

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV 2008/0093

IN THE MATTER OF SECTION 43 OF THE BANKING ACT, NO. 40 OF 1993

AND

IN THE MATTER OF SECTION 295 OF THE COMPANIES ACT, NO. 35 OF 1994

AND

**IN THE MATTER OF AN APPLICATION BY THE MINISTER OF FINANCE FOR AN ORDER
FOR THE APPOINTMENT OF DAVID HOLUKOFF, MANAGING DIRECTOR OF KRALL
ASSOCIATES UK LTD. AS RECEIVER OF CAPITAL BANK INTERNATIONAL LIMITED,
A GRENADIAN FINANCIAL INSTITUTION LICENSED IN ACCORDANCE WITH
THE BANKING ACT**

BETWEEN:

THE HONOURABLE ATTORNEY GENERAL

Claimant

AND

CAPTIAL BANK INTERNATIONAL LIMITED

Defendant

Appearances:

Mr. Hugh Wildman for the Claimant

Mr. Cajeton Hood, with him Mr. Ian Sandy and Mr. Marlon Glean for the Defendant

2008: February 25, 26
March 4

[1] **HENRY, J.:** By an instrument signed by the Honourable Minister of Finance, Mr. David Holukoff was appointed as Receiver of Capital Bank International Limited pursuant to

Section 43 of the Banking Act of Grenada, No. 19 of 2005. Thereafter the Honourable Minister sought and obtained an order from the court dated 15th February, 2008 appointing the same David Holukoff as receiver of the said bank and providing directions. By application supported by affidavit filed 18th February 2008, Mr. George F. De Bourg, Chairman and Managing Director of the Bank prior to the appointment of the receiver seeks an order setting aside the court's order of 15th February.

[2] The grounds of the application are:

- (a) The Minister has failed to comply with certain provisions of the Civil Procedure Rules;
- (b) The hearing and determination of the application was contrary to law in that the application ought not to have been heard without notice to the applicant; and further the Minister on whose behalf the application was made did not have sufficient interest in the property to make the application under section 295(a) of the Companies Act;
- (c) The evidence used in support of the application for the order, the affidavit of Timothy Antoine, was irregular, in that it is contrary to CPR 30.3(1) and it contained statements that were factually incorrect and/or misleading;
- (d) The application was not made for a proper purpose;
- (e) Equity ought not to assist the Minister herein who is presently the defendant in court proceedings initiated by the applicant herein for causing damage to the bank;
- (f) The timing of the application, the conduct of the Minister and the overall effect of the order granted is likely to prejudice the applicant's ability to respond to the Claim made against it.

[3] The Minister in response submits that the action giving rise to the court's order of 15th February was in the nature of an application to confirm the appointment of the Receiver made under Section 43 of the Banking Act and for additional powers; that the provisions of CPR parts 17 and 51 are therefore inapplicable; that no notice could be given to the Bank's Directors because of the nature of the proceedings. He therefore seeks leave to

amend his Claim Form and the order of the court to reflect a confirmation of the appointment of the Minister and not an appointment.

- [4] Counsel for the applicant submits however that the court has no power to confirm an appointment of a Receiver made pursuant to Section 43 or to provide for additional powers. Counsel reasons that this is a statutory appointment under the Banking Act and that the court must look to that Act for its jurisdiction and also for the powers and duties of the Receiver.
- [5] The Court notes preliminarily that in support of the application to set aside the court's order, Mr. George De Bourg, Chairman and Managing Director of the Bank purports to swear an affidavit on behalf of the Bank. A Receiver has been appointed pursuant to Section 43 of the Banking Act. Until that appointment is set aside, only the Receiver can represent the Bank or authorize a legal representative. Mr. De Bourg's affidavit therefore cannot be made on behalf of the Bank.
- [6] What does an application to confirm a statutory appointment entail? It is simply an application for the sanction of the court for the Receiver to do what he has been appointed under the Statute to do.
- [7] In **Hughes v Customs and Excise Commissioners** [2003] 1WLR 177, Simon Brown LJ stated:
- "Statutory receivers are to be treated precisely as their common law counterparts, save to the extent that the legislation expressly provides otherwise. The statute is not to be regarded as an entirely self contained code incorporating nothing from the common law."
- [8] Certainly where a Statute provides for the appointment of a Receiver and grants broad powers to that Receiver, the Court has power to sanction the appointment and to give directions as to how those powers are to be exercised.
- [9] With regard to the submission that any such application ought to be brought by the Receiver and not the Minister, the court cannot say that the Statute having given the Minister the power to appoint, that the Minister is not a person with sufficient interest in the matter to seek the court's sanction of his appointment.

- [10] The applicant has also submitted that the application to appoint the receiver ought not to have been heard without notice.
- [11] In **Century National Merchant Bank Limited and Others v Omar Davies and Others** [1998] UKPC12, the Privy Council considered whether the action by the Minister of Finance of Jamaica in assuming temporary management of three financial institutions pursuant to Banking Act was unlawful inasmuch as no prior notice was given. The Board in concluding that prior notice was not required stated:
- "A prior notice of an intention to assume temporary management may cause grave problems The risk of advance notice of the Minister's intention leaking out, once it is communicated to the bank, must also be substantial. Such a leak would be headline news in Jamaica. It would tend to alarm depositors. It might very well lead to a run on the bank. A run on a bank may not only finally destroy any prospect of reconstruction of a bank but it may have systemic consequences in the sense of adversely affecting the banking sector as a whole and thus the national economy. Finally, there is the risk that directors or other insiders, who have been responsible for unsound practices, may destroy incriminating records."
- [12] Although the issue in the Merchant Bank case was whether the Minister could assume temporary management of the Bank without prior notice, the rationale stated therein is also applicable to the present situation.
- [13] The applicant's objections based on the timing of the application and the real purpose behind the appointment of the Receiver are submissions that are more properly considered in the action filed pursuant to Section 45 of the Act which challenges the validity of the appointment by the Minister.
- [14] The further objections made that the proceedings are not in compliance with Parts 17 and 51 of the CPR are not applicable to proceedings to confirm and the court need not consider them at this juncture.
- [15] Lastly, the applicant asserts that the proceedings were incorrectly commenced by the use of a Fixed Date Claim Form instead of the required Claim Form and that the date has been omitted from the Form. While the court acknowledges that a Claim Form ought to have been used together with an ex parte application, what is the prejudice to this applicant in light of the court's ruling that prior notice to him was not required? Under the overriding

objective the court must deal with the case justly. The litigant is not to be thrown from the judgment seat because of procedural irregularities especially where no prejudice is shown. The error made herein does not invalidate the order that was made.

[16] The fact is that when the matter came before the court, there was already an instrument signed by the Minister appointing Mr. Holukoff Receiver of the bank pursuant to Section 43 of the Banking Act. A second appointment was unnecessary. The court considers that the second appointment merely confirmed the earlier one in law.

[17] Furthermore, with regard to the directions given in the court's order, Section 49 (1) of the Banking Act provides:

"After his appointment by the Minister, the receiver and, subsequent to his appointment by the High Court, the Official Liquidator shall be vested with the full and exclusive power of management and control of that financial institution in Grenada, including the power to:

- (a) continue or discontinue its operations;
- (b) stop or limit the payment of its obligations;
- (c) employ any necessary staff and to terminate their employment;
- (d) execute any instrument in the name of the financial institution;
- (e) initiate, defend and conduct in its name any action or proceeding to which the financial institution may be party;
- (f) restore the financial institution to its board; and
- (g) re-organize or liquidate the financial institution in accordance with the provisions of this Act."

[18] Given the wide powers under Section 49, the Court's order added no additional powers. The Court merely gave directions in carrying out the wide powers already granted under the Act.

[19] The Court will therefore grant the application to amend the Claim Form as requested no prejudice having been shown to the Applicant. The Court will also amend its order of 15th February by deleting the provision for the second appointment under the Company Act and by inserting a provision confirming the previous appointment by the Minister. The directions given by the Court remain the same.

[20] Accordingly, the application to set aside the order dated 15th February 2008 is hereby denied.

[21] Paragraph 1 of the said order is hereby amended to read:

"David Holukoff, a Managing Director of Kroll Associates UK Limited (Grenada Branch), of the Netherlands Building, Grand Anse, St. George's Grenada, having been appointed by the Minister of Finance Pursuant to Section 43 of the Banking Act, he is hereby confirmed as Receiver of Capital Bank International Limited, ("the Bank") and shall act as Receiver in accordance with the directions hereunder."

Paragraph 2 is amended to read:

"Upon the Receiver having provided to the court proof of professional indemnity insurance in the amount of five million United States Dollars, no further posting of security is required herein."

[22] All other provisions of the order remain the same.

[23] Each party will bear their own cost.


Justice Clare Henry
HIGH COURT JUDGE