

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 172 OF 2003

IN THE MATTER OF THE INTERNATIONAL BANKS ACT
NUMBER 19 OF 1996 OF THE LAWS OF ST. VINCENT AND
THE GRENADINES AS AMENDED

AND

IN THE MATTER OF AN APPEAL BY STB SWISS TRUST BANK
LIMITED AGAINST THE DECISION OF THE SAINT VINCENT AND
THE GRENADINES OFFSHORE FINANCE AUTHORITY TO
REVOKE ITS CLASS 1 OFFSHORE BANKING LICENCE

BETWEEN:

STB Swiss Trust Bank Limited

Appellant

and

**The Saint Vincent and the Grenadines
Offshore Finance Authority**

- Respondent

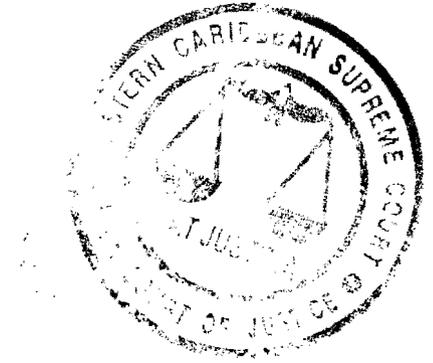
Appearances:

Mr. Grahame Bollers for the Appellant.
Mr. Joseph Delves for the Respondent.

2004: October 26th
2005: September 28th

JUDGMENT

[1] **Bruce-Lyle, J:** The Appellant is an International Business Company which was licensed by the Respondent to conduct Class One International Banking business



under the provisions of the International Banks Act Number 19 of 1996 of the Laws of Saint Vincent and the Grenadines as amended. By fixed Date Claim Form filed on the 24th of July, 2003, it appealed the decision of the Respondent, the Saint Vincent and the Grenadines Offshore Finance Authority, a regulatory authority revoking its Banking licence. The respondents reasons for revocation of the appellants Banking licence are contained in a letter dated 29th January 2003, and are as follows:-

- (a) The Licensee contrary to Section 17 of the Act has never appointed a Resident Director;
- (b) No audited statements have been filed in breach of Section 15 of the Act;
- (c) The licensee sought to change its Auditors without the requisite application and approval as required by Section 6.
- (d) The Licensee committed an offence in breach of Section 23(1) of the Act by filing inaccurate and misleading information.
- (e) The Licensee is in breach of the condition of its licence by failing to commence banking business within the stipulated time;
- (f) The Licensee has neglected and/or failed to implement the directions given to it by the Authority following the on-site inspection.

[2] The appeal came up for hearing before me and the appellant called three witnesses in support of its case – these were Mrs. Kay Bacchus-Browne, the principal of the Appellants Registered Agent, Universal Trust Company Limited, Mr. Bertram Commissiong Q.C. and Mr. Colin Williams who was Offshore Finance Inspector of the Respondent at the time that the Appellant Banking licence was

revoked and is presently the Acting Director of Public Prosecutions for the State of Saint Vincent and the Grenadines. The Respondent also called three witnesses namely Retired Justice Monica Joseph a member of its Board of Directors, Ms. Louise Mitchell its present Executive Director and Mr. Dougal James, its Banking Supervisor.

- [3] In deciding this appeal the relevant legislation guiding the reasons for the revocation of the appellants licence and also its appeal needs to be examined. The legislation applicable to this appeal is the International Banks Act Number 19 of 1996 as amended by the International Banks Amendment Acts Number 7 of 2000 and 16 of 2000 and further amended by the International Banks Amendment Act No. 30 of 2002.
- [4] Section 24 of the International Banks Act 1996 as amended and Section 24(3)(c) permits the Court upon the hearing of the appeal to confirm, reverse, vary or modify the Respondents decision or to remit the matter with the opinion and directions of the Court thereon to the Respondent..
- [5] The International Banks Act 1996 as amended is silent on whether the statutory right of appeal is a rehearing. Part 60.8(1) of the Civil Procedure Rules 2000, provides that unless an enactment otherwise provides, the appeal is by way of a rehearing and Part 60.8(2) of the same rules permits the court to receive fresh evidence on matters of fact in determining whether to confirm, reverse, vary, or modify the Respondents decision. This Court took the view as elucidated in

Sections 60.8(1) and (2) and took into consideration fresh evidence on matters of fact in arriving at its decision. After all the reasons for revocation dwelt on matters of fact which requires further elucidation the appellant having appealed.

[6] The Respondents view on this appeal is that on or about August 1st 2000 the Appellant applied to the Respondent for a class one Offshore Banking Licence under the International Banks Act 1996. The Respondent contended that the application form was dated 13th June 2000 and signed by one Walter Zinke. It also listed two persons as Directors – Walter D. Zinke and the Universal Trust Company.

[7] The respondent further contended that it is a requirement of Section 17(1) of the Act that every licensee have at least two Directors who shall each be a natural person and one of whom shall be a resident. This requirement was not followed says the Respondent.

[8] Further the respondent contends that the appellant had informed the Respondent by letter that "(6.) Letter of auditors confirming that they act for the applicant (was) to follow". And further that the application form listed KPMG, Accountants, of 18 Long Lane, Upper Middle Street, Kingstown as the Appellants Auditors, however no confirming letter was even submitted from KPMG and that this was a breach of Regulation 9 of the International Banks Regulation 1996, and also that Regulation 12 of these Regulations also require that applicants give an undertaking re paid-up capital.

- [9] On the 13th October 2000 the Respondent wrote to the Appellant stating that the application was successful and reminding the Appellant that certain conditions must be satisfied before the licence was issued and these conditions included -
- (1) That the Appellant submit evidence of fully paid up Share Capital of at least \$500,000 United States Dollars.
 - (2) That the Bank employ a minimum of 2 Vincentian residents; and
 - (3) Banking operations should commence within 3 months.
- [10] There was also a reminder to the appellant through Mrs. K. Bacchus-Browne for the appellant to amend its application to comply with Section 17 of the Act which deals with the amount and criteria for directors. Subsequent to that there appeared on the respondents file an application form listing K.R.A. Bacchus-Browne of St. Vincent as a third Director, but this form was undated and unsigned. Interestingly enough there is no application by the Appellant for the said Mrs. Kay Bacchus-Browne to be Director nor an approval by the Respondent for her to act as a Director.
- [11] There was a lot of back and forth correspondence between the parties pertaining to the appellant complying with the requirements of the said Act, but suffice it to say that the appellant complied with some of the requirements of the said Act. For instance on 31st January 2002 a Mr. Leje Frank was appointed a Director by special resolution. (local director). But the respondent contends that no application for the prior written approval for Mr. Frank to act as a resident director

has ever been submitted by the Appellant; nor has any prior written approval been given by the respondent.

[12] After a lot of to and fro between the parties; on the 18th March 2002, the respondent issued a "notice to Show Cause" to the appellant to answer why its licence should not be revoked. In that notice the respondent was specifically concerned that the Appellant –

- (1) Failed to submit and file regular quarterly returns
- (2) Failed to file audited annual accounts
- (3) Failed to employ 2 local persons
- (4) Failed to have a physical presence in the state.

[13] After various meetings and on site visits and inspections by the relevant authorities, including a second "show cause" notice, the respondent on the advice of the Minister of Finance, felt satisfied that the appellant was in breach of the provisions of Section 18(1)(f) and (g) of the act, in that it had contravened provisions of the Act and failed to comply with a condition of its licence in that it has never appointed a resident director as required by Section 17(1); it has not filed audited financial statements as required by Section 15; the bank had sought to change its auditors without the requisite application and approval as required by Section 6; that the licensee appears to have committed an offence contrary to Section 23(1) by filing inaccurate financial information; and that the licensee has not satisfied the conditions of its licence of commencing banking business within the stipulated time.

[14] Having sought the approval of the Minister of Finance as required by Section 18 of the act and his advice, the respondent revoked the appellants licence on January 29th 2003 and decided to appoint a liquidator.

[15] The main reasons for the revocation of the appellants licence were as follows –

- (a) That the Licensee contrary to the requirements of Section 17 of the Act has never appointed a Resident Director
- (b) That no Audited Financial Statements have been filed in breach of Section 15 of the Act
- (c) That the licensee sought to change its auditors without the requisite application and approval as required by Section 6 of the International Banks Act 1996 as amended.
- (d) That the Licensee committed an offence in breach of Section 23(1) of the Act by filing inaccurate and misleading information
- (e) That the licensee is in breach of the condition of its licence by failing to commence banking business within the stipulated time
- (f) That the licensee has neglected and/or failed to implement the directions given to it by the authority following the on-site inspection.

[16] I propose to deal with the main reasons for the revocation of the appellants licence one at a time for clarity and convenience.

[17] Reason (a) Section 17 of the International Banks Act 1996 as amended states:-

17.(1) "A licensee shall at no time have fewer than two Directors who shall each be natural persons and one of whom shall be a resident.

17.(2) Unless exempted by the authority pursuant to Subsection (3), a licensee shall, prior to the appointment of a Director or other Senior Officer apply to the authority for its written approval of the appointment".

[18] The Respondent contended that the Appellants in breach of the provisions of the said Section 17 as aforementioned never appointed a Resident Director. This is as set out in the evidence of Mr. Dougal James, an Officer of the Respondent, at paragraphs seven to fifteen of his Affidavit of 11th March 2004. The Appellant through the evidence given by its witness Ms. Kay Bacchus-Browne at paragraph five to nine of her Affidavit of the 24th July 2003 explains the reason for this seeming lapse and quotes a portion of a letter written by Mr. Linton Lewis, then Offshore Finance Inspector and dated 6th November 2000. This letter is exhibited to Kay Bacchus-Browne's Affidavit and marked "KBB3". From that scenario, it is my view that any lapses in conforming with Section 17 of the said Act could be laid at the door of the Offshore Finance Authority other than wholly at the door of the appellant.

[19] I find it quite interesting and worth commenting on the response given by Mr. Dougal James under cross-examination, when he was asked why wasn't Ms. Bacchus-Browne called or written to asking that she come into the office to sign the form – his response was that that was not his job. He then goes further at Paragraph 15 of his Affidavit to State that the Respondent would not revoke a

licence on this ground alone. I agree with him. I agree with the appellants when they contend that the issue of whether Ms. Bacchus Browne was or was not the Respondents local director could have been easily rectified by the Respondent by asking her to come in to sign the amended application. Since it was on the basis of this unsigned and undated application that the Respondent acted in granting the appellant its banking licence it would be inequitable in my view for it to suggest that Mrs. Bacchus-Browne could not be the local director because the amended application was unsigned and undated. There were also other remedies open to the Respondent under Section 18(2) including imposing conditions, substituting officers or director or appointing a person at the appellants expense to advise it on appointing a local Director – without applying these the Respondent sought to shut the door completely in the appellants face by applying revocation, which was the most draconian of actions permissible under Section 18. I consider it wrong and unjustified, considering all the circumstances under this head. This ground of revocation therefore falls.

[20] Reason (B) – Under this head, the relevant provisions of the International Banks Act 1996 as amended states –

15.(1) “Every Licensee shall have its accounts audited by an auditor annually or at such other periods as the authority may require;

15.(2) The audited accounts shall be forwarded to the authority within three months from the end of the financial year of the Licensee, unless prior approval for an extension has been granted by the authority.

15.2(a) A licensee who fails to file annual accounts, as they become due shall pay a fine of five hundred dollars for each day that the licensee shall be in default.

[21] There is no dispute that the appellant did not file annual financial statements as required by the Act – infact this is admitted by the appellant. But there is evidence from Ms. Kay Bacchus Browne at paragraph 11 to 17 of her affidavit that there was some difficulty in complying with this requirement as the two major accounting firms on the island KPMG and PKF had been contacted and were yet to reply. Indue course KPMG replied declining to do the audit for the appellant. This was known to the Respondent. To go further, the Respondent was also aware that at the time, the appellant had no depositors. Their main expenses were staff salaries and rent for its registered office. There is uncontroverted evidence before this court which shows that during the on-site visit in September 2002, they (the Respondents) were satisfied that the appellant had no depositors or loans on its books. The failure of the appellant to submit audited accounts would therefore not have prejudiced the Respondent in any way. It was well aware that the appellant was fully capitalized and that there were no allegations of impropriety against the appellant, its share holders or its directors and there were no solvency issues since it had no loans or depositors on its books.

[22] Again there were other options open to the Respondents rather than Revocation, as they were fully cognizant of the facts surrounding the Appellants operations. To my mind there was no threat that the appellant was operating in a manner to bring

unnecessary attention to Saint Vincent and the Grenadines as an Offshore jurisdiction. I view the actions of the Respondent to be unreasonable and ought not to have lead to revocation in light of the evidence of Mr. Dougal James when under cross-examination he admitted that there were banks presently in existence which are not in compliance. This is even more compounded by the fact that the authority through Mr. Dougal James was aware of the difficulties the appellant was facing in securing the services of an auditing firm to audit its accounts as KPMG had declined the appellants offer through its Mr. Brian Glasgow, and had communicated such in a memorandum to Mr. Colin Williams, the Respondents then Offshore Finance Inspector. But at the show cause hearing of 30th December 2002 Mr. Dougal James failed to mention or disclose this information to the appellant for their response. Without this response or in the absence of it the Respondents still went ahead with the revocation. This was a clear breach of the Appellants right to a fair hearing. In *Kanda v. Government of Malaya* [1962] AC 322 at 337 Lord Denning stated "if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them". I hold in the circumstances that the appellants right to a fair hearing had been violated by the Respondent. This ground of revocation therefore falls.

[23] Reason C – I need not deal with this ground of revocation as the Respondents main witness Mr. Dougal James conceded that this ground of revocation was

without merit. Mr. Colin Williams, the Respondents Offshore Inspector then, during re-examination also accepted that this ground was ill-conceived. This ground also falls.

[24] Reason D – The reasons for rejecting ground B as one of the reason for revoking the licence of the appellant, also apply to this head. The reason advanced by the Respondent was that the licensee committed an offence in breach of Section 23(1) of the Act by filing inaccurate and misleading information. The relevant section under the International Banks Act as amended is Section 23(1). It reads as follows:-

"23(1) A licensee or applicant for a license under this Act, or any director or officer of a licensee or applicant who knowingly a wilfully supplies false or misleading information to the authority, shall be guilty of an offence and liable on summary conviction to a fine not exceeding one hundred thousand dollars or to imprisonment to a term not exceeding two years or both".

[25] The operative words in this section are "Knowingly or wilfully". Mrs. Kay Bacchus Browne the agent of the appellant said it was an honest mistake, when she was told at some stage that the appellant had been filing nil returns even though it had a security deposit of US\$100,000 at the National Commercial Bank (SVG) Ltd. As well as a minimum share capital of US\$500,000 which should have been recorded on its balance sheet. And further the quarterly returns submitted by the Appellant provided no evidence that costs such as rent and wages were properly recorded and accounted for in its books. It is my view that it was the Respondents duty to

have provided the appellant with the relevant information which would have lead it to believe that the appellant wilfully filed in accurate and misleading information in spite of Ms. Kay Bacchus Browne's explanation that it was an "honest mistake".

[26] At the trial and under cross-examination Mr. Dougal James for the Respondent adduced that he never informed the appellant's agent that he did not believe her nor did he provided her with facts to enable Ms. Kay Bacchus Browne to mount a defence that the inaccurate filings were not done wilfully. Consequently the appellant was found guilty of an offence under Section 23(1) with out being given the opportunity to correct or contradict Mr. Dougal James' opinion that the filings were wilfully done. This breached the rules of Natural Justice clearly – see *United Bank Limited v. The Saint Vincent and the Grenadines Offshore Finance Authority* – Civil Suit No. SVGHCV0078/2003 unreported – Judgement of Brian Alleyne, J as he then was.

[27] If the facts of the present case are juxtaposed with the above mentioned case it becomes very glaring that by the Authority's failure to provide the appellant with facts which would have permitted the appellants agent to mount a defence that the inaccurate filings were not done knowingly or wilfully they breached the appellants right to natural justice and renders the revocation null and void. This ground of revocation also falls.

[28] Reason E – Having dealt with the other four reasons for revocation and having held that at least two of them breached the rules of Natural Justice, it follows from

that premise that the revocation cannot stand as from the other reasons I am of the view that the revocation was not done on a level playing field. From the circumstances that emerge the Respondents could have and to my mind should have applied other alternatives at their disposal and embodied in the International Banks Act as amended. I would therefore not rehash the situation as regards this head for the revocation of the appellants licences as the same principles exist for my consideration and inevitable conclusion that the Respondents acted in a draconian manner in deciding to revoke the appellants licence. Besides the Respondent failed to consider the effects of the FATF blacklisting of this jurisdiction and also the subsequent effects of the events of 11th September 2001 when certain legislative pressures were brought to bear on offshore jurisdictions by the U.S. government pertaining to its fight against International terrorism.

[29] To support this contention the evidence of the then Offshore Finance Inspector, Mr. Colin Williams is very crucial. If one examines his affidavit and viva voce evidence in its entirety it is clear that the above conclusions drawn with regard to the pressures faced by this jurisdiction in light of the FATF Blacklist and the events of 11th September 2001 had a direct bearing on what happened to the appellants viz a viz the revocation of their licence.

[30] I agree with the appellants submission that even though the actual revocation was made by the Minister of Finance and it cannot be established that he had acted based on irrelevant considerations and/or improper motives, he had acted on the advice from the Respondents board, who had also acted on advice from the then

Offshore Finance Inspector. If the advice from the Offshore Finance Inspector was flawed by breaches of Natural Justice and by an all too rigid application of the relevant Act, then the decision of the Minister of Finance would also be flawed because he acted on flawed information. It was the Offshore Finance Authority that relayed information to the Minister of Finance for him to act the way he did – by revoking the appellants licence.

[31] This is a most unfortunate case. Both sides were faced with certain pressures beyond their control and in the case of the appellant sometimes breaches in good faith. In the circumstances I order that the Respondents decision to revoke the appellants Class I International Banking Licence is hereby quashed because the Appellant has satisfied this court that the Respondent acted in breach of the Rules of Natural Justice and procedural unfairness.

[32] I further order that the Appellants name be restored to the Register of Class I International Banks Licenced to conduct International Banking Business pursuant to the provision of the International Banks Act 19 of 1996 of the Laws of Saint Vincent and the Grenadines as amended. I also order that each party bear its own costs for this appeal.


Frederick V. Bruce-Lyle
High Court Judge