GRENADA

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

CLAIM No. GDAHCV2008/0109

IN THE MATTER OF THE BANKING ACT, NO 19 OF 2005

AND

IN THE MATTER OF THE APPOINTMENT BY THE MINISTER OF FINANCE OF DAVID HOLUKUFF AS RECEIVER OF CAPITAL BANK INTERNATIONAL LIMITED

BETWEEN:

CAPITAL BANK INTERNATIONAL LIMITED

Claimant

and

KEITH CLAUDIUS MITCHELL
Minister of Finance in the Government of Grenada
THE ATTORNEY GENERAL OF GRENADA

Defendant

Appearances:

Mr. Cajeton Hood, Mr. Ian Sandy and Mr. Marlon Glean for the Claimant.
Mr. Hugh Wildman for the Defendant.

2008: May 7

DECISION

[1] **HENRY, J.:** Mr. David Holukuff was appointed receiver of the Claimant Bank by the Minister of Finance pursuant to the provisions of Section 43 of the Banking Act, No. 19 of 2005. That section provides that where certain conditions exist, the said Minister, "acting upon the recommendation of the Central Bank may appoint a receiver for any financial institution". Section 45 of the Act provides that with in ten days after the Minister's

appointment of a receiver, the financial institution may institute proceedings in the High Court to have the appointment revoked.

[2] Proceedings pursuant to section 45 were instituted by Claim Form a ong with a Statement of Claim on 25th February, 2008 and by Notice of Application filed herein, the Applicant seeks an order revoking the appo ntment of David Holukuff as receiver of Capital Bank forthwith and ordering the delivery of possession of the C aimant's business and premises together with their books, papers, documents and all other records along with the keys and combination numbers to the premises and vault therein.

[3] The grounds of the applicatior are that a condition precedent to the first-named respondent's exercise of the discretion to appoint a receiver is the recommendation of the Eastern Caribbean Central Bank (ECCB); that there was no such recommendation by the ECCB and therefore the appointment is invalid. The applicant also challenges the formalities of the appointment under section 43 and 44.

[4] Counsel for the respondents admits that the recommendation by ECCB is a condition precedent to appointment. However they assert that the condition precedent has been met. He relies on a letter from the Governor of ECCB dated 19th December, 2007. He submits that the tenor of the letter amounts to such a recommendation. Before considering the content of the letter some background is necessary.

Background

[5] Peoples Bank was granted a license to carry on banking business under the Licences Act No. 172 of 1990. On March 18, 1991, the name of Peoples Bank was changed to Capital Bank International Limited. By letter dated 13th October, 1992, Capital Bank wrote to ECCB requesting "an application form for the establishment of clearing facilities with the ECCB. Under cover of letter dated 16th October, 1992 ECCB provided the bank with its clearing facility rules. ECCB informed the bank that access to the clearing facility was subject to the criteria and conditions set out in the said letter. The ECCB's position is that the said Bank has not complied w th these criteria and conditions and access was not granted.

[6] In October 1994, the then Minister of Finance Nicholas Brathwaite informed Capital Bank that it did not qualify for a banking licence as it never had a licence under the Banking Act of 1988. The said Minister informed the bank that it was operating outside the law. On February 13, 1996, then Minister of Finance, Dr. the Hon. Keith Mitchell issued a licence under the Banking Act of 1993 to Capital Bank. In 1998 and 2000 full examinations of the Bank were carried out by Pricewaterhouse Coopers and Ernst & Young. The examiners reported areas of non-compliance with the Banking Act of 1993. In July 2001, Capital Bank filed an action in the High Court against the ECCB and Sir K Dwight Venner, Governor of the ECCB seeking a declaration that the Bank is licensed to carry on banking business in Grenada, and is therefore entitled to be admitted to membership of the ECCB's Clearing House. Since then there have been proposals, further examinations and additional proposals but the issue of the purported licence issued to Capital Bank and its access to the Clearing House remain unresolved.

[7] In March 2007, the Government of Grenada asked the Monetary Council to recommend the appointment of a receiver for Capital Bank. The Monetary Council's response was that the ECCB could not recommend the appointment of a receiver, as it would prejudice ECCB's position in the pending litigation. Further plans for a 5-member team to undertake a safety and soundness examination and for settlement of the Clearing House issue failed. It is against this background that the letter was written.

The Letter

[8] Because of the importance of the letter of 19th December, 2007 from the Governor of the Central Bank, the letter is set out in its entirety.

> "Dear Prime Minister
>
> Capital Bank International Limited
>
> We are in receipt of a letter from Mr. Anselm Clouden, Attorney at law practicing in Grenada out of Grenlaw Chambers. Mr. Clouden alleges that his client, a Mr. David Mc Intosh has been experiencing difficulties recovering funds which he

deposited with Capital International Bank Limited on the 5th day of March 2007. (A copy of the letter is enclosed for your information).

Mr. Clouden requests the intervention of the Eastern Caribbean Central Bank (ECCB). Regrettably, the Eastern Caribbean Central Bank may not legitimately intervene in the affairs of Capital Bank International Limited as we maintain that the Bank is not duly licensed. Having purported to issue a banking licence without first receiving any input from the ECCB as required by the Banking Act, the Minister of Finance of Grenada, as the purported licensor, has assumed regulatory and supervisory authority over and responsibility for this bank. In the circumstances, we submit respectfully that the Minister of Finance is bound by statute to take action to safeguard the interests of depositors.

We enclose for your information also, a letter from Wilson & Co. dated 14th November, 2007 and addressed to the Governor in which the chartered accountants are alleging breach by Capital Bank of section 16 of the Banking Act 2005. (A copy is enclosed for your information).

Please find enclosed also a letter and supporting documentation from one Patsy Nelson alleging refusal by Capital Bank International Limited to permit her to withdraw funds she has deposited at Capital Bank in Carriacou.

In the premises, we again recommend the revocation of the banking licence purportedly granted to Capital Bank International Limited and that urgent steps be taken to regularize the affairs of that institution before the situation gets far worse.

Yours faithfully

K Dwight Venner
Governor"

[9] Counsel for the Respondents makes two submissions with regard to the letter:

1. That when the Governor wrote in paragraph 2 that the Minister "is bound by statute to take action to safeguard the interests of depositors," the ECCB was

giving the Minister a free hand to take action to protect the interests of the depositors, including the appointment of a receiver;

2. That the broad picture presented by the letter is that the Governor is saying to the Minister use your statutory power and whatever statutory power you use, you should ultimately revoke the licence. However, the Minister could not, under the statute, revoke the license forthwith; there are certain procedures which must be followed under section 1[illegible] of the Act. The Minister therefore used the provisions for the appointment of a receiver to first determine the true picture of the bank, since the ECCB had washed its hands of the situation and was saying to the Minister you deal with it.

[10] Parliament in passing the Banking Act of 2005, provided that both Central Bank and the Minister of Finance work together in regulating financial institutions under the Act. Some provisions require consultation between the two, while others require that the Minister may take certain actions only on the recommendation of the Central Bank. The reasons for this are obvious and need no further comment. As has been conceded by the respondents, section 43, which gives the Minister discretion to appoint a receiver for any financial institution is one of the sections which requires that the Minister do so only upon the recommendation of the Central Bank.

[11] The language of section 43 of the Act is clear and unambiguous. It admits of but one meaning. The words themselves therefore indicate what must be taken to have been the intention of Parliament (see **Westminster Bank Ltd. v Zang** [1966] A.C. 182; Maxwell on The Interpretation of Statutes, 12th Edition). The basic rule of construction is "to intend the Legislature to have meant what they have actually expressed" **R v Commissioners of Income Tax** (1888) 22Q.B.D. 296; **Victoria City Corp. v Bishop of Vancouver Island** [1921] A.C.384. It is also well established that it is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import. See **R. v Ramsgate (Inhabitants)** (1827) 6 B & C 712.

[12] So the question is whether the said letter from the Governor amounted to a recommendation to the Minister to appoint a Receiver.

[13] The letter notes three events that precipitated the writing of the letter by the Governor: (1) the receipt by him of a letter from Mr. Anselm Clouden (2) the receipt by him of a letter from Wilson and Co. and (3) the letter and documentation received from Patsy Nelson of Carriacou. The concluding paragraph of the Governor's letter then makes a specific recommendation: the revocation of the banking licence purportedly granted to the bank and the regularizing of the affairs of the bank.

[14] The use of the word 'again' before the word 'recommend' refers to the fact that this was not the first time that Central Bank was making that specific recommendation. So here the Governor was indicating that his position remained unchanged.

[15] Nor can the court interpret the last clause of that paragraph and paragraph 2 to mean that Central Bank was giving the Minister a free hand to use whatever statutory power he choose, including appointment of a receiver as asserted by counsel. That assertion would have been persuasive was it not for the fact that Central Bank had made its position quite clear on the issue of appointment of a receiver. It is not disputed that in March 2007, the Government of Grenada asked Central Bank to recommend the appointment of a receiver for Capital Bank. The Council took time to obtain a legal opinion. It then respondec by advising the Government that it could not recommend such an appointment as this would prejudice ECCB's position in a pending lawsuil with Capital Bank. That litigation is still pending.

[16] Furthermore, the appointment of a receiver for a financial .nstitution is a serious step. This is demonstrated by the requirements set out in Section 43. One of the safeguards built into this section is the requirement that such a procedure be undertaken by the Minister only where there s a recommendation so to do by Central Bank. That being the case, the court ought to interpret strictly the requirement for Central Bank's recommendation prior to appointment. Therefore, a general statement urging action be taken does not in the court's view satisfy the statutory requirement.

[17] The Court does not interpret the contents of the letter to mean that ECCB is abandoning its role to the Minister; but rather that there is disagreement between the two as to how best to address the issues that have arisen concerning Capital Bank. The Parliament must

have anticipated that there would be times when the Minister and ECCB would disagree. Yet it was the intention of Parliament that before a receiver can be appointed by the Minister, ECCB must so recommend.

[18] The Court therefore must disagree with Counsel for respondents that the condition precedent to appointment of the receiver has been met by the content of the letter of 19th December, 2007. The Court does not come to this conclusion lightly. The Court is cognizant of the concerns expressed by the government and also in the Governor's letter. However, ever where the reason for taking action is to protect the interests of the depositors, the conditions set out n the Act must be followed.

[19] While the Governor did urge the Minister to take action, (and there is certainly more than one possible course of action aimed at safeguarding depositors), in the Court's view, the letter makes it clear that the action recommended was revocation of the license. It is true that the Minister need not act on every recommendation made by Central Bank, but in order to appoint a receiver under Section 43, such action must be specifically recommended by Central Bank.

[20] The Court therefore finds that the appointment of David Holukuff as receiver by the Minister of Finance on 14th February, 2008 was not in accordance with the requirements of Section 43 of the Banking Act and was therefore invalid. The Court need not address the other grounds raised by the applicant.

[21] Accordingly, the appointment of the Receiver, having been made without the required recommendation from Central Bank, is invalid and is hereby revoked. The Court's Amended Order made on 15th February, 2008 is hereby vacated.

[22] The Receiver David Holukuff shall:

(1) Deliver up possession of the business and premises together with the books, papers, documents and all other records found therein and keys and combination numbers to the premises and vault to the Claimant by noon tomorrow.

(2) File a final report of all action taken during the period from the initial report to today, including all action taken in compliance with this order within 7 days hereof.

Respondents to pay to the Applicant costs in the sum of $1,000.00.

Clare Henry
High Court Judge