

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2006/0138

IN THE MATTER OF THE REGISTERED LAND ACT CAP 374 SECTION 146 AND 139

AND

IN THE MATTER OF AN APPLICATION FOR THE REGISTRAR OF LANDS TO
STATE A CASE FOR THE OPENING OF THE COURT IN RESPECT OF:

REGISTRATION SECTION	BLOCK	PARCEL
HODGES BAY & THIBOUS	43 2096A	399

BETWEEN:

CECILE HILL, REGISTRAR OF LANDS

Claimant

And

RBC ROYAL BANK OF CANADA

Defendants

Appearances

Ms. Cecile Hill – Registrar of Deeds

Mrs. Karen DeFreitas-Rait Deputy Solicitor General for the Claimant

Mr. William Archibald for the Royal Bank of Canada

Dr. David Dorsett for American International Bank (In Receivership)

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2006: November 8th
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[1] **Blenman J**; This is a case stated by the Registrar of Deeds pursuant to section 146 of the Registered Land Act, Cap 374 (RLA) the Laws of Antigua and Barbuda.

[2] The statement of case very clearly chronicled the factual background to the matter. In addition, the Court invited Counsel for the Royal Bank of Canada (RBC) and the interested Party the Inter-America International Bank (in Receivership) AIB and the Attorney General to provide written submissions. They have all provided the Court with very helpful submissions.

[3] In addition, Mr. Edward Smith who is the Receiver/Manager of AIB deposed to an affidavit on its behalf. Mr. Edward Roberts also deposed to an affidavit on behalf of RBC. I have also read the statutory declaration of Mr. John Greaves filed on behalf of AIB.

[4] I propose to address the relevant factual background gleaned from the statement of case and the affidavit deposed to by Mr. Smith and that deposed to by Mr. Roberts respectively since all counsel have agreed that the statement of case accurately reflects what transpired.

Factual Background

[5] The AIB is an external bank that operates pursuant to provisions of the International Business Corporation Act Cap 222 Laws of Antigua and Barbuda (the IBC Act,).

[6] The RBC is a bank incorporated under the Banking Act Cap 40 Laws of Antigua and Barbuda.

[7] Mrs. Ann Marie Athill (Mrs. Athill) was the registered proprietor of land situate at Hodges Bay & Thibous and registered as **Registration Section Block 43 2096A 399** (the property).

[8] On the 19th January 1998, the AIB loaned Mrs. Athill the sum of US\$280,000.00 plus interest. AIB had caused a Caution #4074/97 to be registered in the Deeds Registry in its favour on 30th July 1997 in relation to her property. In return Mrs. Athill gave AIB the relevant certificate of title upon which the notice of the Caution was endorsed.

[9] By Instrument No.1809/1998 the Caution was withdrawn. The Registrar appears not to be aware of the circumstances of the withdrawal of the Caution but it is clear that the Caution was withdrawn without AIB being aware of this development neither was it withdrawn based on an order of Court.

- [10] Subsequently, RBC loaned Mrs. Athill the sum of \$US280, 000.00. Prior to lending Mrs. Athill this sum RBC had caused an official search of the register to be executed. The search revealed that the property was unencumbered except for restrictive covenants. On 19th November 1999, the previous Registrar issued a certificate of Official Search to RBC to this effect.
- [11] Having loaned Mrs. Athill the above stated moneys, RBC caused a Caution and charge to be registered in its favour in relation to Mrs. Athill's property. Had it not been for the removal of Caution in favour of AIB, the Registrar would not have registered the Caution and charge in favour of RBC.
- [12] Mrs. Athill has failed to repay the loan that she obtained from AIB and she has also defaulted in the repayment of her loan to the RBC. Acting pursuant to its rights as chargee and with the agreement of AIB, RBC caused her property to be sold.
- [13] Indeed, Mrs. Athill's property was sold at auction and by agreement between the two banks the proceeds of sale are held in an escrow account.
- [14] The Registrar based on the request of the RBC, has stated a case to the Court and requests that the following questions be answered namely:
- (a) What is RBC's legal position in respect of its two charges recorded on register after the official search?
 - (b) What is AIB's legal position in respect of the allegedly fraudulent removal of its Caution?
 - (c) Who is entitled to the proceeds of the sale of the property and if both parties are entitled, in what amounts?
 - (d) Which of the parties, if any, has a claim against the Government of Antigua to be compensated out of the Consolidated Fund?
- [15] I have reviewed the matter in its entirety and of the respectful opinion that the crucial issues that are to be determined are as follows:

- (a) Whether AIB's Caution was lawfully lodged, if not what is the effect of this?
- (b) The second issue is whether RBC's legal charges were lawfully registered?
- (c) What rights if any RBC and/or AIB have to the moneys held in escrow?
- (d) Whether AIB and/or RBC are entitled to be compensated by the Government of Antigua and Barbuda out of the consolidated fund?

Law

[16] At this juncture, I propose to refer to the relevant legal provisions of the RLA.

Section 2 of the RLA states:

"Charge" means an interest in land securing the payment of money or money's worth or the fulfillment of any conditions, and includes a subcharge and the instrument creating a charge;"

"disposition" means any act inter vivos by the proprietor whereby his rights in or over his land, lease or charge are affected, but does not include an agreement to transfer, lease or charge;

Section 37(1) of the RLA states:

"No land, lease or charge registered under this Act shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge."

Section 41(1) of the RLA provides that:

"Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed. Provided that where an instrument is prepared in the registry it shall be deemed to have been presented on the date on which application for its preparation was made to the Registrar."

Section 64(1) of the RLA provides that:

"A proprietor, may, by an instrument in the prescribed form, charge his land or lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a

condition, and the instrument shall contain a special acknowledgement that the charger understands the effect of section 72 of this Act and the acknowledgement shall be signed by the charger or, where the charger is a corporation, by one of the persons attesting the affixation of the common seal.

Section 64(3) of the RLA states that:

"The charge shall be completed by its registration as an incumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.

A charge shall not operate as a transfer but shall have effect as a security only; and a chargee may not require a chargor to give him a power of attorney in addition to a charge for the sole purpose of security."

Section 76 of the RLA states:

"The purchase money received by a chargee who has exercised his power of sale, after discharge of any prior incumbrances to which the sale is not made subject or after payment into Court of a sum sufficient to meet any such prior incumbrances, shall be applied:

- (a) first, in payment of all costs and expenses properly incurred and incidental to the sale or any attempted sale;
- (b) secondly, in accordance with any express provision in the charge (as required by section 64) for disposing of such money and, in the absence of any such express provision, in discharge of the money due to the chargee at the date of the sale; and
- (c) thirdly, in payment of any subsequent charges in the order of their priority."

Section 127(1) of the RLA provides that:

"Any person who:

- (a) *Claims any unregistrable interest whatsoever in land or a lease or a charge; or*
- (b) *Is entitled to a licence; or*

- (c) *Has presented a bankruptcy petition against the proprietor of any registered land, lease or charge; or*
- (d) *Being a Bank or financial institution as defined in section 2 of the Financial Institution (Non Banking) Act has advanced money to the proprietor of land or a lease or charge*

may lodge a Caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and making the entries affecting same."

Section 127(2) of the RLA states:

A caution may either

- (a) *forbid the registration of dispositions and the making of entries altogether; or*
- (b) *forbid the registration of dispositions and the making of entries to the extent therein expressed.*

Section 128(1) of the RLA states:

"The Registrar shall give notice in writing of a Caution to the proprietor whose land, lease or charge is affected by it."

Section 128(2) of the RLA provides that:

"So long as a Caution remains registered, no disposition which is inconsistent with it shall be registered except with the consent of a Cautioner or by order of the Court."

Section 129(1) of the RLA states:

"That a Caution may be withdrawn by the Cautioner or removed by order of the Court".

Section 141(1) of the RLA states:

"Subject to the provisions of this Act and of any written law relating to the limitation of actions, any person suffering damage by reason of:

- (a) *any rectification of the register under this Act; or*
- (b) *any mistake or omission in the register which cannot be rectified under this Act, other than a mistake or omission in a first registration; or*

- (c) any error in a certificate of official search issued by the Registrar or in a copy of or extract from the register or in a copy of or extract from any document or plan, certified under the provisions of this Act,

shall be entitled to be compensated by the Government out of money provided from the Consolidated Fund.

Section 141(2) of the RLA states:

"No compensation shall be payable under this Act to any person who has himself caused or substantially contributed to the damage by his fraud or negligence, or who derives title (otherwise than under a registered disposition made bona fide for valuable consideration) from a person who so caused or substantially contributed to the damage."

Financial Institution (Non Banking) Act

[17] Section 2 of the Financial Institutions (Non Banking) Act (FIA) Cap 169 Laws of Antigua and Barbuda states:

"Business of banking" means the business of receiving deposits of money from the public on current account or deposit account which may be withdrawn on demand, by cheque, draft or order, and generally the undertaking of any business appertaining to the business of commercial banking including the performance of the functions and duties of a trustee, administrator, executor or attorney;

"business of a financial nature" means the collection of funds in the form of deposits, shares, loans, premiums, and the investment of such funds in loans, shares or other securities, and includes the performance of the functions and duties of a trustee, administrator, executor or attorney but does not otherwise include the business of commercial banking;

"commercial bank" or "bank" means any domestic or foreign company licensed under the Banking Act to carry on the business of banking;"

"financial institution" means a company licensed under this Act to carry on business of a financial nature and includes a finance house, a trust company which solicits business of a financial nature from the public, a development bank, a merchant bank, a mortgage bank, a unit trust, a confirming house, and such other

institution as the Minister may from time to time with the approval of Cabinet prescribe."

International Business Corporation Act (IBC) Cap 222 Laws of Antigua and Barbuda

[18] I propose now to refer to Section 227 of the IBC which says:

"No association, partnership, society, body or other group may be formed for the purpose of carrying on any international trade or business from within or outside Antigua and Barbuda unless it is a corporation under this Act.

No natural person may carry on any international banking, trust or insurance business from within Antigua and Barbuda; but this provision does not apply to the provision of services to an international banking, trust or insurance corporation as a director, officer, agent or employee, or as a barrister, solicitor, accountant, investment adviser or by the provision to a corporation of any other prescribed service or activity carried on in Antigua and Barbuda.

A body corporate incorporated outside Antigua and Barbuda and registered under the existing Act on the commencement of this Act whose objects include the carrying on of an international banking, trust or insurance business shall, one year after the commencement of this Act, cease to carry on that business from within Antigua and Barbuda; and section 177 applies mutatis mutandis in respect of that period of one year."

AIB's Submissions

[19] Learned counsel, Dr. Dorsett appearing on behalf of AIB, argued that so long as AIB had registered a Caution as it had, no disposition which is inconsistent with that Caution could have been properly registered. There is no dispute that RBC charges were registered after AIB's Caution. Part VIII of RLA is entitled "Restraints on Disposition". Division 2 of Part VIII (section 127-131) deals with Cautions.

[20] Dr. Dorsett stated that, it is not disputed that AIB had a Caution placed against the property. It is also not disputed that the registration of RBC's charge (a disposition of land) was done without the consent of the cautioner AIB, nor was it done by order of the Court. Indeed, the entry removing the Caution was not signed off by the Registrar. There is no evidence that the removal of the Caution was done in the official manner, as a

consequence the removal was contrary to law. He therefore argued that AIB's Caution therefore remained properly registered.

[21] Dr. Dorsett next submitted that section 128(2) of the RLA is clear and unambiguous. There can be no registration of a subsequent charge once a Caution has been registered. The law lays down a rule which compels certain behaviour and/or actions and prohibits others. The law as plainly stated, he submitted, is that the registration of RBC's charges which were not in accordance with the RLA, "shall be ineffectual" by virtue of section 37 of the Act and by virtue of section 128(1) of the RLA incapable in law of being registered. The registration of RBC's charges, in the absence of the consent of AIB or by order of the Court were actions that in law could not come into being or carry with it any legal force. They were null and void ab initio.

[22] Dr Dorsett further stated that it is not the case that the registration of the RBC's charges was irregular and as such amenable to rectification on the registrar.

[23] Dr Dorsett therefore submitted that the legal position of AIB is that its Caution and the protection that attends to it remains, notwithstanding the allegedly fraudulent removal of its Caution. Sections 128(2) and 129 of the RLA are clear. A Caution may be withdrawn by the Cautioner or removed by order of the Court or the Registrar. In the instant case there was no withdrawal of the Caution by the Cautioner. There was no removal of the Caution by order of the Court. There was a purported removal by instrument #1809/1998. The said instrument lacks the signature of the Registrar.

[24] In England, the law on the effect of a Caution is wholly different from section 128 of the RLA. Section 56(2) of the Land Registration Act 1925 of England is in the following terms:

"A Caution lodged in pursuance of this Act shall not prejudice the claim or title of any person and shall have no effect whatever except as in this Act mentioned."

In support of this contention, Dr Dorsett referred the Court to the judgment of Nourse LJ in **Clark v Chief Land Registrar [1994] 4 ALL ER 96 at 105f** where it is stated that the "the provisions of section 56(2) are "conclusive" and on that basis it was held that "the mere

fact that a Caution had been lodged at the Land Registry to protect an interest in land did not entitle the Cautioner to assert priority for that interest over subsequently registered charges.” However, the RLA is not a line-by-line precept-upon-precept regurgitation or repetition of England’s Land Registration Act 1925. In particular there is no equivalent to section 56(2) of England’s Land Registration Act 1925 in the RLA. Accordingly, Dr Dorsett stated that the decision in **Clark v Chief Land Register** *ibid* is not applicable in Antigua and Barbuda as that would be tantamount to reading into and putting onto the law something that is expressly not there. If the legal draftsman in 1975 wanted to put into the RLA what was in England’s Land Registration Act 1925 doubtless he would have done so.

[25] Next, Dr. Dorsett argued that AIB is entitled to the proceeds of the sale of the property by virtue of a constructive trust. A constructive trust he says arises by operation of law such that a person is held liable as a trustee in circumstances in which the person has knowledge of factors which affect his conscience.

[26] Finally, Dr. Dorsett submitted that both parties have a claim, against the Government of Antigua and Barbuda to be compensated out of the Consolidated Fund pursuant to section 141 of the RLA. The quantum of AIB’s claim against the fund is \$1,225,093.02. However, the proceeds of sale of the property to which AIB is entitled, under the doctrine of constructive trust, the claim of AIB against the government will be limited to the shortfall of \$524,377.11 due to the lack of sufficiency of the escrow account.

RBC's Submissions

[27] Learned counsel Mr. William Archibald submitted that RBC was not required to enquire as to the entitlement of AIB to maintain or have maintained upon the Land Register a Caution in its favour. RBC is bound only by entries actually on the Register at the date it conducts the requisite searches. In accordance with its duty to act prudently, RBC made two Official Searches on the Register on the 5th day of November 1999, and the 27th day of September, 2000, respectively and there was no encumbrances on the register.

[28] Section 64 of the RLA specifically lays down the procedures for registering a Charge on land and that in all respects; RBC complied with the statutory pre-requisites and registered its charges as incumbrances on the subject title. This was done by instruments No. 5565/1999 and No. 4242/2000. The effect of the said Charges were to ensure RBC as a secured creditor with the consequence that it is entitled to enjoy priority over any unsecured creditors such as AIB. In fact, section 41(1) of the RLA specifically states that "Interests appearing on the register shall have priority according to the order in which the instruments which led to their registration were presented to the Registry."

[29] Mr. Archibald stated that it is not contested that at the dates RBC made its searches upon the register there was no Caution in favour of AIB in existence thereon. RBC was therefore free to register its Charges, which it did. The Registration of RBC's Charge was fatal to any Claim AIB could thereafter maintain against RBC's right to the proceeds of sale.

[30] Next, Mr. Archibald stated that when AIB lodged its Caution to the subject property, the Caution did not confer an interest in its favour, but as provided in the RLA, entitled AIB to notice from the Registrar of any proposed dealings with the land. Mr. Archibald referred the Court to **Clark and Another v Chief Land Registrar and Another; Chancery plc. v Ketteringham [1994] ALL ER 96**, at page 97 the English Court of Appeal considered the status of Cautions at length under the equivalent UK Registered Land Act. It was held that:

"On their true construction, sections 54 to 56 of the 1925 Act were clearly intended to describe the nature and effect of Cautions by instituting a procedure... under which a person interested in registered land could ensure that he was warned of any proposed dealing and given an opportunity to assert priority for his interest, and accordingly, the mere fact that a Caution had been lodged at the Land Registry to protect an interest in land did not entitle the Cautioner to assert priority for that interest over subsequently registered charges."

The discretionary grant of an equitable priority over land was held to be, as against the holder of a legal charge, wrongfully contemplated and thus where a memorandum of the dealing had in accordance with existing procedural rules been entered upon the register.

- [31] Further, Mr. Archibald argued that the attempt to elevate the Caution to an interest in the land capable of ousting a registered Charge is to be dismissed as arising from the failure to register a charge. Any allegation of improper removal of AIB's Caution is irrelevant to the position of RBC. This is so as one of the significant impacts of the RLA is to ensure certainty of dealing with the registered proprietor of land. There was nothing on the face of the register which put RBC on notice of any impropriety, mistake or omission on the part of the registry.
- [32] Mr. Archibald therefore maintained that the position of AIB with a registered Caution is no different in law from its position after the removal of the Caution. It remained an unsecured creditor.
- [33] Mr. Archibald referred the Court to Section 140(2) of the RLA (RLA) provides "the Register shall not be rectified so as to affect the title of a proprietor who is in possession or in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the fraud or mistake in consequence of which rectification is sought or caused such omission fraud or mistake or substantially contributed to it by his act, neglect or default." Mr. Archibald therefore said that no allegation of contribution has been or can be made against RBC, so that pursuant to section 64(4) of the RLA its charges took effect as registered against the charged land. This provision reflects the indefeasibility of title concept influencing the Registered Land system. The principle of indefeasibility of title is aptly illustrated in **Frazer v Walker [1976] 1 AC 649**. In this case, a wife had forged her husband's signature on a mortgage. The mortgage was registered and after default in payment, the mortgagee sold the freehold to a purchaser who became registered. It was held that the purchaser was protected by the indefeasibility provisions against the husband's claim. Registration was effective to vest title in the registered proprietor notwithstanding that he acquired his interest under an instrument that was void.
- [34] Mr. Archibald further submitted that any argument that the failure of the registry to give the requisite notice resulted in any subsequent registration on the register being deemed null

and void would also be misconceived. In **Butler v Furlough [1917] 23 CLR 78 (HC)** the Court dismissed an argument suggesting nullity in circumstances where the Registrar had wrongfully treated a caveat as having lapsed and thereby failed to give the requisite notice. It was held that the transferee held free of any interest in respect of which the caveat was lodged, unless he was guilty of fraud.

- [35] Finally, Mr. Archibald submitted that RBC as a secured creditor with power of sale has a superior entitlement to the proceeds of sale in respect of the subject property as against all other creditors including AIB. And as such, should be allowed to apply the said proceeds in accordance with section 76 of the RLA. AIB had a registrable interest which it failed to register and cannot now be heard to contend that its (AIB's) interests rank in priority to RBC's.

Attorney General's Submissions

- [36] Learned Deputy Solicitor General, Mrs. DeFreitas-Rait submitted that Section 127(1)(a) – 127(1) (d) of the RLA provide the legal position in relation to the lodging of Cautions with the Registrar.
- [37] Mrs. DeFreitas-Rait argued that the AIB does fall in within the category of persons as defined in section 127(1)(a) - 127(1)(d) of the RLA, and therefore could not purport to lodge the Caution in pursuance of this section. There is no authority outside of section 127 of the RLA to lodge a Caution.
- [38] Further, Mrs. DeFreitas-Rait stated that section 127(1)(d) requires a bank or financial institution to fall within the definition of section 2 of the FIA in order for it to qualify as a person who may lodge a Caution.
- [39] Elaborating further, Mrs. DeFreitas-Rait submitted that section 2 of the FIA defines "bank" as "any domestic or foreign company lincenced under the Banking Act to carry on the business of bank" it also defines "financial institution" as "a company licensed under this Act to carry on business of a financial nature." It is not in dispute that AIB was licenced

under the IBC. Therefore AIB is not a bank or institution for the purposes of section 127(1) (d) of the RLA and cannot lodge a Caution. For the above reasons, Mrs. DeFreitas-Rait argued that AIB is not a person as defined by section 127 of the RLA and therefore was not authorized to register any Caution on the land in the first place.

[40] Mrs. DeFreitas-Rait next submitted that the Caution #4074/97 that AIB lodged was not validly placed on the register having regard to section 127 of the Registered Land Act (RLA) of the Laws of Antigua and Barbuda.

[41] Mrs. DeFreitas-Rait next submitted that AIB does not qualify under section 127(1)(a) of the RLA to register a Caution, in so far as the subsection provides that such a person to be someone who claims any **unregistrable interest** whatsoever, in land or a lease or a charge. AIB in its Caution dated 28th July 1997 stated the interest claimed by the Cautioner to be “an interest as “charger” in the above Parcel of land having advanced money to the registered Proprietor” Therefore, Mrs. DeFreitas-Rait argued that the interest which AIB claims is clearly registrable as a charge, under section 56 RLA and therefore does not fall within the parameters of section 127(1)(a) which specifically requires the interest to be **unregistrable** in order for a Caution to be lodged with the Registrar.

[42] Another impediment to which Mrs. DeFreitas-Rait adverted the Court’s attention was the statutory declaration made by John Greaves on behalf of AIB in which he stated that:

“AIB claims an interest pursuant to an agreement dated the 30th day of June, 1997 and made between the proprietor, and ourselves whereby a loan was made to the said proprietor using the above-mentioned parcel of land as security.”

This alleged agreement of 30th June, 1997 referred to by Mr. Greaves has not been disclosed by AIB in these proceedings. Mr. DeFreitas-Rait said that in his affidavit Edward Smith does not mention any such agreement but instead appears to rely upon an agreement dated 9th December, 1997 and signed on 19th January, 1998 between the proprietor and AIB as the basis for claiming an interest in the subject land. This latter agreement is exhibited to Mr. Smith’s affidavit. However Mrs. DeFreitas-Rait submitted that this latter agreement could not have created an interest in the land that would have

retroactively justified a Caution six months earlier on 28th July, 1997. The Caution of July 1997 and the terms of the January 1998 agreement may be construed on the face of the documents to reference two different and unrelated transactions and there is no evidence before the Court to link the two. In fact since the document was not signed until 1998 it is possible that AIB's Caution may have already been removed from the register at that time pursuant to Instrument No.1809/98, even though the exact date of such removal is not known.

- [43] Finally, Mrs. DeFreitas submitted, for the Caution to have been properly lodged AIB needed to qualify under section 127(1) (a) RLA, and accordingly AIB must have had an unregistrable interest in the land at the time it placed the Caution, not six months later. However, AIB has failed to provide the Court with evidence of any such an interest in the land at the time the Caution was placed. If the agreement of 30/6/97 referred to in Mr. Greaves' Declaration exists, there is nothing to indicate that it provided AIB with an interest in the subject land or any land. Certainly, the Statutory Declaration of Mr. Greaves in support of the Caution #4074/97 is of no assistance in determining the scope or form of AIB's interest at the time the Caution was lodged. Indeed it is not clear on what basis the Registrar originally accepted and lodged AIB's Caution in July 1997 in the absence of any or any sufficient evidence from AIB of an interest in the subject land. Mrs. DeFreitas-Rait reiterates that AIB had no right in the first instance to lodge the Caution #4074/97.

Court's Analyses

- [44] I have given careful consideration to the written submissions provided by all counsel and have reviewed the facts.
- [45] Let me say immediately and with respect, that Dr. Dorsett's submissions in relation to AIB's Caution must have been premised on the existence of a validly placed caution. Surely, counsel could not have advanced those arguments on the basis that, even if AIB could not have validly placed the Caution it still took priority over the charges registered by RBC or to put another way that even if AIB's caution was registered in violation of the law it still had legal efficacy.

- [46] I am of the considered opinion that the arguments advanced by Dr. Dorsett will only carry any weight, if AIB falls within the category of persons, recognized by section 127(1)(a) – 127(1)(d) of the RLA, who are authorized to lodge a Caution.
- [47] To put another way, I do not accept Dr. Dorsett's submissions, without more, that once AIB had registered the Caution, no disposition which is inconsistent with that Caution could have been properly registered. In order for a cautioner to be able to assert any rights at all it must be proven that the caution was lawfully placed. If the Court were to conclude that the Caution was unlawfully lodged this would be fatal to AIB's position. In this regard, I find Nourse LJ's judgment in **Clark v Chief Land Registrar (1994) 4 All ER 96 at p. 105** very persuasive in which he stated that "the mere fact that a caution had been lodged at the Registry to protect their interest in land did not entitle the Cautioner to assert priority for that interest over subsequently registered charges."
- [48] I am persuaded by Mr. Archibald's submissions and accept that the mere lodging of a Caution, without more, does not confer an interest in favour of the cautioner; but entitles the Cautioner to notice from the Registrar of any proposed dealings with the land. In my considered view, a Caution is not an interest in land and is therefore incapable of ousting a registered charge.
- [49] I also accept Mr. Archibald's assertion that the charges that RBC placed on the title of the property resulted in it being a secure creditor and it is therefore entitled to priority over any unsecured creditor. AIB is an unsecured creditor since at no time did it place a charge on the title to the property.
- [50] However, in my respectful view the crux of the matter (as alluded to earlier) is whether or not AIB's Caution was lawfully registered. In order for AIB's Caution to have been lawfully registered, AIB must fall within the category of persons stated in Section 127(1) of the RLA. I have no doubt that AIB does not fall within either section 127(1)(b) or 127(1)(c) of the RLA in so far as there is no evidence that it was entitled to a licence or that it

presented a bankruptcy petition against Mrs. Athill (as required by the two subsections herein). I therefore agree with Mrs. DeFreitas-Rait's submissions on this aspect of the matter.

- [51] This brings me to address the issue of whether AIB is a "bank" or "financial institution" as defined by section 2 of the FIA and so falls within the category of persons referred to in section 127(1) (d) of the RLA. I accept Mrs. DeFreitas-Rait submissions that AIB is neither licensed under the Banking Act nor licensed under the FIA, it therefore follows that AIB is not a bank or financial institution recognized by section 127(1) (d) of the RLA. To put another way AIB was not incorporated in accordance with Banking Act or the FIA and therefore does not fall within section 127(d).
- [52] Further, I am of the considered opinion, that Mrs. DeFreitas-Rait is correct in stating that AIB is not a person who was entitled to lodge the Caution with the Registrar of Lands.
- [53] In my opinion, the above conclusions are fatal to AIB's position and since the Registrar is obliged to act in accordance with the statute, any acts that are done ultra vires the statute are null and void. I have no doubt the Registrar has no power to act in a manner that is in consistent with the statute, therefore the act of the Registrar in registering the Caution of AIB, when AIB was not a person who the law permitted to so do, amounts to a nullity.
- [54] Additionally, I am of the considered opinion that the interest which AIB claimed against Mrs. Athill was the interest as "chargee" in the property having advanced money to her as stated in Mr. Smith's affidavit. Section 64 of the RLA clearly permits the registration of charges. Accordingly, there lay another impediment to AIB's ability to register the Caution since the interest which AIB claims was registrable under section 64 of the RLA. I am therefore persuaded by the alternative argument advanced by Mrs. DeFreitas-Rait and agree that the Registrar should never have accepted AIB's caution for registration. I reiterate that the Caution was not lawfully registered and in my respectful view the act of registering the Caution in so far as the interest which AIB claimed was registrable, was in law a nullity. In order to be able to registrar a Caution in accordance with Section 127(1)

- (a) of the RLA the interest ought to be unregistrable which was not the case in relation to AIB.
- [55] As if not enough, I am of the considered opinion that in order to be able to lawfully register a Caution, the unregistrable interest which is claimed ought to exist at the time the Caution was registered. Based on the evidence AIB presented, I find that any interest AIB may have had did not exist at the time when the Caution was lodged. In his affidavit Mr. Edward Smith deposed at paragraph 5 that "on 19th January 1998 Mrs. Athill entered into the loan agreement with AIB for US\$280,000.00 plus interest and that the loan was secured by "a charge #4074/97 dated 30th July 1997 lodged in the Registry."
- [56] For all of the above reasons, I state that AIB's lodging of the Caution, in the circumstances was unlawful, null and of no effect.
- [57] As indicated earlier, the Registrar by accepting the Caution acted outside the scope of her powers provided by statute. The end result is that the Caution, even if it were not removed, would not have given the Cautioner any right vis a vis the Government of Antigua and Barbuda or RBC.
- [58] For what it is worth, I also find the arguments advanced by Mr. Archibald very attractive when he opined that AIB's Caution could not take priority over the interest which RBC had in the property. AIB was obliged to secure any interest it had by way of a charge and not to rely on a Caution which in any event was invalid in so far as it infringed section 127(1) of the RLA.
- [59] It seems clear to me that AIB cannot properly claim to have suffered any losses by the removal of the Caution without its consent since it was unlawfully registered in the first place. The court will not allow AIB to benefit from an unlawful act which was a nullity.
- [60] Further, I am not of the view when the Caution was removed that there was any mistake as contemplated by section 141(b) of RLA. In my respectful opinion this subsection

addresses a mistake made on the register and does not speak to an unlawful registration of a Caution. In so far as I have already concluded that AIB's Caution was unlawfully lodged in the first place, I am therefore satisfied that the fact that AIB's Caution was removed in the circumstances not contemplated by the legislation is of no moment.

[61] It seems to me that the justice of the case requires that the proceeds of the sale of the property should go exclusively to RBC. There is no doubt that RBC, exercised its rights as a secured creditor under the charges and, is entitled to the exclusion of AIB to the proceeds thereof.

[62] In all of the circumstances, I do not for one moment accept that AIB has any claim against the Government to be compensated out of the Consolidated Fund for any damage or loss it may have suffered. AIB would not in my view be caught by section 141 of the RLA.

Summary of Conclusions

[63] The following represents a summary of my conclusions:

- (a) AIB's Caution was unlawfully lodged and therefore was a nullity and of no effect.
- (b) RBC charges were lawfully lodged to secure its interest in the property.
- (c) RBC, as a secured creditor and having exercised its rights as chargee under the Order of Sale, is entitled exclusively to the proceeds of sale.
- (d) AIB is not entitled to be compensated out of the Consolidated Fund

[64] Finally, I am not of the view that it is appropriate to award costs in this matter in so far as the issues that were dealt with were of great importance and benefit to all.

Louise Esther Blenman
Resident High Court Judge