

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0046/2010

BETWEEN:

CREDIT SUISSE AG (CAYMAN ISLANDS BRANCH)

Claimant/Applicant

And

ANGUILLA MASONRY PRODUCTS COMPANY LIMITED

First Defendant/Respondent

ANGUILLA TRADING COMPANY LIMITED

Second Defendant/Respondent

GREIG'S TRUCKING AND HEAVY EQUIPMENT RENTAL

Third Defendant/Respondent

PAT-BAN CONSTRUCTION COMPANY LIMITED

Fourth Defendant/Respondent

SUPERIOR INDUSTRIAL EQUIPMENT LIMITED

Fifth Defendant/Respondent

FLAG LUXURY PROPERTIES (ANGUILLA) LLC

Sixth Defendant/Respondent

Appearances:

Mr. John Carrington and Mr. Gerhard Wallbank for the Applicant/Claimant

Mr. Ravi Bahardursingh and Mr. John Wigley for the Sixth Defendant/Respondent

Ms. Eustella Fontaine for the First, Second, Fourth and Fifth

Defendants/Respondents

2010: October 7th
November 30th

DECISION

- [1] **BLENNAN, J:** This is an application for a declaration that the proposed procedure for the sale of the Charged Properties by invitation and advertisement to members of the public satisfies the requirements of section 75 of the Registered Land Act (R 30) Laws of Anguilla.

Background

- [2] The factual circumstances of the matter are quite complex. However, Learned Counsel Mr. Carrington has quite clearly chronicled the relevant background to the matter. This background has quite helpfully been agreed to by the parties.
- [3] The court proposes to state the agreed background as provided by Learned Counsel Mr. Carrington:
- [4] Credit Suisse is the Cayman Islands branch of a Swiss banking institution based in Zurich and is chargee of the properties owned by Flag Luxury Property (Anguilla) LLC by virtue of its first legal charge that has been registered over these properties (Charged Properties).
- [5] Anguilla Masonry Products Company Ltd, Anguilla Trading Company Limited, Greg's Trucking and Heavy Duty Equipment, Pat-Ban Construction Company Ltd and Superior Industrial Equipment Limited are all Anguillan companies that hold registered judgment charges over the Charged Properties and as such are entitled, to that extent and priority of their charges, to recover their debts after all the secured liabilities of Credit Suisse have been satisfied.
- [6] Flag Luxury Property (Anguilla) LLC is the proprietor and chargor of the Charged Properties and the judgment debtor of the first to fifth Defendants.

- [7] Credit Suisse says that the liabilities of Flag, secured by Credit Suisse, stood at US\$152,194,858.32 as at 1 June 2010 and that the amounts outstanding from Flag to the other Defendants and secured by their judgment charges amount to US\$1,189,393.55 plus interest.
- [8] The charge in favour of Credit Suisse was made by Flag to secure a loan of \$140 million made by Credit Suisse in its capacity as administrative agent and collateral agent for several lender parties, to Flag, for the purpose of the development of the Charged Properties as the Temenos Resort.
- [9] The Temenos resort was to comprise a Greg Norman designed 7,063 yard golf course, a resort hotel and spa complex and 100 luxury residential units on 275 acres of land with $\frac{3}{4}$ mile beach frontage. The development of this resort remains incomplete. While the golf course, clubhouse and clubhouse restaurants are complete and, for the most part, operational, the hotel accommodation is incomplete and the pre-sold villas and accommodation units are in various stages of completion.
- [10] During the course of 2008, Flag defaulted on the loan. On 23 October 2008 Credit Suisse issued a notice of accelerated repayment of the loan with which notice Flag did not comply. On 29 January 2010, Credit Suisse caused Mr. William Tacon to be appointed as receiver under the provisions of the Registered Land Act section 72.
- [11] On 19 April 2010, the court entered an Order with the consent of Credit Suisse and Flag in Suit AXAHCV2010/0009 that the sale of the Charged Properties shall only be affected by public auction under the Registered Land Act sections 72 and 75.

- [12] Credit Suisse issued a further notice to Flag to repay the outstanding principal and interest on 1 June 2010. Flag has not complied with this notice to date.
- [13] Credit Suisse therefore seeks to exercise its statutory power of sale over the charged properties by public auction and seeks to have the court sanction the method of sale, which it proposes, as a public auction. It asks the court to declare that the proposed sale satisfies sections 75 of the Registered Land Act.
- [14] Flag opposes the application on the basis that the entire procedure violates section 75 of the Registered Land Act insofar as it is not a public auction but rather it amounts to no more than a sale by private treaty.
- [15] Initially, Superior Industrial Equipment Limited, Pat-Ban Construction and Anguilla Masonry Company opposed the application on the basis that the proposed method of sale could not amount to a public auction. However, during the hearing of the application they seemed to have resiled from that position and took the position that insofar as Credit Suisse has modified the proposed sale, they were no longer opposing Credit Suisse's application.
- [16] Anguilla Trading Company Ltd opposes the declaration that is sought. Anguilla Trading Company has filed an affidavit, deposed to by its director Mr. Calvert Fleming in which it is stated that it has a registered Judgment charge on Flag's properties for the sum of US\$23,406.88 plus interest. The basis of the opposition is the lack of transparency of the proposed sale by auction. It no longer pursues its opposition.
- [17] However, Flag persists in its opposition. It says that the procedure which Credit Suisse commenced is incurably bad and can never culminate in a public auction. Flag implores the court not to sanction the proposed method of sale.

Issue

- [18] The issue that arises for the court to resolve is whether the court should grant the declaration sought namely:

“that the proposed procedure for the sale of the Charged Properties by invitation and advertisement to members of public, followed by assessment of the financial viability and developmental expertise of potential buyers who have shown interest in purchasing the Charged Properties by property experienced brokers and culminating in a final bidding process of qualified potential buyers (if more than one), coupled with the procedure as stated in the affidavit of Jeff Woolson’s satisfies the requirement of section 75 of the Registered Land Act that the sale by public auction subject to such conditions of sale at the chargor thinks fit.”

Law

- [19] The procedure laid down in section 72 of the Registered Land Act states:
- Where a chargor is in default for a period exceeding a month, the chargee serves a notice of default;
 - If there is a default in compliance with that notice that continues for a further three months, the chargee may either sell the property or appoint a receiver;
 - If a receiver has been appointed, the chargee may serve a further notice for remedy of the default and if this is not complied with within three months, the chargee may exercise its powers of sale.

[20] Section 75, of the Registered Land Act with respect to the exercise of the power of sale, contains the following provisions that are material to these proceedings:

- The chargee in exercising its power of sale shall act in good faith and have regard to the interests of the chargor;
- The chargee may sell the property himself or concur with other persons in selling the Charged Properties;
- The properties may be sold together or in lots;
- The properties may be sold by public auction subject to such reserve price or other conditions of sale as the charge thinks fit;
- The properties may be sold for a sum payable in one amount or by installments;
- The charge may purchase the properties at the auction with power to re-sell them by public auction.

Evidence

[21] Credit Suisse's application is supported by an affidavit filed by Megan Kane. This affidavit shows the procedure that was initially proposed and utilised. Subsequent to her affidavit and in reply to affidavits in opposition, Mr. Jeff Woolson filed an affidavit on behalf of Credit Suisse. Mr. Jeff Woolson, in his Affidavit in Reply, filed on behalf of Credit Suisse gives additional detail of the proposed procedure of sale for which Credit Suisse is seeking to obtain the court's approval.

[22] It bears stating that Mr. Jeff Woolson is the Managing Director of one of the brokers who has been contracted by Credit Suisse. He speaks about the

procedure which Credit Suisse, as chargee, proposes to implement in seeking to sell the charged properties. Mr. Woolson provides details of his experience in the sale of resorts and says that in determining the procedure that should be utilized the following realities have to be taken into account, among others:

- (a) The most likely purchaser for this type of development would be an international corporation, due to the size, shape and status and partial completion of the project which would require approvals of the Government of Anguilla;
- (b) The fact that the existing market for this type of development is still in the initial stages of recovery from depression, arising from lack of financing;
- (c) The need for Credit Suisse to have finality of a sale where interest on its debt is accruing without any reasonable expectation that the debt will be repaid;
- (d) The need to have regard for the interests of the subsequent charges and chargors to secure the fair market value of the property.

[23] Mr. Woolson says the proposed procedure is as designed by his company and Smiths Grove Overseas Limited. Mr. Woolson, further states that the rationale of the process, therefore, is to seek to ensure that at the point of bidding there are persons who are capable of bidding at a fair market value of the property and who are capable of completing the sale. More than likely the persons who are likely to be capable of purchasing the property may require an alien licence. Due to the importance of this project to the economy of Anguilla, and based on communications by the Government to Credit Suisse, the Government of Anguilla would only be prepared to grant a licence to persons who have shown capability in

not only completing the development, but to do so in a manner that the Government considers to be in the best interests of Anguilla.

[24] Further, Mr. Woolson states as follows:

"This process was not exclusionary, as there was no limit to the number of persons who could participate in the process, as can be seen from the wide initial advertisements of the sale of property. Equally there is nothing exclusionary about requiring interested parties to sign a confidentiality agreement or to invite them to conduct due diligence concerning the purchase of the property. This is something that from my experience is very common in the market and expected of any purchaser who intends to acquire a property of this type. As of the date of this affidavit 89 persons have obtained access to the data room."

[25] Mr. Woolsons further states as follows:

"I note that criticism has been made of the fact that parties were to meet some initial criteria before signing the confidentiality agreement. In my experience, high profile projects like Temenos attract a lot of interested people that have no interest in bidding on the property but still would like to review all the confidential information. In addition to allowing these non-buyers to have access to confidential information, they detract from the real, qualified bidders by using up human resources of my team with unnecessary pursuits and questions when more time should be dedicated to the qualified prospects. Therefore, it is typical that some level of scrutiny needs to be applied to all prospects. In the interest of being inclusionary, the criteria my team used to scrutinize the prospects was extremely liberal and dealt specifically with credibility. If a prospect could demonstrate that in the past they owned, managed developed or assisted in any capacity a real estate project of size or type similar to Temenos,

they were considered qualified. Using a liberal interpretation of qualified, most prospects easily establish credibility through their websites alone. Others were quickly qualified through questioning and follow up phone calls. Only five parties have been excluded as at the date of this affidavit, their exclusion being either because they declined to sign a Confidentiality Agreement or, in one case, because the applicant gave false information and was therefore judged to be acting in bad faith."

[26] Next, Mr. Woolson states:

"that the culmination of the sale process in a competitive bidding process will include advertising the property further, both in The Anguillian and in the Wall Street Journal, with the advertisements specifically indicating that the property is being sold by public auction and indicating the date and place for the competitive bidding. This advertisement will also indicate that we have prepared Particulars of Sale and Conditions of Sale, which will be made available to any person who may be interested in bidding on the property. Interested parties will be able to contact us with any queries concerning the sale. The auctioneer, when appointed, may, prior to their publication, make such modifications to these draft Conditions of Sale as he may see fit, within the parameters of normal auction practice."

[27] Mr. Woolson says that any person who complies with the Conditions of Sale will be entitled, upon providing to the auctioneer an undoubted letter of credit or cash for the required non-refundable deposit, payable within two working days after the close of bidding and forfeitable at the sole discretion of Credit Suisse chargee in the event of failure to complete the purchase, to bid at the auction, which will be conducted in Anguilla by a qualified Auctioneer on the set date.

[28] Mr. Woolson opines that *"the updated explanation of the original process should satisfy all the concerns raised by the defendants, as the bidding will be among the parties that we have identified as being capable of offering a price that is the true market value of the property as well as any other member of the public that may be interested in acquiring the property and can demonstrate his or its ability to pay the required deposit"*.

Flag's Evidence

[29] Mr. Paul Kanavos, the president of the Managing Member of Flag has sworn to an affidavit on its behalf. He objects to the procedure proposed by Credit Suisse on several grounds. His main objections include that the proposed procedure of the auction does not conform to the dictates or requirements of the Registered Land Act, insofar as the auction would not be public. He says the details provided in the Kane affidavit clearly shows that the procedure that Credit Suisse has embarked upon is not a public auction.

[30] Mr. Kanavos complains that the proposed procedure is not transparent. He says that insofar as the initial procedure was clothed in privacy, and required a confidentiality agreement to be signed by interested persons, this would militate against the procedure being a public auction. This is so even if steps are taken to open the bidding process, at this stage, to members of the public, as is now suggested in the Woolson's affidavit.

[31] One of the hallmarks of a public auction is that the entire process is conducted in a fully transparent manner. Mr. Kanavos questions the revised proposed procedure of the sale and complains that the requisite safeguards have not been built into them.

[32] Mr. Kanavos, on behalf of Flag, insists that the aspect of the proposed procedure which required prequalification of bidders is exclusionary. He also complains of the

lawfulness of considering the interest of the Government of Anguilla within the sale process. Further, he complains that the proposed procedure as formulated on behalf of Credit Suisse's in which qualified bidders are required to outline conditions of purchase and confirmation of funding violates section 75 of the Registered Land Act.

- [33] He also takes issue with the proposed power that Credit Suisse has to pre-select the qualified bidders. He also questions the ability of the broker to perform the functions which they have undertaken lawfully, insofar as they are not registered auctioneers in accordance with the Laws of Anguilla.

Credit Suisse's Submissions

- [34] Learned Counsel Mr. John Carrington stated there is no statutory definition of the term public auction and there is surprisingly little authority at common law on what constitutes an auction. This concept appears to be one of those that are easily recognizable once seen but difficult to describe. He referred the court to the dictionary meaning of public auction and the learning in Halsbury's Laws on England on public auction.
- [35] The authorities are clearer, however, on the circumstances that must surround the sale by public auction. In *Caribbean Banking Corporation v. Alpheus Jacob* CA 10 of 2004 (Antigua), the court of Appeal reiterated that the chargee has a right to act in his own interest in determining the timing of a sale and where his interest conflicts with that of the chargor, he can give preference to his own interests once he has had regard to the interest of the chargor. His duty is to act in good faith and he owes a duty of care to the subsequent chargees and the chargor to obtain the true market value of the property at the time of the sale. In that case, the duty was held to extend to requiring sufficient advertisement of the sale.

- [36] In *Cuckmere Brick Co v. Mutual Finance Ltd* [1971] 2 WLR 1207 the English Court of Appeal held that the duty extended to ensuring that the property and its attributes were properly described for the purposes of the sale and at page 1219G observed that while the mortgagor is vitally affected by the result of the sale, its preparation and conduct is left entirely in the hands of the mortgagee. At page 1222A the court also observed that the sale must be a genuine sale at a price honestly arrived at.
- [37] The onus of proof is on the chargor to demonstrate that there has been a breach of duty on the part of the chargee in effecting a sale of Charged Property: see *Haddington Island Quarry Company Limited v. Huson* [1911] AC 722, 727-728
- [38] In *Newport Farms Ltd v. Damesh Holdings* [2003] UKPC 54, the Privy Council held at para 24 that in determining whether reasonable care was taken, the matter should be looked at in the round and viewed in practical commercial terms.
- [39] Learned Counsel Mr. Carrington reminded the court that the affidavit in opposition filed on behalf of Flag attacks in particular certain aspects of the procedure, namely:

The size and content of the initial advertisements; the need for pre-qualification of bidders and whether this has an exclusionary effect, i.e. limits the members of the public who may bid; the relevance of considering the interests of the Government of Anguilla within the sale process; the requirement that qualified bidders should proffer outline conditions of purchase and confirmation of funding; the confidentiality agreement that the brokers require before access is given to certain information; the nature of the final bidding process.

[40] The affidavit of Jeff Woolson in reply addresses in greater detail the procedure which Credit Suisse has adopted for the sale of the charged properties and the rationale for the qualification criteria. This affidavit also demonstrates that Credit Suisse has modified its original process to take into account the concerns expressed by Flag in their original affidavits.

[41] Learned Counsel Mr. Carrington argued that the sale process will culminate in a competitive bidding process:

There will be a further round of advertisements which will indicate that the property is being sold by public auction and the date of such auction. The brokers will set and make available to the public the terms of bidding, particulars of sale and conditions of sale of the property. The brokers will respond to any reasonable requests for further information by members of the public including requests to visit the property. The competitive bidding on the property will take place at the date and place advertised in the second round of advertisements and will be open to all members of the public as well as the qualified bidders.

[42] Mr. Carrington submitted that the wide advertisement of the sale to the public at large and the fact that it is open to any member of the public to seek qualification and/or subsequently bid on the properties satisfies the element of publicity under the Act. The conclusion of the sale by a competitive bidding process satisfies the requirement of competitive bidding that is contemplated by all definitions of an auction. Section 75 expressly permits a chargee to impose conditions on the sale. The requirements of pre-approval by government and the ability to complete the project are not unreasonable in the circumstances.

[43] The court should note that while the authorities are clear that the chargee can effect the sale in its own interest while having regard to the interests of subsequent chargees and the chargor, there is no prohibition under the statute against the

chargee having regard to interests other than its own and that of the chargor especially, where, as in this case, there is some common interest in the Government and the chargee to ensure that the process results in a final sale of the property, i.e. to a person to whom the Government is prepared to grant a license, if necessary.

- [44] In **Newport Farms** the Privy Council opined that the circumstances of the sale should be looked at in the round to determine whether the duty of care had been breached. Learned Counsel Mr. Carrington submitted that, similarly, in determining whether to approve the process, the court should look at the matter in the round and court should conclude that this is an open and fair and competitive process in the light of the nature of the property sold and thereby satisfies the statutory requirement of a public auction.
- [45] Mr. Carrington said that the chargor does not appear to appreciate that all matters concerning the preparation, conduct and timing of the sale are determined by the chargee solely. There is therefore no obligation on the chargee to inform the chargor, or indeed this court, of the date when it will make the further advertisements, the number of advertisements or the date of the sale.
- [46] Equally, the chargor does not appear to understand or appreciate that a confidentiality agreement is not exclusionary but merely obliges the recipient of information not to disclose it to third parties and that further there is no obligation, and indeed no legal authority has been cited otherwise, on the chargee to allow access to information that it has created.
- [47] The chargor further appears not to consider the provisions of the RLA section 75, which permits the chargee to impose such conditions of sale as the chargee, thinks fit. There is therefore no obligation on the chargee to seek the approval of the court or even to consult with the charger with respect to these conditions and indeed neither is sought in these proceedings.

[48] Mr. Carrington urged the court to make the declaration sought in the fixed claim form that the process described above satisfies the requirement under the Registered Land Act section 75 that the Charged Properties be sold by public auction subject to such conditions of sale as the chargee thinks fit.

Flag's Submissions

[49] Learned Counsel Mr. Bahadursingh said that the procedure described in the Affidavit of Megan Kane clearly intended that only persons considered qualified by Credit Suisse (or its agents) would be invited to bid at the auction of the Charged Properties. All other members of the public who maintained an interest in the purchase of the Charged Properties would be excluded from the said auction. This conclusion is clearly enunciated at various points in the Kane Affidavit.

[50] Mr. Bahadursingh referred the court to the meaning of public auction. Osborn's Concise Law Dictionary (Sweet & Maxwell, 9th Ed.) defines the word auction as follows:

A process whereby a person, the auctioneer, sells or offers for sale goods or land where a person bids against competition to purchase. Unless there is a reserve price which is not met, the purchaser will generally be the highest bidder.

[51] Learned Counsel Mr. Bahadursingh stated that it is clear that the requirement that Charged Properties be sold by public auction under the provisions of the Registered Land Act (c.R30) – in the ordinary meaning of the term requires that Charged Properties be put before an auctioneer for open and competitive sale, to the highest bidder which actual occasion of the auction is to be accessible to all persons.

[52] The term public may be contrasted with private auctions. There is no authoritative definition of public or private auction, but public probably denotes that the general public has a right of attendance and participation as opposed to private auctions where specific persons only are invited to attend and participate.

[53] Halsbury's Laws of England 4th Ed Vol 2 Para 901 defines an auction as "*a manner of selling property by bids, usually to the highest bidder, by public competition*". The Concise Oxford Dictionary defines an auction as "*a sale of goods usually in public in which articles are sold to the highest bidder*". Black's Law Dictionary 5th Ed has a similar definition: "*an auction is a public sale of property to the highest bidder...*" The Encyclopedia of Forms & Precedents 5th Ed Vol 38 alludes to the fact that an auction is public where anyone may attend and bid [para. 203] and an auction differs from a sale of land by private treaty in that the Vendor sets all the terms of sale which are not subject to negotiation [para 207].

Mr. Bahadursingh said that it would therefore appear that it is common ground between the parties that any procedure whereby members of the public are deliberately excluded from attending and participating (bidding in an auction is not capable of constituting a public auction. He posited that the procedure described in the Kane Affidavit clearly involved the exclusion of interested members of the public from attending and participating (bidding) at the auction of the Charged Properties.

[54] Next, Mr. Bahadursingh stated that the information pertaining to the Charged Properties (Information) was held by Credit Suisse (or its agents) in a secure data room. Members of the public who may have been interested in bidding for the Charged Properties were refused access to this data room unless and until such members of the public-

- a. Satisfied certain initial criteria purportedly formulated by Credit Suisse (or its agents); and
- b. Agreed to sign a Confidentiality Agreement.

- [55] Mr. Bahadursingh Learned Counsel stated that insofar as Credit Suisse (or its agents) maintained no right in law to require interested parties to satisfy some initial criteria or sign a Confidentiality Agreement, such refusal of access to Information to that section of the interested public – which was unable to satisfy the initial criteria or unwilling to sign the Confidentiality Agreement – was clearly incompatible with the conduct of the public auction as required by the Registered Land Act (c.R30).
- [56] Mr. Bahadursingh said that interested members of the public, who were ultimately granted access to the Information, were then required to submit initial proposals to Credit Suisse (or its agents). Insofar as Credit Suisse (or its agents) maintained no right in law to require interested members of the public to submit initial proposals, the resultant exclusion of such section of the public which refused to submit initial proposals – from attending and participating at the auction – further disqualifies the procedure described in the Kane Affidavit from being characterized as a public auction.
- [57] It is incontestable that the procedure described in the Kane Affidavit expressly excluded sections of the public – which had maintained an interest in the purchase of the Charged Properties – by reason of such persons' –
- Failure to satisfy some initial criteria, refusal to sign the Confidentiality Agreement, refusal to submit an initial proposal, failure to be selected in Stage 1 of the selection process and failure to be selected in Stage 2 of the selection process.

- [58] Mr. Bahadursingh Learned Counsel said that the proposed procedure described by Credit Suisse in the Kane Affidavit was clearly incapable of constituting a public auction pursuant to section 75 of the RLA. Mr. Bahadursingh advocated that any rationale for the procedure described in the Kane Affidavit is simply irrelevant and incapable of displacing the statutory requirement that a chargee's sale of Charged Property be by way of public auction.
- [59] Mr. Bahadursingh said that in any event – and without prejudice to the dispositive effect foregoing – the central characteristic of a public auction is the right of attendance by interested members of the public to bid competitively for the Charged Properties. There is no legal basis for a chargee to purport to restrict an auction to persons capable of bidding a price which we consider fair..." and, conversely, exclude any other persons thereby. The chargee's principle method of ensuring the property is sold for the true market value is to set a reserve price – being the proper minimum price for which the Charged Property may be sold at public auction.
- [60] Further, and without prejudice to the dispositive effect of the foregoing – there is no legal basis for a charge to identify qualified parties on the basis of what it determines would satisfy the Government of Anguilla or, indeed, at all. Mr. Bahadursingh said that it is solely for the Government of Anguilla to make its own determination as to whether or not a successful (highest) bidder will be granted an Alien Landholding Licence based, *inter alia*, on any proposals for *any* use of the relevant property which the Government of Anguilla may deem appropriate.
- [61] Mr. Bahadursingh maintained that the withholding of Information, from interested members of the public who are unwilling to execute a Confidentiality Agreement, has no basis in law and constructively excludes such members of the public from attending and participating at the relevant auction insofar as such excluded member of the public is unlikely to dedicate the substantial resources necessary to complete proper due diligence and to make a serious bid for the property...

(including) a substantial deposit and possible forfeiture thereof. See also *Pendlebury v Colonial Life Assurance Society Ltd* (supra).

- [62] As a result of the enactment of the procedure described in the Kane Affidavit, which commenced in April 2010, sections of the public which became interested in the purchase of the charged properties – by reason of the advertisements published or emails circulated by Credit Suisse (or its agents) – were irreversibly excluded from attendance and participation of the auction of the Charged Properties. By reason of the withholding of Information from sections of the public which were not willing to execute a Confidentiality Agreement, it is expressly admitted by Credit Suisse (or its agents) that interested members of the public were not granted access to such information. Consequently, such members of the public would have, thereafter irrevocably ceased to monitor the procedure implemented by Credit Suisse and, ultimately, dismissed the possibility of attending and participating at the auction of the Charged Properties.
- [63] Even if the procedure leading to the sale of the Charged Properties by auction – as commenced in April 2010 – was now revised to allow attendance at the auction of any and all interested members of the public, the resultant auction would *still* be incapable of constituting a public auction. Restated, if members of the public have been wrongfully led to believe that they would not be able to attend and participate at the auction of the Charged Properties (or indeed that there was no auction in the offing) and consequently ceased and active pursuit of the purchase of the properties or monitoring thereof, any auction subsequently effected would – in reality – be to their wrongful exclusion and could not therefore be characterized as a public auction.
- [64] Mr. Bahadursingh Learned Counsel stated that any attempt to revise the procedure commenced in April 2010 – in such a manner so as to lead to the constitution of a public auction – is doomed to failure unless and until such revision addresses, *inter alia*, the following critical elements –

- a. Re-Advertisement of the Charged Properties;
- b. Such re-advertisement to clearly state that the Charged Properties are to be sold by public auction; and
- c. Sufficient time allowed, subsequent to the re-advertisement, so as to allow any previously excluded (or misled persons) to (i) review all Information pertaining to the Charged Properties and (ii) liaise with the Government of Anguilla to the extent desired. In light of the time afforded to the qualified candidates to accomplish these matters, it would be necessary to allow a minimum period of 6 months – from the date of first publication of the re-advertisements to the date of the auction – so as to allow the general public to be on equal footing of persons previously selected by Credit Suisse (or its agents) since April 2010.

Although the adoption of these critical elements may not, in itself, be sufficient to constitute a public auction, any procedure not containing these critical elements would result in the previously qualified bidders obtaining an unwarranted and deliberately induced preference thereby disqualifying any revised procedure from leading to the genuine constitution of a public auction. Mr. Bahadursingh stated that a careful review of the revised procedure reveals certain critical defects, to wit,-

- (a) No information is disclosed as to when the further advertisements will be published. No information is disclosed as to how many advertisements will be published and the rate of such publication (e.g. bi-weekly). (Insofar as the previous advertisements published by Credit Suisse did not inform the public that the sale of the Charged Properties was to be by public auction, the new advertisements must

be treated as the first advertisements for the sale of the Charged Properties by public auction).

- (b) No information is disclosed as to period for which the new advertisements will run prior to the date fixed for auction. Credit Suisse (or its agents) does not, unequivocally, confirm that all interested members of the public will be permitted access to the data room – in order to review Information pertaining to the Charged Properties – without the need to (i) satisfy any initial criteria or (ii) execute any Confidentiality Agreement. In truth and in fact, Credit Suisse appears to be deliberately non-committal in this regard, preferring to simply state that (i) interested parties will be able to contact us.... See Paragraph 14 of Woolson Affidavit. See also paragraph 34 of CS Written Submissions.

- (c) No or no full and final Terms of Bidding, Particulars of Sale or Conditions of Sale have been presented to this court for consideration. Indeed, Credit Suisse (or its agents) expressly seeks to reserve the right for the auctioneer to make such modifications as he/she may see fit. It is clearly inappropriate for Credit Suisse to seek the approval of this court for a procedure or revised procedure without providing finalized details of such procedure/revised procedure.

[65] Moreover, a review of the revised procedure reveals certain new elements which are themselves wholly inconsistent with the conduct of a public auction.

[66] Mr. Bahadursingh submitted that the Order sought by Credit Suisse – in terms of the Declaration contained in the Fixed Date Claim Form – is incapable of being approved by this court insofar as the Declaration purports to seek the approval of a procedure which includes:

...assessment of the financial viability and development expertise of potential buyers...culminate in a final bidding process of qualified potential buyers...

- [67] The clear non-compliance with any procedure which includes the aforesaid elements, with the conduct of a public auction appears to have been accepted by Credit Suisse itself as evidenced by the changes set out in the revised procedure proposed in the Woolson Affidavit.
- [68] Mr. Bahadursingh stated that Credit Suisse's application for an Order in the terms of the Declaration set forth in the Fixed Date Claim Form be dismissed in its entirety.
- [69] Mr. Bahadursingh submitted that any approval by the court of the procedure or even the revised procedure – in the form presented to the court – would serve to wholly undermine the clear provision and intent of section 75 of the Registered Land Act (c.R30) and would, accordingly, expose chargees, to such abuses by chargees which the Legislature in its wisdom saw fit to safeguard against.

Pat-Ban Construction, Superior Industrial Equipment, Anguilla Masonry and Anguilla Trading Submissions

- [70] Learned Counsel Ms. Eustella Fontaine indicated that in view of the modified position as stated in Jeff Woolson's affidavit, the above named parties were no longer maintaining their objection to Credit Suisse being granted the declaration that it has sought. Ms. Fontaine further stated that the modified position, in relation to the proposed sale of the Charged Properties would satisfy the original concerns that Pat-Ban, Anguilla Masonry, Anguilla Trading and Superior Industrial Equipment had. Accordingly, during the hearing they no longer resisted Credit Suisse's application.

[71] They however maintained that they were entitled to receive their costs insofar as they were forced to retain Counsel and file affidavits in opposition to Credit Suisse's application. They sought costs in the sum of US\$5000.00 which were not opposed by Credit Suisse.

Court's Analysis and Conclusions

[72] The court has perused the pleadings and the affidavits that are filed in the matter. In addition, the court has given deliberate consideration to the very lucid submissions of all Learned Counsel.

[73] It is noteworthy that even though at first blush, the matter appeared to be quite simple, as the arguments unfolded, the court became acutely aware that the application is one that should be given very careful attention, particularly in view of the apparent paucity of judicial precedent in this area and the significance of this application.

[74] It bears stating that the simple question for the court to determine is whether the procedure as stated in the Kane affidavit which culminates in the process as provided in the Woolson's affidavit satisfies the requirement of section 75 of the Registered Land Act chapter R30. To put the matter shortly, the issue is whether the entire procedure can properly be held to be a public auction as required by section 75.

[75] This begs the question: what is a public auction as provided by section 75. There is common ground that there is no statutory definition of public auction neither does it appear that there is any case law which provides guidance as to the essential pre requisites of a public auction. In any event, no such authority was provided to the court.

[76] However, the parties quite helpfully referred the court to the definition of auction as stated in Halsbury's Laws of England 4th Ed Vol. para 901 which defines an auction as a manner of selling or letting property by bids, usually to the highest bidder by public competition. The concise Oxford Dictionary defines an auction as "a sale of goods usually in public in which articles are sold to the highest. Merriam-Webster On line Dictionary defines auction as *"a sale of property to highest bidder"*. The above review is necessary in view of section 75 of the Registered Land Act.

Section 75 (1) Registered Land provides:

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

[77] There is some help further provided in Halsbury's Laws of England, (Fifth Ed. Reissue 2008) at paragraph 201 footnote states:

"The term "public" may be contrasted with "private" auctions. There is no authoritative definition of public or private auction, but public probably denotes that the general public has a right of attendance and participation as opposed to private auction where specific person only are invited.

[78] It bears stating that Mr. Paul Kanavaros also takes issue with the fact that Credit Suisse has already commenced a process for the sale of the property. He says that process cannot be said to satisfy the statutory requirement that it be by way of public auction. The process as commenced is inconsistent with a public auction.

He says that the proposed continuation of the procedure leading up to the auction, as suggested in Mr. Woolson's affidavit does not constitute a sale by public auction. He takes issue with the requirement that interested persons subscribe to a confidentiality agreement. Mr. Kanavaros does not agree that the complexity and role of government create any or any insurmountable impediments to the sale of the Charged Properties by public auction. He says that any attempt by Credit Suisse to exclude any prospective bidders at the public auction or restrict information to prospective bidders is wholly inconsistent with the conduct or concept of public auction which by definition must be open to members of the public at the bidding stage.

[79] The court in seeking to determine the issue at Bar, is mindful of the fact that the legislature in requiring that the sale be by public auction sought to ensure that certain safeguards were afforded to the Chargor and to any other persons who have rights that are later in time to the Chargee's. Chief among these safeguards is the need for transparency which would serve to ensure, among other things, that the highest possible sale price would be obtained on the sale of the Charged Property. It is important that the reserve price that is set by the Chargee represents the fair market value of the Charged Property.

[80] The court is of the view that insofar as there is no statutory or common law guidance in Anguilla as to the nature of a public auction it is left to the court to examine the proposed procedure in order to ascertain whether it is transparent, just, fair and likely to yield the best market price in a manner contemplated stated by section 75 of the Registered Land Act. This would of necessity include getting the best price which should have at its minimum obtaining the fair market price for the Charged Property.

[81] The court has no doubt that one of the main reason that the legislature, in its wisdom, provided for the sale of the Charged Property by public auction is to

ensure that the sale is conducted in an open and transparent manner and to ensure that the highest price is obtained by way of open competition.

- [82] This is a commercial transaction. The court in making its ultimate determination is mindful of the undisputed facts that the Chargee is seeking to recover very substantial sums of money that it loaned to Flag namely approximately US\$140,000,000. The court takes cognizance of the nature of the Charged Properties and acknowledge the state of completeness or lack of completeness in which some of the buildings are. Also, of interest is the extensive nature of the Charged Property. It is important that the court pays regard to the expertise of Mr. Woolson in conducting sales of similar properties.
- [83] This sale the court opines would not be like the typical sale of a house or a few acres of land and the court accepts the evidence of Mr. Woolson who has experience in sales of similar nature. Also, noteworthy is the state of the economy, which the court can properly take judicial notice.
- [84] The court was hopeful that at the very least, Flag would have accepted the court's invitation to proffer suggested conditions for inclusion in any order the court was likely to make; however Flag did not find it convenient to accept the court's invitation. Be that as it may, the court cannot resile from its responsibility to seek to do justice between the parties and to determine whether the proposed procedures satisfies section 75 of the Registered Land Act.
- [85] The court finds very instructive the judicial pronouncements made in *Pendlebury v Colonial Life Assurance Society Ltd* [1912] HC of Australia.

"In my opinion the object of sale by auction is to secure a fair price for the property offered by means of competition between probable purchasers and the object of giving the public notice of a sale by auction, whether by advertise any bell man, posters or otherwise is to bring the subject of the

sale of the notice of such probable purchasers, and so as to induce such competition as will be likely to secure a fair price."

[86] The court reiterates that the procedure that is utilized by Credit Suisse or its agents must be one that is designed, among other things to ensure competitive bidding among members of the public with the ultimate purpose being achieving a fair market price and selling the Charged Properties to the highest bidder. In seeking to come to a conclusion the court has also reviewed Regulation 17(4) of the Auctioneer Rules of Kenya which was very helpfully brought to the court's attention by Mr. Bahadursingh. It provides that *"the highest bidder shall be the purchaser subject to compliance with the conditions of sale."* This regulation is of interest to the court even though there is no similar regulation in Anguilla.

[87] Perhaps it is appropriate to state that the proposed procedure as gleaned from Mr. Woolson's affidavit is as follows:

- (a) Credit Suisse (or its agents) will advertise the Charged Properties again;
- (b) The new advertisements will appear in the Wall Street Journal and the Anguillian.
- (c) The new advertisements will specifically indicate that the Charged Properties will be sold by public auction.
- (d) The new advertisements will specifically indicate the date and place of the auction.
- (e) Bidding at the auction will be competitive.

- (f) Particulars and Conditions of Sale will be prepared by Credit Suisse (or its agents).
- (g) Particulars of Sale and Conditions of Sale will be made available to any persons who may be interested in bidding.
- (h) Interested parties may contact Credit Suisse (or its agents) with regard to any queries concerning the sale.
- (i) The auctioneer may prior to publication make such modification to the Conditions of Sale as he sees fit.

[88] While the court has some sympathy for the Flag's view, it is a matter of law that matters that concern the preparation, conduct and timing of the sale are determined by the Chargee only. However, insofar as the Chargee is seeking to obtain the courts approval. The court is not of the view that it is precluded from examining the proposed procedure (not minutely) in order to ascertain whether it meets the threshold of openness, fairness and competition that is consistent with a public auction.

[89] The Chargee cannot reprobate and approbate. It cannot seek the court's approval of its proposed procedure while at the same time saying to the court that it is debarred from stipulating the conditions upon which the court is prepared to accept that the proposed sale meets the required threshold of section 75 of the Registered Land Act. The court accepts Learned Counsel Mr. Bahadursingh submissions that sale by public auction in accordance with section 75 of the Registered Land Act requires that the Charged Properties be put on sale in a process that is open and competitive to the highest bidder, and that the actual auction should be accessible to all persons.

- [90] In *Caribbean Banking Corporation v Alpheus Jacob* *ibid* Civil Appeal No 10 of 2004 Antigua, the Court of Appeal was clear that the duty of the Chargee is a duty to act in good faith and he owes a duty of care to subsequent Chargees and the Chargor to obtain the true market value of the property at the time of the sale. In that case, the auction was held to extend to requiring sufficient advertisement of sale.
- [91] The court is of the considered opinion that the procedure as stated in the Kane Affidavit has been built upon by that suggested in the Woolson affidavit. That being so, of necessity an examination has to be undertaken of the entire procedure as stated in the Kane and Woolson's affidavit in order to determine whether or not it satisfies section 75 of the Registered Land Act.
- [92] In order to achieve the fairness and transparency contemplated by section 75 of the Registered Land Act the court is of the view that the information in the secure data room that Credit Suisse provided to the persons, who were pre-selected, should similarly be made available to any person who responds to the advertisement and indicates an interest in purchasing the Charged Properties.
- [93] The court is of the considered opinion that prospective bidders should be provided with the same information that was provided to those persons who signed the Confidentiality Agreement and were able to access the secure data base. In addition, the court is of the considered view that interested persons should be provided with the opportunity to carry out site inspections before having to bid on the Charged Properties, should they desire.
- [94] Looking at the matter in the round, the court is prepared to accede to Credit Suisse's request for the declarations upon Credit Suisse's satisfaction of the two conditions referred to earlier. It is expected that all members of the public must be advised by way of advertisement of the public auction. This must be done in a manner that ensures the fullest competition and parity between bidders, Credit

Suisse is obliged to make the confidentiality information available to members of the public who indicate an interest in bidding for the sale of the Charged Properties.

- [95] While it is no part of the court's function to stipulate the period that should elapse between the next round of advertisements and the actual day of the auction one would have thought that given, the totality of uncircumstances, at minimum two to three months may suffice. This however is entirely a matter that falls within the purview of the chargee. Breach of these duties by the chargee can result in the incurring of serious liability. See *Caribbean Banking Corporation v Alpheus Jacobs* *ibid*.

Costs

- [96] The parties have quite helpfully agreed the matter of costs. The parties have agreed that should Credit Suisse succeed in its application it will be awarded costs in the sum of US\$5000, which would be treated as a charge against the sale of the Charged Properties.
- [97] In view of the premises, there will be judgment for Credit Suisse in accordance with the declaration it has sought.

Conclusion

- [98] In view of the totality of circumstances, this court hereby declares, that upon condition that Credit Suisse AG (Cayman Islands Branch or its agents) making available the confidential information to any member of the public who is interested in purchasing the Charged Properties and enabling them to view the properties if desired, and upon the further condition that Credit Suisse AG Cayman Islands or its agents advertises the sale Charged Properties by way of public auction widely both here in Anguilla and on elsewhere, the procedure as stated in the Kane

Affidavit read together with that chronicled in the Woolson affidavit satisfies section 75 of the Registered Land Act.

Costs

[99] Anguilla Masonry Products Company Ltd, Anguilla Trading Company Ltd, Pat-Ban Construction Company Limited and Superior Industrial Equipment Limited are awarded costs agreed in the sum of US\$5000, against Credit Suisse AG (Cayman Islands Branch).

[100] Credit Suisse AG (Cayman Island Branch) is awarded costs in the sum of \$US5000.00 agreed against Flag Luxury Properties (Anguilla) LLC. The costs are to be incorporated as part of the costs in relation to the sale of the Charged Properties.

[101] The court gratefully acknowledges the assistance of all Learned Counsel.

Louise Esther Blenman
Resident High Court Judge,
Anguilla

