SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO: 57 OF 2001

BETWEEN:

NANO AND SONS 1146 PRIVATE BANKERS LIMITED **Applicant/Appellant**

and

THE SAINT VINCENT AND THE GRENADINES OFFSHORE FINANCE AUTHORITY
Respondent

AND

CIVIL SUIT NO. 58 OF 2001

BETWWEN:

NEW BANK LIMITED **Applicant/Appellant**

and

THE SAINT VINCENT AND THE GRENADINES OFFSHORE FINANCE AUTHORITY
Respondent

Appearances:
Mr. Alair Shepherd QC with
Mr. Colin Williams for the Applicants/Appellants
and
Mr. Bertram Commissiong QC with
Ms. Mira Commissiong for the Respondent

2001: February, 20, March 8, 15 and 19

DECISION

[1] **WEBSTER, J (acting):** This is an application by the Applicant/Appellant in Suit No. 57 of 2001, Nano & Sons 1146 Private Bankers Limited, and the Applicant/Appellant in Suit No.

58 of 2001, New Bank Limited, for an injunction restraining the Respondent, the Saint Vincent and the Grenadines Offshore Finance Authority, from taking any further action whatsoever on letters dated February 9, 2001 to the respective Applicants purporting to appoint a person to assume control of the affairs of the Applicants, and restraining the Respondent or any person appointed by it from acting in any manner whatsoever as a receiver of the Applicants until the trial of this action.

[2] The affidavit evidence consists of the following:

(a) Affidavits of Rene Mercedes Baptiste sworn and filed on February 16, 2001 in both suits

(b) Reply affidavits of Linton Aron Lewis sworn on February 28, 2001 and filed on March 1, 2001 in both suits

(c) Affidavits of Linton Aron Lewis sworn on December 15, 2000 and filed on December 16, 2000 in Suit No. 310 of 2000 and Suit No. 311 of 2000 respectively

(d) Paragraphs 34 to 42 and paragraphs 47 to 62 of Rene Mercedes Baptiste's affidavits sworn and filed (without leave) on March 15, 2001 in Suit Nos. 310 of 2000 and 311 of 2000 respectively. The Applicants were given leave to refer to these paragraphs on March 15, 2001 on Counsel's undertaking to file affidavits in these proceedings by Ms. Baptiste in identical terms to the said paragraphs 34 to 42 and 47 to 62 respectively.

[3] On February 20, 2001 the Court ordered that the applications be heard together.

[4] The Applicants are companies incorporated under the International Companies Act, Cap. 104 of the laws of Saint Vincent and the Grenadines 1990 Revision. The International Companies Act was repealed by the International Business Companies Act, 1996 on December 18, 1996.

NEW BANK LIMITED

[5] On October 26, 1990 the Government of Saint Vincent and the Grenadines granted a licence to New Bank Limited ("New Bank") under the provisions of the International Companies Act to carry out the business of international banking. On August 31, 1993 the

Government granted approval for the New Bank licence to be renewed for a period of fifteen (15) years.

[6] On January 12, 1999 the Respondent wrote to the local representative of New Bank requesting the particulars prescribed in the First Schedule of the International Banks Regulations 1996 as required by section 29 of the International Banks Act, 1996 ("The Banks Act"). The letter also requested the annual audited accounts of the bank for the year ending December 31, 1997 as required by section 15 of the Banks Act. The audited accounts were submitted forthwith, but not the particulars prescribed by the First Schedule.

[7] On August 4, 1999 the Respondent again wrote to New Bank confirming a telephone conversation of the previous day requesting information relating to "... *the names of all the shareholders and directors of New Bank Limited*". On August 9, 1999 New Bank submitted the names of its directors, but not the names or other details of its shareholders. The bank refused to give the details of its shareholders on the ground that disclosure of this information was prohibited under the Confidential Relationships Preservation (International Finance) Act, 1996. New Bank also stated that they would provide the information relating to its shareholders on receipt of a written undertaking by the Respondent not to divulge the information to any third party. This undertaking was not given.

[8] By letter dated November 22, 1999 the Respondent wrote to New Bank requesting detailed information relating to the bank. The request was made pursuant to section 13 of the Banks Act. On February 21, 2000 the Respondent wrote to New Bank repeating the request for information in the November 22, 1999 letter and threatened to revoke the bank's licence if the information was not submitted within 30 days. A reminder was sent to New Bank on March 13, 2000. On March 20, 2000 New Bank wrote the Respondent declining to provide the information on the ground that the Respondent was not authorised by law to request the information.

[9] By its letter dated July 13, 2000 the Respondent informed New Bank that its licence was revoked pursuant to section 18 of the Banks Act as a result of its failure to submit the information requested in accordance with section 13 of the Act.

NANO AND SONS 1146 PRIVATE BANKERS LIMITED ("NANO")

[10] Nano was registered under the International Companies Act on October 5, 1992. On June 23, 1995 Nano applied for a licence to carry on banking business for fifteen (15) years. By letters dated June 14, 1996 and June 24, 1996 respectively Nano was informed that its application for a licence was approved. The Banks Act came into force on December 18, 1996 and on January 3, 1997 the Respondent issued a licence to Nano pursuant to Banks Act.

[11] In paragraph 2 of his affidavits filed in these proceedings on March 1, 2001 the Offshore Finance Inspector conceded that both Applicants were issued with licences under the International Companies Act and so no issue arises on this point.

[12] On November 22, 1999, February 21, 2000 and March 13, 2000 the Respondent wrote to Nano in the same terms as it had written to New Bank. On March 20, 2000 Nano responded taking the position (like New Bank) that the Respondent was not authorised by law to request the information, but nonetheless submitted the information without prejudice to its position to challenge the lawfulness of the request. However, in paragraph 4 of his affidavit filed on March 1, 2001, the Offshore Finance Inspector disputed that Nano had complied with the request. His position is that Nano had supplied information in respect of only one of the nine items listed in the letter of November 22, 1999.

[13] On July 12, 2000 the Respondent wrote to Nano revoking its licence. The letter is in identical terms of the revocation letter to New Bank.

THE APPEALS

[14] On July 27, 2000 the Applicants filed separate appeals in Suit Nos. 310 of 2000 and 311 of 2000 respectively against the Respondent's decision to revoke their licences ("The

Appeals"). The Appeals were filed pursuant to section 24 of the Banks Act. They are set for hearing on March 26, 2001.

APPOINTMENT OF RECEIVER

[15] On October 17, 2000 section 2 of the Banks Act was amended by including a new sub-paragraph (g) giving the Respondent the power to appoint a person to assume control of a former licensee's affairs when the licence of the licensee has been revoked. The amending section reads:

"(2) The actions the Authority may take in pursuance of subsection (1) are:

(g) the appointment, where a licence has been revoked, at the expense of the previous licensee, of a person to assume control of the previous licensee's affairs who shall mutatis mutandis have all the powers of a person appointed as a receiver or manager of a business appointed under the Companies Act."

[16] By letters dated February 9, 2001 the Respondent wrote to the respective Applicants as follows:

"Please be informed that the Directors of the Offshore Finance Authority have taken a decision to appoint a person to assume full control of the affairs of (the Applicants) pursuant to section 18(2)(g) of the International Banks Act, 1996 as amended. the said appointment will take effect from Tuesday 15th February, 2001. Accordingly, kindly indicate whether there are any reasons why the aforesaid appointment should not be made."

[17] By a further letter dated February 13, 2001 the Respondent informed the Applicant as follows:

"In light of your representation indicating that insufficient time was given within which to provide reasons why the appointment of a person to take control of the (Applicants) should not take effect we hereby extend the period within which you are required to respond to Tuesday 20th February 2001. Accordingly we await your response which will be carefully studied in order to determine whether or not the appointment should be made."

The person to take control of the affairs of the Applicants is referred to in this decision for convenience only as a receiver.

[18] Also on February 13, 2001 Applicants' local representative, Rene Baptiste, replied to the Respondent describing the attempt to appoint a receiver as illegal and politically motivated, and designed to remove from the banks' files evidence of fraud and corruption by the Offshore Finance Inspector and other prominent persons. There is no gainsaying that this letter, read as a whole, does not enhance the position of a party seeking equitable relief.

[19] On February 15, 2001 the Applicants initiated these proceedings seeking to set aside the Respondent's decision to appoint a receiver and for the injunction that is the subject of this application.

THE APPLICANTS' POSITION

[20] Following the hearing in Chambers on February 20, 2001 the Applicants' Solicitors responded to the Respondent's letters of February 9th and 13th, 2001. The letter sets out the Applicants' position in the following terms:

(a) The Respondent had already appointed the receiver and the invitation to show cause why this should not be done was nothing more than an attempt to pay *"lip service"* to the provisions of the Banks Act.

(b) If section 13 of the Banks Act applies to the Applicants then section 18 mandates that the Applicants must be given a meaningful opportunity to be heard prior to any action being taken. This includes:

  (i) notifying the Applicants in detail of the case against them;

  (ii) giving the Applicants sufficient time to prepare their case; and

  (iii) providing details of a hearing in sufficient time to prepare for the hearing.

(c) The Applicants cannot give reasons without being fully informed of the case against them.

(d) The purported appointment is predicated on the revocation of the licences. That issue is before the court and the parties were proceeding on the assumption that no further action would be taken until the Appeals are determined.

(e) Section 13 does not apply to the Applicants and the Respondent has no legal authority to demand the disputed information from the Applicants.

[21] The Applicants also submitted that the appointment of a receiver will have the effect of rendering the Appeals redundant in that the disputed information that is the subject matter of the Appeals will be available to the Respondent via the receiver.

[22] Finally, there are serious issues to be tried, and the balance of convenience favours maintaining the status quo by not appointing a receiver.

THE RESPONDENT'S POSITION

[23] The Respondent's position as follows:

(a) The Applicants cannot take the position that the Banks Act does not apply to them, and yet avail themselves of the appeal procedure in section 24.

(b) The Applicants have had ample time to give reasons why the appointment should not take effect. They have chosen not to give reasons. Instead they launched an attack on the Offshore Finance Inspector and others in the form of the letter from Rene Baptiste on February 13, 2001.

(c) The Respondent is a public body and higher standards must be applied before restraining them in the lawful exercise of their statutory functions.

(d) The Applicants are operating to the potential detriment of their customers and the Respondent.

(e) The balance of convenience favours the appointment of the receiver without further delay.

[24] With regard to sub-paragraph (a) above I do not find that the Applicants position is that the Banks Act does not apply to them. Briefly, their position is that section 29 of the Act confers certain privileges on them, and the provisions of the Act that are inconsistent with those privileges do not apply to them. This is very different from saying that the Act does not apply to the Applicants. I therefore find that the Applicants can avail themselves of the appeal provisions in section 24.

THE LAW

[25] In order to restrain the appointment of the receiver the Applicants must establish that:

(a) there are serious questions to be tried;

(b) damages are not an adequate remedy; and

(c) the balance of convenience favours the grant of the injunction.

SERIOUS QUESTIONS TO BE TRIED

[26] Counsel for the Respondent submitted that the Respondent is a public authority exercising its statutory functions in seeking to secure the appointment of a receiver. As such the case falls into the category of cases with "*special factors to be taken into consideration*" referred to in the judgment of Lord Diplock in **American Cyanamid Co. v Ethicon Ltd** [1925] 1 All E.R. 504 at page 511. Counsel also referred to the case of **Smith v Inner London Education Authority** [1928] 1 All E.R. 411 in which the plaintiffs sought to restrain a local education authority from closing a long established grammar school as a part of its policy to provide secondary education exclusively in comprehensive schools. The trial judge granted the injunction. The Court of Appeal, while lamenting the closure of the grammar school, discharged the injunction on the ground that a local authority should not be restrained by interlocutory injunction from exercising its statutory powers unless the plaintiffs can show that there was a real prospect that they will succeed at the trial in their claim for a permanent injunction. The plaintiffs failed to do this and so the injunction was discharged.

[27] Relying on this case Counsel submitted that the Respondent should not be restrained by an interlocutory injunction unless the Applicants can show that they have a real prospect of success at the trial.

[28] Counsel for the Applicants submitted that in order to satisfy the first step in the American Cyanamid case all that the Applicants are required to prove is that there are serious issues to be tried. Further, that **Smith v ILEA** did not create a different standard for determining whether there are serious issues to be tried when the defendant is a public body. He also referred to the following passage in the judgment of Browne L. J. at page 419:

> *"Counsel for the authority submitted that the test should be different and the burden on the plaintiffs higher when the defendant is body performing public duties; he says that in such cases a plaintiff should be required to go further and establish a prima facie case or a strong prima facie case. I cannot agree that on this part of the case the nature of defendant makes any difference, though it may be important when one comes to the balance of convenience."* (my emphasis)

He urged the Court to follow the approach of Browne L.J., and take into consideration that the Respondent is a public body only when dealing with the balance of convenience.

[29] I am of the view that the standard of serious questions to be tried also applies to a public body. Applying that test to the Applicants' case as set out in paragraph 20 above, and having regard to the cases and authorities cited by Counsel for the Applicants relating to fairness and natural justice, I am satisfied that there are serious issues to be tried relating to the manner in which the decision to appoint the receiver was taken. Serious issues relating to the revocation of the licences are already joined between the parties in the Appeals.

DAMAGES AS A REMEDY

[30] In considering this aspect of the application I am mindful of the fact that the Applicants carry on banking business which is based to a large extend on the trust and confidence that their customers have in the banks. Their licences have been revoked but their directors remain in control of the banks pending the hearing of the Appeals. Counsel for the Applicants submitted that if the Receiver is appointed the directors of the bank will no longer be in control, and this will result in loss of customers and closure of the banks. The resulting damages will be difficult to assess.

[31] Counsel also submitted that section 25 of the Banks Act gives the Respondent, the Offshore Finance Inspector, and any other person acting under the authority of the Authority, immunity from liability for any act done in good faith in the proper discharge of their official functions under the Act. The effect of this is that if the receiver is appointed

and the Applicants succeed at the trial, the Respondent will not be liable in damages unless the Court finds that it acted in bad faith in appointing the Receiver. This is a heavy burden to discharge against a public authority exercising its statutory powers.

[32] I agree with both submissions and I find that damages would not be an adequate remedy for the Applicants.

BALANCE OF CONVENIENCE

[33] In **Smith v. ILEA** (supra) Browne, L.J, while not agreeing with the majority that there is a higher test for public authorities, went on to say at page 422:

> *"... where the Defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom those duties are owed. I think this is an example of the "special factors" affecting the balance of convenience which are referred to by Lord Diplock in American Cyanamid Co. v. Ethicon Ltd."*

[34] Accepting this principle in assessing the balance of convenience I have taken into account that:

(a) the issue of the revocation of the licences is pending before the Court in the Appeals;

(b) the amendment to the Banks Act to give the power to appoint a receiver following revocation of a licence became effective on October 17, 2000, and yet no step was taken to appoint a receiver until February 9, 2001;

(c) that there is no evidence of any new circumstances between October and February making the appointment an urgent matter;

(d) the Respondent's evidence does not disclose any clear reasons why it became necessary in February to appoint a receiver;

(e) the main issue in the Appeals is the Applicants' ability to withhold information from the Respondent relating to certain aspects of their businesses. The

appointment of a receiver will have the effect of giving the Respondent this information, and the Appeals will become redundant for all practical purposes;

(f) the immunity enjoyed by the Respondent conferred by Section 25 of the Banks Act; and

(g) the potential damage to the customers of the banks and the Respondent from not having a receiver in place at this stage.

CONCLUSION

[35] Having reviewed the evidence and the submissions of Counsel, and having regard to the respective positions of the parties, and all the other circumstances in the case, I am satisfied that the Court should grant the relief claimed by the Applicants in their respective Summonses. The Rene Baptiste letter of February 13, 2001, though unfortunate, is not sufficient to deprive the Applicants of the relief that I have found that they are entitled to.

[36] Accordingly an injunction is granted restraining the Respondent, its servants or agents or howsoever otherwise, from taking any further action whatsoever on the letters dated February 9, 2001 to the respective Applicants purporting to appoint a person to assume control of the affairs of the Applicants, and restraining the Respondent or any person appointed by it from acting in any manner whatsoever as a receiver of the Applicants until the trial of this action or until further order.

[37] The Applicants will have their costs to be taxed if not agreed.

Paul Webster
High Court Judge [Ag.]