraph 13 of the judgment. Whilst these two cases addressed the issues of a lack of notice and also the question of whether the statutory powers and obligations under the Act can be modified by the mortgage deed or the contract itself,

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[5] (1994) 31 JLR 304, 309
[6] [2007] UKPC 8

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the general proposition here is sound. It is my view, therefore, that one purpose of notice is to give the chargor an opportunity to forestall the sale. This may be on a number of bases. One is that the chargor may challenge whether the right to sell the property has in fact arisen. This may be on the basis that the chargor is in fact not in arrears or perhaps no longer owes on the mortgage. Another is that the chargor may be in a current position to improve his capacity to pay the debt over time, therefore obviating the need to sell. Also, and very importantly in this case, he may question or query the amounts which the notice claims that he owes. He may also redeem the property by simply paying off the debt prior to the sale.

[52] Insofar as it relates to the court's discretion in granting an interim injunction therefore, something must be said about a chargor who has for in excess of 2 and a half years and, after the service of numerous notices, not queried the amounts being claimed on the notices themselves and not seeking to move the court much earlier to resolve this dispute prior to the property being placed on auction. It is my view that in the circumstances of this case, the delay in bringing this action and raising concerns regarding the amounts claimed in the notices is a serious factor for this court to consider. This is coupled with the fact that, as I will expound upon later, I am not satisfied that the applicants have proven that the forestalling of the sale of the land is necessary in order to do justice in this case as I am not satisfied that there is a likelihood that the debts will be satisfied prior to the sale, even if delayed.

[53] I turn now to consider the issue of the accrual of interest and the Prudential Standard of the ECCB.

The Prudential Standard and the Calculation of Interest

[54] It is submitted, on behalf of the applicants, that NCBA is in breach of section 10.8 of the **Eastern Caribbean Central Bank's Prudential Standard for the Treatment of Impaired Assets for Institutions Licensed under the Banking Act, January 2021 (The Prudential Standard)**. In summary, the argument is that, given the length of delay in payments towards the loan facilities, the loans ought to have been regarded by NCBA as impaired assets within the provisions of section 10.2 of the Prudential Standard. In accordance with section 10.8 NCBA ought not to have continued accruing interest once the loans had formally become impaired.

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[55] In written submissions and in the affidavits in support of the application for an injunction, it was intimated that the period upon which a loan ought to be deemed an impaired asset is at least 90 days from the date upon which default of payment commenced. As such, interest ought not to accrue after that period[7]. However, in oral submissions before the court, counsel for the applicants conceded that this proposition was not feasible but instead relied on the submissions that a stop on the accrual of interest ought to be in place at the latest when the interest begins to exceed the principal. However, in order to place this issue in its proper context it is important to pay close attention to the substance of the Prudential Standard.

[56] Before addressing section 10 of the Prudential Standard, I refer to the objectives of the standard as outlined in the document itself. It states, firstly, that **"[c]redit risk usually represents the single largest risk facing a licensed financial institution. The presence of a well-functioning credit risk management framework is therefore fundamental to the safety and soundness of a licensed financial institution."** The Prudential Standard goes on to state that it **"… provides a framework for the monitoring, recognition, measurement, classification, provisioning, accounting and reporting of impaired facilities of licensed financial institutions."** It is further noted that **"[t]he Prudential Standard seeks to ensure that licensed financial institutions have in place adequate frameworks for ensuring the carrying amounts of credit portfolios represent recoverable values; determining adequate allowances for credit losses; and ensuring that there is timely recognition of identified losses."**

[57] Insofar as it relates to the specific submissions made in the case before me, there are two broad observations to be made here. The first is that the objectives of the standard appear to relate to the management of financial risk by the banking institution. It is designed to provide a framework for the management and reporting on those risks. This is underscored by the opening paragraph in the overview provided in section 5 of the guidelines which states as follows:

> **"Adequate loan review and classification policies and practices are essential to an effective credit risk management framework. Licensed financial institutions are required to continuously assess their credit portfolios with a view to recognising any deterioration in credit quality and making adequate provisions for anticipated losses.**

[7] See Pragraph 22 of the Applicant's submissions filed on 26th February 2026

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Such reviews should systematically and realistically classify banks' credit exposures based on the perceived risk of default, and identify and assess the adequacy of provisions. This Prudential Standard provides guidance on the minimum criteria for the classification and application of provisions on impaired assets."

[58] Secondly, there is nothing in the objectives which supports the proposition that it is designed in any way to allow a chargor, who has defaulted on his loan, the benefit of an automatic moratorium being placed on the accrual of interest which he is contractually bound to pay. That is a different matter altogether, and in fact does not appear to be a commercially sound principle. Making adequate provision for potential loss and its impact on the accounting and performance of the financial institution is not synonymous with an alteration of the contractual duties of the debtor. It is in that context we come to consider the content of sections 10.2 and 10.8 of the guidelines.

[59] 10.2 of the Prudential Standard states that:

"A licensed financial institution must have policies and procedures to ensure the timely and reliable recognition of impaired credit facilities. Such policies and procedures must provide a documented analytical framework approved by the Board of the licensed financial institution for assessing impairment. Further, the credit risk management policy must be supported by appropriate accounting procedures, and information systems, to ensure its integrity."

[60] Subsection (2) goes on to state that:

"The existence of any of the following factors will, at a minimum, constitute evidence of weakness and require a credit facility (on- or off-balance sheet) to be regarded as impaired:

(a) an asset is more than 30 days past due and not adequately secured;

(b) an asset is 90 days or more past due, regardless of security;

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(c) an entity to which facilities have been provided is subject to administration or bankruptcy proceedings;

(d) with respect to off-balance sheet facilities, the licensed financial institution is unlikely to receive timely payment of the full amounts which it is contracted to advance; and

(e) the asset has been restructured."

[61] In the context of the case before me, subsection 10.2(b) applies. There is adequate security here and the loans are way past 90 days due at this point. There can be no doubt that the loans due to NCBA are to be regarded as impaired at this stage. The issue is whether the applicants are correct in their submissions that there is a real prospect in proving at trial that this impairment renders the accrual of interest beyond a certain point invalid. Section 10.8 of the Prudential Standard goes on to state that:

"(1) In accounting for impaired facilities, the following should be adhered to:

(a) All categories of non-performing credit facilities should automatically be placed in non-accrual status, that is, interest due thereon should not be recognised as income unless such loans are adequately secured and the full collection is assured within three months. Neither should interest be accrued on overdrafts when the approved limit has been reached and/or when credits to the account are insufficient to cover interest accruals for at least a three-month period, whichever is sooner.

(b) All interest previously accrued and uncollected but taken into revenue should be reversed and credited to a memorandum account specifically created for this purpose, unless paid in cash by the borrower. Future interest charges should also be credited into the same account until such facilities begin to perform.

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(c) When payments are received for impaired facilities, payments shall first be applied to the outstanding principal before allotments are made to interest charges accrued in accordance with section (b) above."

[62] In assessing the language used in this section it is quite obvious that the provisions which are made for impaired assets, create no bar on the financial institution's contractual rights to demand all sums due and owing by the borrower, including the past and future interest which had and continues to accrue. The Prudential Standard states that interest which is accrued and uncollected at that point should be credited to a memorandum account specifically created for that purpose. Future interest charges are placed in the same account until the facility begins to perform. This is not the same as saying that future interest does not accrue at all and should not be collected. Rather, provision is made in the accounting for impaired assets and the specific account into which the interest is to be placed.

[63] The section goes on to state that:

"(d) A non-accrual loan may be restored to accrual status when the licensed financial institution documents and provides to the credit committee or board of directors evidence that:

(i) all arrears of principal and interest have been paid in full and the facility is performing;

(ii) the asset has performed in accordance with contractual terms for twelve months or three payment cycles, whichever is longer;

(iii) it is reasonably expected that the customer is capable of fully servicing all future obligations under the facility; and

(iv) In the case of overdrafts, when the account is operating within the established limit and all interest arrears have been paid in cash."

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[64] Again, there is nothing in this section which seeks to provide any benefit to a defaulting party by placing a moratorium on its own contractual obligations to pay the interest which accrues under the contract. In fact, in contrast, the Prudential Standard goes as far as to say that a loan can be re-placed into accrual status **provided that all arrears of principal and interest have been paid in full and the facility is performing.** It is therefore not correct to argue that the obligation to pay the interest is extinguished when the loan is impaired. Finally, and perhaps more importantly, section 10.8(2) states that **"[l]oans and advances must be written off within 90 days after being classified as loss. This does not, however, extinguish the bank's right to full recovery of the outstanding debt."** To my mind, the outstanding debt is not merely the principal borrowed but the interest which accrues under the contract. That right does not extinguish because the loan is impaired or written off.

[65] In the circumstances, the court is not satisfied that the Prudential Standard provides a basis upon which NCBA was obligated to place a moratorium on the accrual of interest as per the contract. Placing non-performing credit facilities in non-accrual status for accounting and risk management purposes, does not alter the applicants' obligations to pay the interest which has accrued during the period of their default. Therefore, I am of the view that there is no real prospect of this line of argument succeeding if this matter is to proceed to a full trial.

[66] However, even if I were to be wrong on this point, as I have noted later on in this judgment, I am equally unsatisfied that, if interest were to have stopped accruing when the interest exceeded the principal, there is a real prospect of arguing at trial that there exists any hope of redeeming this debt at this stage in the process.

Equity of Redemption and the Compulsory Acquisition

[67] The applicants have further submitted that the actions of NCBA, as it relates to the government's attempt to acquire the property, has wrongly interfered with the equity of redemption expressly provided for in section 70 of the RLA. Counsel places specific emphasis on the part of the provision which states that "… **any agreement or provision that purports to deprive the chargor of this right of redemption is void**." Effectively it is argued that there is a public policy which discourages a clogging of the equity of redemption. For that proposition, counsel has quoted from the decision of

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Haultain CJA in the case of **Hoar v. Mills (No. 2)**[8] where he stated the following in paragraph 5 of his judgment:

> **"With regard to the doctrine forbidding any "clog on the equity of redemption" and its application to the transaction now under consideration, I would adopt the language of the "note" in vol. 19 of the Law Quarterly Review, at p. 359, which is as follows:**
>
> > **"The doctrine of 'clogging' threatens to become an intolerable nuisance—an interference with the freedom of the subject. It was a useful enough doctrine in a primitive and more technical age when ignorant people were often entrapped into oppressive bargains, but to-day it is an anachronism and might with advantage be jettisoned. Instead the Courts have taken to emphasizing the doctrine in all its original crudity. It was open to them a few years since to have moulded the doctrine to meet the changing conditions of modern life, and to have confined redress to cases where there was something oppressive or unconscionable in the bargain, to make this the test, as it was the origin, of the doctrine; but the Courts have preferred to adhere to technicality and an unprogressive judicial policy. The decision of the Court of Appeal in Jarrah Timber and Wood-paving Corpn. v. Samuel [1903] 2 Ch. 1, 72 L.J. Ch. 262, C.A. was inevitable after Noakes & Co. Ltd. v. Rice [1902] A.C. 24, 74 L.J. Ch. 139; but see to what conclusion it leads. A company with a board of directors composed of experienced men of business, advised by a competent solicitor, after it has invited a loan and settled considered terms is supposed to be the victim of some oppression at the hands of the mortgagee, because it has given the mortgagee an option of purchasing the mortgaged property at a certain price, and is permitted by the Court to repudiate its own bargain deliberately entered into in its own interests—surely a proceeding more unconscionable than anything involved in the so called 'clogging,'**

[8] 1935 CanLII 158 (SKCA)

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If there is any such thing as sanctity in contracts. Alas! for those cobwebs of technicality which lawyers are so fond of spinning, and which so often shut out the daylight of common sense."

[68] For my part, it would seem that rather than embracing the concept of the clogging of the equity of redemption, this judgment appears to question its relevance to modern loan transactions. The judgment goes on to refer to the case of **Samuel v. Jarrah Timber & Woodpaving Corpn.**[9] where the following was noted:

> **"This doctrine, described by Lord Henley as an established rule nearly 150 years ago, has never, so far as I can discover, been departed from since or questioned in any reported case. It is, I believe, universally accepted by text writers of authority. Speaking for myself, I should not be sorry if this House could have seen its way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arm's length and negotiating on equal terms. The directors of a trading company in search of Financial assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty moneylender. At the same time I quite feel the difficulty of interfering with any rule that has prevailed so long, and at present I am not prepared to differ from the conclusion at which the Court of Appeal has arrived:"**

[69] I must confess that I too disagree with the need for this specific doctrine to continue without modification to fit the needs of modern banking transactions. This is especially the case as what we are dealing with here are commercial loans between parties, the bargain of which is not unconscionable in any way and it is doubtful that one can argue for there being any imbalance in the bargaining power between the parties. As was noted by the author of the text **Commonwealth Caribbean Property Law**[10]**:**

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[9] [1904] A.C. 323, 73 L.J. Ch. 526

[10] Taylor & Francis e-Library, 2010

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> **"… the traditional hostility of equity towards clogs on the equity of redemption has diminished somewhat in modern times, especially where mortgagor and mortgagee are business concerns of equal bargaining power, and the principle of sanctity of contract now often overrides the notion of protection of the mortgagor. The modern approach of the courts, therefore, is that a bargain freely entered into by mortgagor and mortgagee must be adhered to, unless there is evidence of harsh and unconscionable dealing or inequality of bargaining power."**

[70] However, having said that, I accept and appreciate that the law exists. I note here that we are not dealing with any specific term of the loan agreement which seeks to place any clog in the equity of redemption. What the applicants are concerned about is the sale of the property by the bank prior to the compulsory acquisition of a portion of it by the government. Insofar as that is the case, counsel for the Applicants assert that NCBA is attempting to sell the charged land after secret discussions with its sole shareholder, the Crown, and in tandem with the Crown's initiation of the statutory compulsory acquisition process. It is submitted that the effect of these actions is that they rob the Applicants of their best opportunity to pay the debt secured by the charges.

[71] Counsel submits that the sum demanded by the Respondent has an unlawful interest component of some Fourteen Million United States Dollars (US$14,000,000.00). The court is therefore invited to consider that NCBA has advertised the charged lands for sale with a reserve price of USD$30,000,000.00. This, it is submitted, is the value which the property is expected to yield on a forced sale. The argument is therefore that if the crown is compelled to pay an equivalent amount to the Applicants as compensation for Compulsory Acquisition, then that would be more than enough to discharge the debt. It is therefore argued further that by selling the property at this stage, NCBA is removing all possibility that the Applicants will receive any compensation for compulsory acquisition. This, it is submitted is the palpable aim and purpose of NCBA's actions.

[72] Counsel for the applicants also refers the court to Section 64(4) of the RLA which states that a charge **"shall not operate as a transfer but shall have effect as security only."** The submission being made here is that the statutory power of sale exists solely for the purpose of recovering the debt. Therefore, the proprietary interest remains with the chargor unless this is displaced by a genuine sale conducted independently, in good faith, and for proper purposes consistent with the character

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of the charge as security. The applicants therefore contend that attempting to sell the property in circumstances where NCBA's main shareholder, the Government of Anguilla, is compulsorily acquiring the property, creates a risk of the sale ceasing to operate as neutral enforcement, but rather as a mechanism through which ownership passes from chargor to a connected party. It is alleged that this amounts to a misuse of the charge — as a vehicle for acquisition rather than security realization. In summary counsel submits that:

> "The evidence demonstrates prolonged bilateral discussions between the chargee and its sole shareholder concerning both the indebtedness and the property, conducted without the participation of the chargors. In those circumstances, the proposed exercise of the power of sale raises a real question whether the sale represents an independent realisation of security or instead operates, in substance, as a pathway by which the charged land is transferred to the chargee's controlling shareholder. Such use of the statutory power would undermine the principle embodied in section 64(4) and warrants the Court's supervisory intervention. The Court should therefore be satisfied that the Applicants have, at least, a good arguable case."

[73] Whilst I appreciate the substance of this submission, it must also be appreciated that the right of sale conferred upon a chargee does not place the bank in the position of a trustee either. Whilst the proprietary interests of the chargor remain, the bank reserves the contractual right to sell the property if the chargee is in default. I refer to the decision of Salmon LJ in the case of **Cuckmere Brick Co Ltd v Mutual Finance Ltd**[11] where he states that:

> **"It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that, by waiting, a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Provided none of those adverse factors is due to any fault of the mortgagee, he can**

[11] [1971] 2 All ER 633, 643

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do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor."

[74] For my part, I would not go as far as to say that the mortgagee can "do as he likes." There is a duty to act in good faith here and as Salmon LJ himself acknowledged in that case **"both on principle and authority, … a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."**

[75] To my mind in order to succeed in proving at trial that an injunction should be placed on the exercise of the right of sale bad faith is a factor to consider. The question is whether the actions of NCBA in seeking to sell the property in circumstances where the government is acquiring a portion of it, and all the peripheral issues raised by the applicants can amount to bad faith if proven at trial. It has been said that the duty of the mortgagee is a **"duty to act honestly and without a reckless disregard of the interests of the mortgagor"[12].**

[76] Having considered these submissions in full I do not agree with those of counsel for the applicants. I do appreciate that Mr. Aidan Harrigan's presence on the committee established by the government may create the semblance of a conflict of interest and perhaps should have been avoided. I also take notice of the fact that notices went out to the applicants in October 2024, coinciding with the government's decision to compulsorily acquire a portion of the land. Insofar as it relates to the allegation that there were bilateral talks between the government and NCBA on the acquisition of the land, the most which can be said at this stage is that this is disputed by NCBA. It would seem that at the very least, information was required from NCBA regarding the nature of the debts and that some information was provided to the government negotiating team after consulting with the applicants. Whether there were separate and direct negotiations between NCBA and the government in the manner described by the applicants is not an issue which can be resolved at this interlocutory stage.

[12] Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] 2 All ER 633, 653

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[77] However, there are a number of other factors to consider here. Firstly, this was not the first time the banks had either written to or served notices on the applicants regarding the outstanding debt. They have not been able to clear those debts for a number of years. Secondly, the notices were served in October 2024. The auction, which is the subject of this dispute, was not set until January 2026. Whilst there were previous auction dates, these were abandoned in order to facilitate discussions regarding the acquisition of the land for the airport runway expansion. There was ample time for the applicants to object to the sale of the property by public auction if they were concerned about the clogging of the equity of redemption. They simply did not.

[78] The only issue raised with NCBA with any measure of assertion related to attempts at marketing the property in order to maximise the price. Based on the evidence presented, I am not satisfied that the steps taken by NCBA to market the property by way of advertisement can be said to fall short of the duty to ensure that **reasonable precautions to obtain the true market value of the mortgaged property** have not been taken**.** I am not satisfied that this is an issue which will be expounded upon in any way at trial to influence the court in prohibiting the sale of the property at this stage. In any event, as I will examine later on, even if I were wrong about that issue, I am satisfied that damages would be an adequate remedy if this is proven to be the case.

[79] Thirdly, and very importantly, the government is only acquiring 43 of the 227 acres of land which was charged to the loans. The evidence is that the negotiations for the sale of that portion of those lands, which preceded the decision to compulsorily acquire them, centered around a price of approximately US$1,500,000.00. It is here that the court expresses doubt about the forcefulness of the submissions of the applicants.

[80] As I stated earlier, counsel for the applicants acknowledged the weakness in the argument that the banks were to have ceased accruing interest on those loans after 3 months of default. Instead, counsel submitted that, at the very least, interest ought not to have accrued beyond the point when it began to exceed the principal. It must therefore be observed that the loans which were subject to the charges amount to an aggregate of approximately US$11,000,000.00. By that token, even if the court were to accept counsel's submissions, then the interest accrued on these loans would be approximately US$11,000,000.00, given that very little has been paid towards these debts over the

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years. In my view, if this submission is to be accepted, then interest and principal on this loan can hardly be said to be anything lower than US$21,000,000.00 to US$22,000,000.00.

[81] I am satisfied that there is no real prospect of successfully arguing at trial that the government's attempt to acquire the land will raise sufficient funds which are remotely close to being able to satisfy the outstanding debt. There is insufficient evidence here to satisfy the court, even at this interlocutory stage, that the equity of redemption is affected in any meaningful way by the sale of the property prior to the government's attempts to acquire a portion of the land in order to facilitate the expansion of the Clayton J Lloyd International Airport. There is therefore no clogging of the equity of redemption here.

[82] In addition to this it is important to consider whether questions relating to the amount due and owing are in and of themselves sufficient ground to impose an injunction on the sale of the property. I refer to **Halsbury's Law of England**[13] where the following is noted:

> **The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive, but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim. The mortgagee will also be restrained if, upon a subsequent incumbrancer offering to pay off the first mortgage, the mortgagee denies his title to redeem.**

[83] There is no inherent entitlement here to prevent the sale of the property because the amounts due and owing are disputed. This does not take away the court's duty to ensure that justice is done and the court should never fetter its broad equitable power to grant injunctions where the situation warrants it. However, the chargor should, at the very least, satisfy the court that it is willing and able to pay the funds allegedly owing into court, or at the very least some reasonable amount of payment towards what in this case is a significant loan, the bulk of which has never been serviced. It is doubtful

[13] (2021) Vol 77 para 458

that equity should prevail in favour of the applicants here. Other than the prospect of the government's acquisition of a portion of the land, the applicants have come empty-handed in much the same way described by Gonsalves-Sabola CJ in **American British Canadian Motors Ltd et al v Imperial Life Assurance Company of Canada.** For reasons which I will now explain, I am satisfied that damages is an adequate remedy if the applicants were to succeed at trial.

Damages as an Adequate Remedy

[84] It is submitted on behalf of the applicants that damages are not an adequate remedy because the sale of registered land permanently extinguishes their proprietary rights and redemption rights. Counsel submits that there is an immediate risk of irreparable harm if the injunction application is not granted. Reference is made to Section 75(3) of the RLA which provides that once a transfer is registered, the only remedy available to a chargor for an irregular exercise of the power of sale is that of damages.

[85] It is submitted further that the charged properties have been held within the Lake and Kentish families for a number of generations and constitute ancestral family lands of unique historical and sentimental importance. It is noted that some of those lands were transferred to CBDL, which was described as an asset holding company which is beneficially owned by the members of the Lake & Kentish Families. Counsel specifically submits that "unlike fungible commercial assets, these properties carry irreplaceable familial and heritage value." A sale of this property at this stage was, in the words of counsel "incapable of true restitution and would cause loss not measurable in monetary terms."

[86] The submissions go on to state that, in contrast, there would be no comparable prejudice to NCBA if the sale is postponed until after the trial. It is argued, therefore, that NCBA would retain the benefit of its registered securities over the said charged properties.

[87] From the outset I wish to state that the court appreciates the sentimental and family history attached to the land in question. No doubt, this is a factor to consider. However, after careful consideration of this submission in particular, I do not agree with it. Firstly, one must give some consideration to the fact that the applicants would have been aware of the risks they were taking in contracting for those very lands to have been provided as security for what can be described as significant commercial loans. Secondly, save for one payment over a decade ago, the loans have not been paid. Thirdly,

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the bank has over the years been particularly lenient in staying its hand against the sale of the property, which has not resulted in any measure of satisfaction towards the debt. Fourthly, the court is not satisfied that a further delay in the sale of this property will lead to any other result than the eventual sale of the property in any event. On balance, it is not arguable that the acquisition of 43 acres of the land by the government will make significant inroads in satisfying the debt and the applicants have not provided any reasons to conclude that there is another source of income or resources which will likely do so.

[88] I also do not agree that NCBA will suffer no prejudice if there is further delay in the sale. Again, one must appreciate the commercial nature of modern banking. The bank has an obligation to pay interest to its depositors. Anguilla, in particular, knows all too well the repercussions of high rates of non-performing loans and the impact these have on the survival of the bank. This in turn has wider implications for the financial sector.

[89] To my mind, damages is indeed an adequate remedy as the sale of this property appears on balance to be the most effective way of satisfying this long outstanding debt. Whilst it is true that the bank does not operate as a trustee for the mortgagor in the sale of the property, the authorities suggest that funds obtained for the sale of the property are indeed held on trust prior to its disbursement. The applicants thereafter will and ought to have an opportunity to be heard on the distribution of the proceeds. However, at this stage equity does not weigh in their favour or in further delays in the bank's rights to enforce this debt.

[90] To conclude that further delay in satisfying what is an initial US$11,000,000.00 debt is not prejudicial to the respondent is not accurate. I also do not accept that the balance of convenience favours the applicants. The default in this debt is by far protracted, and the bank continues to be the one to mainly suffer financial losses as a result.

Conclusion

[91] In conclusion, therefore, I am not satisfied that there is a real prospect of success at trial on the issues raised by the applicants. The Prudential Standard does not create an obligation on the part of the bank to stop accruing interest when the debt is impaired. Even if the court were to find that

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interest ought to have stopped accruing when it exceeded the principal, that still does not provide any real prospect of the applicants being able to redeem these properties prior to the sale of the lands. The court is equally not satisfied that the issues surrounding the compulsory acquisition of a portion of the land by the government is a ground upon which the court should interfere with the bank's power of sale under section 72 of the RLA.

[92] Given the length of time which has elapsed since these debts have been outstanding, the size of the debts themselves and the unlikelihood that there is any prospect of fully satisfying these debts any time soon, the court is not satisfied that the balance of convenience weighs in favour of the applicants, neither is it just and convenient to prohibit the bank from exercising its power of sale. In addition to this, the court is satisfied that damages would be an adequate remedy if the applicants were to succeed in proving the issues raised at trial.

[93] In the circumstances it is ordered that:

(a) the application for an interim injunction is dismissed and the preliminary order staying the chargee's right of sale is set aside.

(b) The applicants will pay costs to the respondent to be assessed on application to the court if not agreed within 21 days from the date of this order.

Ermin Moise
High Court Judge

BY THE COURT

REGISTRAR