GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NOS.13 & 14 of 2002

BETWEEN:

CAPITAL BANK INTERNATIONAL LIMITED

Appellant

and

[1] EASTERN CARIBBEAN CENTRAL BANK
[2] SIR K. DWIGHT VENNER

Respondents

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Cajeton Hood for the Appellant
Mr. Anthony Astaphan, Q.C.; Mr. Emile Ferdinand and Ms. Lydia Elliott instructed by Mr. Dickon Mitchell holding for Henry, Henry and Bristol for the Respondents

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2002: November 25;
2003: March 10.

JUDGMENT

The Background

[1] **BYRON, C.J.:** The Eastern Caribbean Central Bank [ECCB] was established by Treaty on 5th July 1983, which was incorporated into the domestic law of Grenada by The Eastern Caribbean Central Bank Law 1983, Peoples Law No.23 of 1983. In accordance with statutory powers conferred by the Act, the ECCB established a cheque Clearing House facility in Grenada. The appellant by letter dated 13th October 1992 requested to join the clearing facilities. Response was sent by letter dated 16th October 1992 setting out the criteria and including a copy of the

Clearing House rules. It is the respondents' position that the appellant has never met the stated criteria. The respondents have written the Minister of Finance recommending that the license issued to the appellant should be revoked. The Minister has not acted on that advice.

[2] On 23rd July 2001, the appellant filed an originating summons to establish and enforce its alleged right to be admitted to membership of the said Clearing House facility and for compensatory and other relief on the basis of the "malicious" recommendations made to the Minister of Finance to revoke the appellant's banking license. During the pre-trial proceedings Benjamin J dismissed the appellant's application to join the Attorney General of Grenada as a defendant, and on 26th March 2002 he upheld the respondents' application that they enjoy statutory immunity from judicial process in the matter and dismissed the case.

The Appeal

[3] The learned trial Judge did not provide the reasons for his rulings. The issues raised in this appeal, however, are clearly identified in the helpful and thoroughly written arguments supplied by counsel for which I am grateful. These issues come under three broad headings.

[a] Whether it was appropriate to hear the immunity issue as a preliminary issue?

[b] Whether the immunity from process was inconsistent with the constitutional provisions, which guarantee the appellant a right to have the court determine its legal rights?

[c] Whether the Attorney General could have been joined as a party after the Case Management Conference?

The Preliminary Point

[4] The appellant challenged the decision for the immunity issue to be heard as a preliminary issue, arguing that the immunity question was not capable of

determination without examination of the facts and law and was therefore not suitable for decision as a preliminary issue. It seemed from this argument that the appellant equated the process with a *point in limine*. The matter had gone to case management conferences and a pretrial review. The parties had introduced evidence by affidavit with supporting documents and arguments in writing were advanced on the merits. We were deprived of the learned trial Judge's reasons but observation of the record indicates that the arguments included a full assessment of the evidence as well as the relevant legal points. This would lead to the conclusion that the court was giving effect to the case management power conferred by Part 26.1(2) (d) of the Civil Procedure Rules 2000, which provides that the court may "decide the order in which issues are to be tried". In my view, this was an appropriate matter to be treated in that way because it was possible that the entire litigation could be decided on that point alone. It was therefore a proper exercise of discretion to isolate that issue for adjudication, to save expense, time and the resources of the court. I do not support this complaint.

The Immunity

[5] The primary approach to statutory conferment of immunity is that it must be strictly construed to ensure that no greater immunity is granted than intended, as explained in 4th Halsbury Vol. 18 at para.1608. This requires that we look at the express terms in which the immunity has been granted.

[6] The Eastern Caribbean Central Bank Law, 1983, Article 50, provides:

> "(1) To enable the Bank to fulfill the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territory of each Participating Government.
>
> (2) The Bank, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.
>
> (3) Property and assets of the Bank shall be immune from search, requisition, confiscation, expropriation or any other form of seizure…

> (7) The Governor, the Deputy Governor, the appointed Directors, officers and employees of the Bank shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity."

[7] The language is clear and unambiguous and the statutory intention unmistakable. The intent of section 50 is that the first respondent cannot be sued or be subject to any legal process unless it expressly waives the immunities and privileges and even if it does, its property, assets and archives are protected from execution. The second respondent is immune from legal process once he acts in his official capacity, unless the first respondent waives the immunities and privileges conferred on him.

[8] Counsel on both sides agreed that these immunities despite their language are not absolute because of the effect of the constitutionally guaranteed right to the protection of law prescribed in section 8(8) of the Constitution.

[9] Section 8(8) of the Constitution prescribes:

> "Any Court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and when proceedings for such determination are instituted by any person before such Court or other authority, the case shall be given a fair hearing within a reasonable time."

[10] The section gives rise to four matters that are relevant to this issue:

[a] Although the section does not confer the right of access to the courts in express terms it is generally accepted that it does.

[b] Proceedings must be instituted or be likely to be instituted before the provision comes to life.

[c] Although the section is not subject to express limitations all rights are subject to the rights of others and the public interest whether expressly stated or inherent or implied.

[d] It is a right for the determination of the existence or extent of any civil right or obligation. Therefore unless such a determination is invoked the provision cannot be relied on.

[11] The principles on which constitutional provisions are interpreted include reference to the meaning attributed to the sources of these provisions. The high ideals and principles in section 8(8) of the Constitution are part of the fundamental rights and freedoms, which have sought to entrench and guarantee that citizens enjoy the rights and dignity associated with humanity in a democratic society. These rights fit into universal patterns.

[12] In this case, section 8(8) of the Constitution is derived from section 6(1) of the European Convention of the Protection of Human Rights. The linkage between this Constitution and international norms for the protection of human rights and fundamental freedoms was expressed in the **Minister of Home Affairs v Fisher** (1979) 3 A.E.R. 21 at p.25 in the well known words of Lord Wilberforce:

> "Chapter 1 is headed `Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called `the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. Section 11 of the Constitution forms part of Chapter 1."

[13] Section 6(1) of the European Convention has been construed by the European Court of Human Rights. This has been adopted in the participating states and should inform the meaning that we give to section 8(8) of the Constitution. The fact that it is regarded as conferring a right of access to the court which is subject to

limitations was explained, in terms that I adopt and apply, by Lord Bingham in **Brown v Stott (PC)** (2001) 2 W.L.R. 817 at 826:

> "Article 6 contains no express right of access to a court, but in **Golder v United Kingdom** (1975) 1 EHRR 524, 536, para 35 the European Court held that it would be "inconceivable" that article 6 should describe in detail the procedural guarantees afforded to parties in a pending law suit and should not first protect that which alone makes it possible to benefit from such guarantees, namely access to a court. The court added, at p.537, para 38:
>
> > 'The court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.'
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> This expression of view was repeated in **Ashingdane v United Kingdom** (1985) 7 EHRR 528,546, para 57 where the court ruled:
>
> > 'Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, 'by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals'. In laying down such regulation, the contracting states enjoy a certain margin of appreciation. Whilst the final decision as to observance of the convention's requirements rests with the court, it is no part of the court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field'.
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> These principles were repeated in **Fayed v United Kingdom** (1994) 18 EHRR 393, 429, para 65; and in **Tinnelly & Sons Ltd v United Kingdom** (1998) 27 EHRR 249, 288, para 72 the court said that while the right of access to a court might be subject to limitations:
>
> > 'The final decision as to the observance of the Convention's requirements rests with the court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Art. 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'

> The court's judgment in **National and Provincial Building Society v United Kingdom** (1997) 25 EHRR 127, 178, para 105 was to the same effect. Restrictions on the access to court of other potential litigants have also been recognized in the cases of minors (Golder at para 39) vexatious litigants (**H v United Kingdom** (1985) 45 DR 281) prisoners (**Campbell and Fell v United Kingdom** (1984) 7 EHRR 165) and bankrupts (**M v United Kingdom** (1987) 52 DR 269): see **Clayton and Tomlinson**, The Law of Human Rights, p.640, para 11.191"

[14] In this case, there is no issue that the immunity provisions have legitimate objectives. They reflect the agreement of the participating governments that it was in the public interest to confer immunity from judicial process in their respective territories. The provisions have statutory force and effect and are recognized in public international law. These immunities were considered necessary to protect the currency, financial system and economies of the participating territories.

[15] The issue in this case is whether they offend the constitutional concept of proportionality. The appellant contended that they impair its right to have its rights determined and there is no other provision for the settlement of the dispute. Several cases were prayed in aid of the submissions. See **Observer v Matthew** (UKPC) 11 58 WIR 188; Re **President's reference Vanuatu** (1993) 1 LRC 141; **A.G. v Swissborough Diamond Mines** (1998) 1 L.R.C.1; **McInnes v Onslow Fane** (1978) 3 ALL E R 211; **Burroughs v Rampargat Katwaroo** 40 W.I.R. 278 **De Freitas v Permanent Secretary** (1998) 53 W.I.R. 131.

[16] The respondents pointed out that the statutory provision permitted the respondents to waive the immunity provisions and these proceedings were evidence that there was a right of access to the courts. The respondent relied on a series of cases dealing with the interpretation and application of the Section 6(1) of the European Convention. These cases included: **Neigel v France** (1997) 30 EHRR 310; **Beer and Regan v Germany** (1999) 33 EHRR 54; **Ashingdane v United Kingdom** (1985) 7 EHRR 528; **Fayed v United Kingdom** (1994) 18 EHRR 393; **Young v Ireland** (1996) EHRLR 326; **McElhinney v Ireland**; **Al-Adsani v United Kingdom**; **Waite and Another v Germany** (1996) 6 BHRC 499.

[17] It is the contention of the respondent that the appellant failed to show that a genuine and serious dispute exists concerning the determination and/or the existence of one of its civil rights or obligations. The principle was expressed in **Neigel v France** (1997) 30 EHRR 310 at 323 para 38:

> "The court reiterates that according to the principles enunciated in its case law, it has first to ascertain whether there was a dispute over a "right" which can be said, at least on arguable grounds, to be recognized under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question."

[18] In order to develop the propositions of both sides of this case, it is therefore necessary to see whether there is any civil right in dispute.

Is There a Civil Right in Dispute?

[19] The appellant seeks two different types of relief. One is to compel admittance to the ECCB cheque Clearing House as a holder of a banking license. The other is for compensatory and other relief against negative reports and actions submitted and performed by the respondents.

The Claim to Enter the Clearing House

[20] The appellant claims that its possession of a banking license gives it a right to enter the Clearing House facility, and that the ECCB by its conduct of exclusion has effectively revoked the license. The appellant's argument is simple. It is that the definition of Bank in the Banking Act 1993 is:

> "Bank" means any financial institution whose operations include the acceptance of deposits subject to the transfer by the depositor by cheque"

consequently the issue of a Banking license coupled with the payment of the prescribed fees confers statutory and contractual rights to trade in that manner and the regime established by the ECCB to facilitate that activity must therefore be

accessible to the appellant as the holder of a Banking license. That argument is obviously flawed, because there is no provision under that Act, which prescribes that a licensed bank has a right of access to the Clearing House. The acceptance of deposits subject to transfer by cheque is capable of being performed without membership of the Clearing House. There was no statutory prescription or mandate that the issue of a banking license gives an automatic right of entry into any regime established to facilitate banking operations. It would be expected that each such regime would have its own rules and regulations.

[21] The Clearing House was set up in accordance with statutory power conferred by the Eastern Caribbean Central Bank Law. Article 36 prescribes:

> "The Bank may at a suitable time in conjunction with other banks organize clearing houses in such places as may be desirable."

[22] The evidence is that the ECCB did consult with commercial banks and set up Clearing Houses, including the one in Grenada, and published Clearing House rules. The ECCB alleges that the entry to the Clearing House facility is based on invitation and not every commercial bank is invited to join, consequently application for membership does not give rise to any claim for a civil right or obligation. As I understand the argument, these rules do not regulate the admittance of the appellant because they were not gazetted and were not intended to have general binding force and effect but were for the internal use of the ECCB and those banks, which had been invited to join the Clearing House. I have great difficulty with that contention. The rules were issued under a statutory power and the evidence is that when the appellant asked for information about accessing the Clearing House, the ECCB had sent a copy of the Clearing House rules to the Appellant in 1992. These Clearing House rules state:

> "Rule 2: The Central Bank and all duly licensed commercial banks operating in the Eastern Caribbean Central Bank Area shall be members of the Clearing House and are required to abide by these rules…
> Rule 13: A commercial bank which is a member of the Eastern Caribbean Central bank Clearing House system may not act as a conduit or agent for any financial institution issuing cheques and or any form of deposits

withdrawal, with a view to circumventing the established practice in the financial system…
Rule 37: Membership ceases on suspension or revocation of a bank's license."

[23] No other provision was made for membership in the rules. These rules are unequivocal in their requirement that all duly licensed banks shall be members of the Clearing House. The argument that the phrase in rule 2 "all duly licensed banks" is limited to those banks operating at the time the rules were made is unsustainable and the words musts be given their plain and ordinary meaning. In addition to those rules, the ECCB developed protocols and in the communication sent to the appellant in 1992 along with the rules indicated the criteria for joining the Clearing House.

"16th October 1992

W R Agostini
F.C.C.A.
Chartered Accountant
P O Box 380
ST GEORGE'S
Grenada

Dear Sir

Capital Bank International Limited

This letter is in response is to your request for information regarding membership in the Eastern Caribbean Central Bank (ECCB) Clearing House.

After a bank has received a license to operate within the ECCB Area, application would be made to the ECCB for an account to be opened, in the name of the commercial bank. In order for the ECCB to consider such an application, certain conditions must be met.

Firstly, copies of the following documentation should be submitted to the ECCB:

a) A valid license to operate a bank, issued by the Government in the country in which the bank intends to operate.
b) The bank's latest audited financial statements.
c) The bank's Certificate of Incorporation.

In addition to the requirements listed above, the bank should complete an account opening form (sample attached) as requested. This form also indicates the terms and conditions for establishing an accounting relationship with the ECCB.

Finally, after permission has been granted for an account to be opened, the bank may apply for membership in the ECCB Clearing House, by completing the form on page XI of the enclosed rules of the Clearing House. In order to provide security to cover operations in the Clearing House, it is also necessary for the bank to pledge at least $500,000.00 in Government Securities (or some other agreed upon instrument) to the ECCB. It would also be necessary to make a deposit to your account, in an amount to be determined by the ECCB, before the commercial bank becomes a full fledged member of the Clearing House. At such time the bank would also be provided with general information regarding the following:

1. Further details concerning the accounting relationship with the ECCB.
2. Treasury Bill and Inter-Bank Markets.
3. Export Credit Guarantee Department.
4. Directives issued by the ECCB.
5. Returns to be submitted to the ECCB.

If you require any further information, please do not hesitate to contact us.

Yours faithfully

DIRECTOR
BANKING AND OPERATIONS

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IF:kgl"

"EASTERN CARIBBEAN CENTRAL BANK

CLEARING HOUSE AGREEMENT

The ……

(Name of Bank)

a duly licensed commercial bank operating in the Territory of ……..,

hereby accepts membership of the Eastern Caribbean Central Bank

Clearing House and accordingly undertakes to observe all the Rules of the said Clearing House.

Signed: ……....

Name in Full: …….

Date: ……...
(Day) (Month) (Year)

Official Stamp"

[24] These criteria do not show any qualification for membership other than possession of a banking license, certificate of incorporation and audited statements. It does not refer to any exercise of a discretion by the ECCB other than in regard to the amount of the security deposit. Qualified banks must then satisfy the accounting and administrative protocols. In these circumstances it is clear that only those licensed banks that comply with those protocols would become members of the Clearing House. I am disposed to the view that if the ECCB refused to admit a duly licensed commercial bank who complied with the published criteria that an important right under the domestic law relating to commercial banking was in issue. But that is not exactly the case here because the ECCB has explained that it has excluded the appellant from the Clearing House to protect the Eastern Caribbean currency on the ground that the appellant does not have a valid license and is not a suitable or viable banking institution.

[25] As one would expect the Banking Act has made provision for a bank to have recourse to the courts to resolve a dispute about the validity of its banking license and its entitlement to trade as a bank. If the legislative scheme works properly, the Minister of Finance would take action under the Banking Act 1993 which, if

disputed, would allow the initiation of proceedings in the High Court for determination of this issue. It is clear that the legislation did not establish the ECCB as the arbiter in matters of this nature. It conferred an investigative and recommendatory role. The issue as to the validity of the Banking license of the appellant conceals a dispute between the ECCB and the Minister of Finance.

[26] The Banking Act 1993 makes the Minister of Finance the licensing authority. But it imposes a mandatory duty on the Minister to request the ECCB to investigate the applicant before granting the license. This is prescribed by section 4:

> "(2) In considering an application for a license the Minister shall request the Central Bank to conduct such investigation as it may deem necessary to ascertain……
>
> (3) Within a reasonable time of its receipt of the application for a license the Central Bank shall make its recommendations to the Minister.
>
> (4) Within 30 days of the receipt of the recommendations of the Central Bank the Minister shall either grant the license or, if the Minister is of the opinion that it would be undesirable in the public interest to grant the license, he may refuse to grant the same and need not give any reason for so refusing but shall inform the applicant that he had refused to grant the license.
>
> (5) A financial institution shall not be granted a license under this section unless it fulfills the capital requirements specified in section 13".

[27] The affidavit of the Governor of the ECCB filed on 22nd Feb 2002 alleged that the requirements of section 4 of the Act were not complied with in relation to the "purported issuance of the license dated 13th February 1996 to the appellant" in that section 4(2) and (5) were not satisfied and accordingly no recommendations were made as contemplated by sections 4(3) and (4). The ECCB has therefore considered that the appellant does not have a valid license because of a breach of statutory duty by the Minister of Finance. The question of the validity of the license is a justiciable matter, which cannot be resolved by the ECCB, but must be referred to the court for determination. I consider that this involves an important right in the domestic law of Grenada.

[28] The ECCB, in the absence of any request from the Minister of Finance, then exercised its powers under section 20 of the Banking Act and caused investigations to be conducted and concluded that the Appellant failed to meet minimum prudential banking criteria and obligations under the Banking Act, a situation that, in their view, has persisted since the appellant's inception in 1988. The situation as disclosed in the affidavit of Sir Dwight Venner could be summarized as follows:

[a] there have been breaches of the Banking Act in particular Section 16(1) (f) in that the appellant invested in Phoenix Limited in excess of 10% of the appellant's stated capital and reserves; Section 8(1) (a) in that the Debourg's were the largest shareholder with 51% of the shares, being in excess of the 20% stipulated by the Act; Section 19 in that the appellant's external auditor has not been approved by the ECCB and financial statements have not been submitted to the Minister of Finance within the prescribed timeframe and Section 26(1)(b) in that the chairman of the appellant defaulted on mortgage payments to a third party bank and when the bank sought to recover the debt the mortgage was transferred to the appellant.

[b] The nature of the appellant's capital is unsatisfactory in that of the 9 million dollar capital 5.2 million consists of the investment in Phoenix Ltd a company whose primary asset appears to be 12.4 acres of land which is not suitable to represent the capital of a commercial bank; 1.7 million is in intangible assets (pre-opening expenses) and without source documentation to support the expenditure and 2.3 million in fixed assets.

[c] the services offered by the appellant appear to relate primarily to offshore companies. In this regard the Governor explained that on 31st August 2000 66% of its total deposits were US dollar deposits while the ECCB clearing facility is intended for financial institutions whose principal business is domestic commercial banking.

[d] the management and control of the bank was unsatisfactory. Specific concerns were addressed as to the lack of independence since the Chairman is also majority shareholder and chief Executive officer and other non executive directors lack banking experience. Lending to the Chairman was in excess of 25% of appellant's outstanding loans and leasehold improvements to the Chairman's home was capitalized. Criticisms were also made of the internal controls.

[29] The ECCB concluded that the appellant was not a suitable or viable bank or banking institution. It recommended to the Minister of Finance that the purported banking license should be revoked. The Minister took no action.

[30] What does the Banking Act envisage should happen? Section 10 of the Act prescribes:

> "(1) The Minister, acting upon the recommendation of the Central Bank, may revoke any license to carry on banking business in Grenada if the licensee……..; and
>
> (4) If any financial institution is aggrieved by any decision made under subsection (1), that financial institution may appeal to the High Court within fourteen days of such decision, setting forth the grounds of such appeal, and the High Court may revoke or confirm the said decision."

[31] Thus under the Banking Act, the Minister of Finance acting on the recommendation of the Central Bank may revoke any license to carry on banking business. The Act stipulates the process by which the revocation should be executed and provides for application to the court. It is clear that the scheme of the legislation could be completely frustrated by a Minister who issues a license in contravention of the Banking Act or refuses to revoke a license despite breaches of the Banking Act that have been brought to his attention by the ECCB unless there is some other provision in the legislation.

[32] In my view, the legislation did make such alternative provision for the ECCB to take action in such cases. Section 11(1) prescribes:

> "Whenever the Central Bank, has reason to believe that any person is carrying on banking business without a valid license, it may, after consultation with the Minister apply to the High Court for an order to examine the books, accounts and records of such persons in order to ascertain whether such person is carrying on banking business without a valid license."

Since an enquiry from the Minister is the most direct way of determining whether a license has been issued, this section could not be creating this machinery to make that enquiry. It must, therefore, apply to cases where there has been a purported

issue of a license by the Minister and the question is as to its validity. This is a question which may involve non compliance with the Banking Act notwithstanding the existence of a license otherwise the machinery for examination of the books would have no purpose. Despite the immunity provisions the Banking Act has made provision for the ECCB to initiate litigation whenever it has reason to believe that any person is carrying on banking business without a valid license. The Act does not empower the ECCB to order the revocation itself. It must recommend to the Minister or apply to the court. The reasons given by ECCB for ineligibility to join the Clearing House are exactly the same reasons that would entitle non issue or revocation of the license. It is therefore at least arguable, that The Banking Act itself provides a statutory exception to the immunity provisions where ECCB has reason to believe that a person is carrying on banking business without a valid license. In a case like this it would be ineffective for proceedings to resolve this issue to be conducted without the ECCB as a party. How else would the evidence of non-compliance be guaranteed? The alternative of ruling that the issue should not be determined would in my view be clearly disproportionate to the objectives of the immunity provisions and would be a deprivation of the rights conferred by section 8(8) of the Constitution.

The Reports Submitted by the Respondents

[33] The reports submitted by the respondents were submitted under statutory duty prescribed by the Banking Act for the public purpose of regulating the banking industry and the Eastern Caribbean currency. There is abundant judicial precedent to rule that the provisions for immunity from judicial process resulting from allegations relating to the reports, advice and other conduct under the Banking Act are not inconsistent with the constitutional provisions of section 8 of the Constitution.

[34] In addressing this I would consider the case of **Fayed v United Kingdom** (1994) 18 EHRR 393 in which the European court examined the extent of the immunity in

relation to article 6(1) of the Convention. In my view, the issues raised are very similar to this aspect of the case before us. In that case the applicants had acquired ownership of a major public company in circumstances of some controversy. After a media campaign hostile to the applicants, The Secretary of State, appointed inspectors to conduct investigations in relation to the circumstances surrounding the acquisition in accordance with the provisions of the Companies Act 1985. The reports, which were published, were unfavourable to the applicants who, eventually, complained to the European Commission that their rights under article 6(1) were violated because the Inspectors report had inter alia: determined their civil right to honour and reputation, denied them effective access to a court in determination of this right and to challenge the findings of the Inspector, and determined criminal charges against them in violation of the presumption of innocence.

[35] In rejecting the contention of the applicants the Commission made its opinion clear that it is a matter of general public interest and necessary in a democratic society that governments exercise supervisory controls over large commercial activities to ensure good management practices and the transparency of honest dealings, transparency which is enhanced by publication of the Inspectors' reports. The Commission also clarified the importance of the distinction between determination of rights and investigative functions. It ruled that an element of the protection afforded by the Article 6(1) was the existence of a dispute over civil rights or obligations. Consequently as the function performed by the Inspectors was essentially investigative their reports did not determine any rights. Any diminution of the freedom to express the results of the investigations would unduly hamper the effective regulation, in the public interest, of complex financial and commercial activities. The Court considered that investigative proceedings of that nature fell outside the ambit of the Article. It was also significant that recognition was given to the fact that proceedings for defamation would have been met with the defence of privilege, which confers an immunity from process under the domestic law. The court however found it necessary to remind that it would not be consistent with the

rule of law in a democratic society or with the basic principle underlying Article 6(1) if a state could without restraint remove from the jurisdiction of the courts a whole range of civil claims, or confer immunities from civil liability on large groups or categories of person. A fair balance had to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

[36] When one considers the Banking Act 1993 it is clear that the legislative scheme for the regulation of the financial activities of the State revolve around the ECCB. Most of its duties however are investigative and recommendatory. The authority under the Act is in most cases the Minister of Finance, but he is required to consult with the ECCB for its recommendations after investigations. I do not think it necessary to list the instances. Like the Fayed case I would think that the immunities given pursue legitimate aims. The underlying aim of the system is clearly the furthering of the public interest in the proper conduct of the banking, currency and economic affairs of the region. The conduct of the investigations by the ECCB and the submission of their reports pursued legitimate aims and are suitable for the conference of total immunity from suit. None of the reports or recommendations determined any rights of the appellant as the ECCB functioned in an investigative and recommendatory manner.

[37] On this issue I have concluded that the aspects of the claim which seek relief for the investigative and reporting activities of the respondents are covered by the statutory immunity under the Act and the ruling of the learned trial Judge should be affirmed in relation to them. In this regard, those are the only issues, which required the second respondent to be joined as a party to these proceedings and I would confirm the dismissal of the proceedings against him.

[38] With regard to the claim for admittance to the Clearing House, it seems to me that that the central issue is whether the appellant has a valid banking license. Both the Central Bank and the Minister of Finance are necessary parties to that issue

by virtue of the circumstances of this case and the specific provisions of the Banking Act to which I have referred even though section 11 of the Act does not impose a mandatory obligation on the ECCB to act, but merely gives it the power to do so.

The Joinder Issue

[39] We were informed that the application to add the Attorney General was refused because it was made after the Case Management Conference under the provisions of Part 19.2[7] which provides:

> "The court may not add a party [except by substitution] after the case management conference on the application of an existing party unless that party can satisfy the court that the additional party is necessary because of some change in circumstances which became known after the case management conference."

[40] Attention should, however, be drawn to Part 19.2[3] which prescribes:

> "The Court may add a new party to proceedings without an application if –
> [a] it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
> [b] there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue."

[41] This rule requires the court itself to consider whether the addition of a new party is desirable to facilitate the resolution of the matters in dispute, and so it is not sufficient to rely only on the time at which the application is made to inform the decision making process under Part 19.2. In this case, the conclusions to which I have reached indicate that the Minister of Finance is a necessary party if the court is to resolve the real issues in dispute. This may require the addition of the Attorney General as the representative of the Government. Accordingly, I would order that there be liberty to add them as parties to the proceedings so that the court can determine whether the appellant is or should be the holder of a valid banking license.

[42] What should the court do in these circumstances? I do not think that the interests of justice would be served if there was no opportunity for the determination of the question whether the appellant has a valid banking license and is qualified to enter the Clearing House facility. The order dismissing the case should be set aside so that the claims relating to the Clearing House should be permitted to continue. The provisions of the Banking Act make it clear that the Minister of Finance is a necessary party to the proceedings and this may require the addition of the Attorney General. The matter should go back to Case management for directions including the restatement of the issues to be determined.

Costs

[43] This is an appeal in an interlocutory proceeding. Both sides have won and lost. The orders we have made were not in the terms that either side sought. The appellant acted boldly with a perceived complaint which the facts as presented exposed many concerns about its viability as a banking concern. The justice of the case seems to me to be best served by ordering each party to bear their own costs.

The Order

[44] The order of the learned trial Judge is set aside; the parties are at liberty to enter judgment in the following terms:

[1] Declaration that the respondents are immune from process relating to the relief sought at paragraphs 3 and 4 of the originating summons and they are struck from the originating summons and dismissed.

[2] That the second respondent be and is hereby dismissed from the proceedings.

[3] That either or both parties be at liberty to join the Minister of Finance and the Attorney General as parties to the proceedings.

[4] The matter is referred to Case Management for directions.

[5] Each party to bear their own costs of appeal.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal

I concur.

Ephraim Georges
Justice of Appeal [Ag.]