ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV2001/0135

BETWEEN:

ANNE L MANFRE
DOMINIC P MANFRE
OVERSEAS DEVELOPMENT BANK & TRUST CO LTD

Claimants

and

EDWARD ST CLAIR SMITH
As Receiver/Manager of American International Bank (In Receivership)

Defendant

Appearances:
Justin Simon for the Claimants
Gerald Watt QC for the Defendant

2003: November 24, 25
2004: January 27, April 1

JUDGMENT

[1] MITCHELL, J: A court-appointed receiver of a bank is sued by two depositors and a creditor who fear that he is not working in the interests of the depositors and creditors as a whole. The question for the court is whether the claim is made out so that a forensic examination should be ordered and he should be discharged and ordered to make good any default and another Receiver appointed. There is an ancillary issue whether Mr Smith is in contempt of an earlier court order.

[2] Edward St Clair Smith is the court-appointed receiver of American International Bank. American International Bank is an Antiguan offshore bank. It was incorporated in the year 1990, and duly licensed to operate as a bank. Mr and Mrs Manfre have deposited sums of money in the bank while it was operating. Several thousand other persons similarly

became depositors. The bank was badly managed. It ran into financial difficulties. On 9 July 1998 the Supervisor of International Bank and Trust Companies appointed Mr Smith its Receiver/Manager.

[3] Mr Smith's appointment was subsequently confirmed by a court order, as required by law. The order of the court was that the bank be reorganised. Mr Smith was authorised to continue to act as Receiver/Manager until the reorganization was completed. He was granted an indemnity out of the assets of the bank. His remuneration was fixed at 7½% of the gross assets. He was authorised to postpone and/or delay payment to creditors and/or depositors if in his discretion it is in the best interest of depositors and/or creditors.

[4] The claimants complain that since his appointment Mr Smith has failed to submit any report or interim statement of affairs to the court, nor has he prepared any audited financial accounts or a scheme for the reorganisation of the bank. They complain that he has also disposed of substantial assets while failing to provide any return of investment to the depositors and investors.

[5] On 25 August 1998, Mr Smith mailed some four thousand depositors his first report in the form of a circular letter. This explained that he had begun assessing the quality of the bank's assets and that it would be some time before he could convert the assets to cash to service the needs of the creditors.

[6] On 3 November, he issued his second report in a similar form. In it, he advised the creditors that a valuation of the assets had commenced. Once this was completed he expected to be in a position to provide a statement which would give an estimate of the realisable value of the bank. He had been forced to put many of the loans in the hands of lawyers to collect through the courts. He enclosed a draft statement of affairs as of 23 October 1998. This indicated among other assets cash of US$1,808,220.00, a money market account of US$9,358,244.00 and loans of $18,902,244.00. The bank's assets totalled US$40,219,928.00. Among the liabilities were US$4,413,326.00 due to banks, and amounts of US$26,827,028.00 and US$4,808,821.00 due to depositors.

[7] On 31 March 1999, he wrote the depositors advising that he had drafted a scheme of arrangement for presentation to the court for approval. This would allow the restructuring of the bank, and paying out the depositors. He enclosed a further statement of financial condition up to 28 February 1999. This showed total assets and liabilities of US$39,621,250.34, with net realizable assets valued at only US$18,712,194.00. Most of the assets were bad loans made by the directors to themselves or their associated companies.

[8] On 31 December 1999, he wrote advising on efforts to reconcile the bank accounts and an audit of the records. This would allow for the presentation to the court of a scheme of arrangement after the Christmas recess.

[9] On 28 April 2000, he wrote advising that he had decided to defer filing the scheme of arrangement until the accounting review was complete. He advised that the bank building had been sold and the net proceeds were being held for distribution. He was taking other steps to collect in the assets. Some matters were before the High Court, and one before the Court of Appeal. There was one matter in court in Canada. He had had to change local attorneys and to retain a recognised regional accounting firm.

[10] On 14 July 2000, he wrote advising that the recovery program for collecting assets was continuing, with writs of execution being prepared. He was hopeful that the scheme of arrangement could be filed later that month.

[11] Mr Smith also wrote directly to Mr and Mrs Manfre in response to correspondence from them. He did the same with other creditors who communicated directly with him. His last letter to Mr and Mrs Manfre was dated 6 December 2000. He explained then that the poor record-keeping at the bank had prevented him sending out a formal statement. He was having great difficulty reconciling the bank accounts. A scheme of arrangement had been prepared and counsel was reviewing it. The accountants were expected to produce a final

statement soon. He had not circulated the creditors with an update since there had been no significant progress to report.

[12] On 9 May 2001, the claimants began this action. It is an Originating Summons brought under the International Business Corporations Act, Cap 222, s.220. The first two claimants claim an order that the Receiver produce a statement of affairs and detailed accounts; an order for a forensic examination of the statement of affairs; and an order discharging him and requiring him to make good any default and appointing another Receiver. The claim of the third claimant was not pursued at the trial.

[13] The claimants are concerned that Mr Smith has been drawing a fee of 7½% of the gross assets as his remuneration, and that by June 1999 this had amounted to in excess of US$550,000.00. They say the fee of 7½% is unauthorised by the court. They believed that he was conducting the receivership for his own personal gain and without regard for the rights of the bank's creditors and depositors, his duty under the Act, or to the supervisory role of the court.

[14] On 15 June 2001, after the case commenced, Mr Smith filed in court the draft scheme of arrangements together with the accounts and the auditors' report on them.

[15] On 2 October 2001, a representative of Overseas Development Bank applied to the court without notice to Mr Smith for a number of orders. On 5 October, in the absence of Mr Smith who had not been served with the application, the judge made a number of orders. These included, in summary, (1) that he not remove any of the assets from the jurisdiction or dispose of them or diminish their value; (2) that he not pay himself any further remuneration; (3) that he not pay any of the expenses of the receivership except ordinary business expenses, salary and wages of office staff, provided that before any such payment he file and serve a schedule of such payments; (4) that he disclose his monthly remuneration verified by affidavit; (5) and that he might on 72 hours notice apply to discharge this order. On 16 October Mr Smith, having meanwhile been served with the application and order, swore and filed an affidavit in reply. He set out in this affidavit his

substantive response to the various matters ordered. In particular, he explained that he had no monthly remuneration, but that his remuneration was based as ordered by the judge on a percentage of assets recovered; and that he had instructed the auditors to prepare and file the statement of commissions and expenses as ordered. The audited financial statements of his receipts, expenditure and commission were filed on 10 October 2001. In this affidavit, Mr Smith asks, for the reasons that he sets out, that the order made on 5 October be set aside. On 25 February 2002, Mr Smith swore and filed a supplemental affidavit in the matter of the various interlocutory orders, and set out his reasons for stating that far from being a creditor Overseas Development Bank was a debtor to American International Bank in the amount of US$843,098.83. At the trial it transpired that he had delivered to his attorneys schedules of monthly expenses, but that his attorneys had only dispatched copies to the attorneys for the claimants by letter of 11 December 2002. The matter of the interlocutory injunction and Mr Smith's affidavits in response never came up to be dealt with until the trial.

[16] The application for committal rests on paragraph (3) of the original order as set out above. As I understand it, the complaint is that he failed to file and serve a schedule of the ordinary business expenses, salaries and wages of office staff before he paid them. No complaint is made about the other orders. It is not to be doubted that although for several months he duly sent the schedules to his attorneys, because of an oversight they were not filed and served in compliance with the order. The question for the court is, is Mr Smith in contempt of the order and, if so, what penalty should he pay?

[17] The rule governing the grant of an interim remedy is rule 17 of CPR 2000. It permits the court to grant interim remedies including an interim declaration, an interim injunction, and any one or more of a list of various orders[1]. The fact that an interim remedy is not listed does not affect any power that the court may have to grant that remedy[2]. The Chief Justice may issue a practice direction as to the procedure for applying for an interim order including interim injunctions, search orders, and freezing orders[3]. No such direction has

[1] Rule 17.1(1)
[2] Rule 17.1(3)
[3] Rule 17.1(5)

yet been issued. The court may grant an interim remedy without notice if it appears to the court that there are good reasons for not giving notice[4]. The evidence in support of an application made without giving notice must state the reasons why notice has not been given[5]. The court may grant an interim order on an application made without notice for a period generally of not more than 28 days, if it is satisfied that in a case of urgency no notice is possible, or that to give notice would defeat the purpose of the application[6]. On granting such an order the court must fix a date for further consideration of the application and fix a date on which the injunction will terminate unless a further order is made on the further consideration of the application[7]. Thereafter, the applicant must serve the respondent with the application, the affidavit, the interim order, and notice of the date and time on which the court will further consider the application[8]. The application to extend an interim order must be made on notice to the respondent unless the court otherwise orders[9].

[18] Prior to the coming into effect of CPR 2000, it was common for judges to make what were called interim *ex parte* orders in the form made in this case: that the order was made and was binding on the defendant until the trial with leave to the defendant to apply to set it aside earlier. Under the old rules of court, when such an order was made the burden of moving the court for relief from the order was on the respondent. If he did not apply to set it aside he continued to be bound by it. Much abuse resulted. Poor, illiterate, and otherwise un-represented litigants frequently ran afoul of such orders and found themselves in difficulty. Many complaints about the quality of our justice arose. The restrictions that have now been introduced in the rule on granting interim remedies is a response by the rule-making authority to these complaints. No guidance is to be found in the White Book. CPR 2000 is to a large extent based on the current UK rules of court. The equivalent of our Rule 17 is not found in the UK rules. Perhaps in that country, such a rule was not necessary.

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[4] Rule 17.3(2)
[5] Rule 17.3(3)
[6] Rule 17.4(4)
[7] Rule 17.4(5)
[8] Rule 17.4(6)
[9] Rule 17.4(7)

[19] The order made in this case on 5 October 2001 was not one that could properly have been made under Rule 17 of CPR 2000 for the following reasons. There was no good reason shown for not giving Mr Smith notice of the application. It was not a matter of urgency; There was no suggestion that no notice was possible, or that to give notice would have defeated the purpose of the application. The order was not limited to 28 days. It did not have an expiry date. It did not give a date for the hearing to be continued. It was not renewed on application by the applicant. For all these reasons the order was a bad one. It broke all the rules. No doubt, the reason why it was made at all was because the new rules had only come into effect three months before, and through inadvertence counsel did not bring the requirements of Rule 17 to the attention of the judge. Such a mistake would not occur today.

[20] The law is well established that in proceedings for breach of an order of the court there is no need to prove that the defendant's conduct was wilful or contumacious. When an injunction prohibits an act, that prohibition is absolute and is not related to intent unless otherwise stated on the face of the order[10]. Nor is there any doubt that under CPR 2000 it is open to a judge to make an order without notice to the other side who is bound by the order, and that failure to comply may amount to contempt.

[21] It is equally well established that no matter how bad an order of the court is, it must be obeyed until it is set aside[11]. As a matter of public policy, it is the unqualified duty of the citizen to obey an order of the court. If it is wrongful, it may be set aside either by the judge who made it or on appeal to the appropriate court. It is not open to the citizen to decide which court orders are lawful and binding and which are unlawful and can safely be ignored. On the other hand, the court will only reluctantly and in the clearest of cases, if at all, enforce by contempt proceedings an order made without notice that was obtained in breach of the rules of court governing such orders.

[10] Knight v Clifton [1971] 2 All ER 378
[11] Robertson v Isaacs [1985] 1 AC 97

[22] Both Mr Manfre and Mr Smith testified in court. They were the only witnesses. Their evidence in chief was constituted principally by their affidavit evidence, upon which they were cross-examined. Their counsel have filed written submissions on their behalf, and have also addressed the court on both the facts and the law.

[23] Mr Smith's receivership has been hampered by a number of factors. These include the unsatisfactory way in which the records and accounts of the bank were kept, by the obstacles put in his way by the borrowers in repaying the loans they had received from the bank, by the various law suits he has had to pursue in Antigua, Canada and Dominica to recover sums owed to the bank. He has had to prepare the accounts from scratch. Regular reporting to the depositors has not been made any easier by the fact that there are so many of them, causing the cost of individual communication to be prohibitive. Mr Smith has circulated and filed accounts which show that the amount of cash available to pay the depositors is a small fraction of the amount owed to them. He has hired reputable auditors to audit the accounts, and their report has now been filed. His selling the bank building, about which they complain, was essential to bring an end to the expensive bank loan with which it had been acquired. I find no fault proved in this regard. It is noticeable that out of the several thousand creditors and depositors, besides Mr and Mrs Manfre none other than the dubious Overseas Development Bank has filed a single document in complaint at the receivership. I do not accept that Mr Smith has acted dishonestly, or that the information he has sent out has been inaccurate, untrustworthy, or meaningless, as testified to by Mr Manfre.

[24] So far as Mr Smith's fees are concerned, it has not been shown that he has acted improperly. The judge did evidently at one time have a question about what was the normal fee of a receiver in these circumstances. He resolved this question in due course by accepting and authorising a fee of 7½% based on the gross assets. He initialled the minute of the order in these terms. While on the question of fees, it may be as well to observe that the judge clearly intended the term assets to mean "realised" assets, not "booked" assets, which would include bad loans and other unrealisable assets. It is not

clear at this stage how many of the bad loans Mr Smith has collected. The final amount of his fee will depend on the amount of cash that he actually collects in.

[25] It is also true that the receivership is taking a very long time. The longer it takes the more expensive it is in time for Mr Smith and in cash for the creditors. The world financial system has turned against offshore banking. There is no market for damaged offshore banks headquartered in Antigua. All of Mr Smith's attempts to find a good and substantial buyer for the bank have failed. There comes a time when attempts to sell the bank as a going concern must end. It is perhaps now time to wind it up. The depositors and other creditors must receive back their portion of the reasonably realisable assets, even if it is only 10 cents in the dollar. However, Mr Smith was appointed to receive and to manage, not to liquidate, as the claimants seem to believe. He had the express authority to postpone payment to depositors if in his opinion it was in their best interests. He has done nothing wrong in not having wound up the bank and disposing of all the remaining assets, as the claimants expected. Separate proceedings will have to be brought to wind up the bank. The failure of Mr Smith's attorneys to have filed on time the monthly statements of receipts and expenses was a trifling matter. Although Mr Smith was technically in breach of the order, the court does not consider that any good purpose will be served by imposing some penalty real or otherwise on him.

[26] The claim is dismissed with costs of $14,000.00 under CPR 2000 R.65.5(2)(b)(iii) to be paid by Mr and Mrs Manfre to Mr Smith. The committal application is similarly dismissed, with no order as to costs.

Don Mitchell, QC
High Court Judge