THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 27 OF 2008

BETWEEN:

DR. HYMIE RUBENSTEIN
MOPSIE RUBENSTEIN

Claimants

v

SAFE HARBOUR BANK LTD.

Defendant

Appearances: Mr. Stanley John and Mr. Akin John for the Claimants
Mr. Alair Shepherd Q.C. and Mr. Grahame Bollers for the Defendant

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2008: May 9;
September 30.

JUDGMENT

[1] **THOM, J**: This is an application for Summary Judgment.

[2] The Applicants/Claimants are husband and wife. They reside in Canada. The Respondent/Defendant is an International Bank registered under the International Companies Act and licensed to carry on offshore banking business under the International Banks Act 2004.

[3] On January 26, 2006, the Applicants/Claimants deposited a sum of US$50,000 with the Defendant/Respondent receipt of which was acknowledges by the Defendant.

[4] By a letter dated October 17, 2007 the Applicants issued instructions to the Respondent for the sum with interest to be paid to their legal counsel. The Defendant failed to do so

and the Applicants instituted proceedings alleging that the Defendant had wrongfully refused to make the payment as demanded and sought the following reliefs:

(1) Payment of the sum of US$50,000.00 or its equivalent in Eastern Caribbean Currency.

(2) Interest thereon at the rate of 6% per annum or to be assessed by the Court.

(3) Costs.

[5] The Defendant in its defence alleged that the sums were seized by the Crown acting by the FIU under and pursuant to the provisions of the Proceeds of Crime and Money Laundering (Prevention) Act No. 39 of 2001 of the Laws of Saint Vincent and the Grenadines.

[6] The Applicants made this application for summary judgment on the ground that the Defendant has no real prospect of successfully defending the claim.

ISSUE:

[7] Whether the Defendant's defence has any real prospect of success.

SUBMISSIONS:

[8] Learned Counsel for the Applicants submitted that the Applicants being customers of the Defendant the relationship which existed between them was a relationship of debtor and creditor. Learned Counsel referred the Court to the cases of ***Taxation Commissioners v English, Scottish and Australian Bank Ltd*** (1920) A.C. 683; ***Ducreay v Ducreay and Royal Bank of Canada*** (1999) H.C.D.M. As a result of this relationship of debtor and creditor the Defendant is under an obligation to repay the Applicant the debt of US$50,000.00 and interest thereon. The Defendant cannot properly be absolved from this obligation by the forfeiture proceedings which the FIU has instituted against it pursuant to the Proceeds of Crime and Money Laundering (Prevention) Act. It is immaterial whether the FIU seized the exact notes from the Defendant since at the time of the seizure property

in the money would have already passed to the Defendant upon receipt of the funds on January 26, 2006. Learned Counsel referred the Court to the decision of the House of Lords in ***Foley v Hill*** (1848) 9 E.R. 1002, where Lord Cotenham LC explained the relationship as follows:

> "Money, when paid into a bank, ceases altogether to be the money of the customer. It is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the customer to be placed there for the purpose of being under the control of the banker. It is then the banker's money; it is as his own; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest according to the custom of bankers in other places. The money placed in the custody of a banker is to all intents and purpose the money of the banker, to do with it as he pleases. He is guilty of no breach of trust in employing it; he is not answerable to the customer if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of the customer, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the customer, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situation of banker and customer, the banker is not an agent or factor, but he is a debtor. Then the analogy between that case and those that have been referred to entirely fails, and the ground upon which these cases have by analogy to the doctrine of trusteeship, been held to be the subject of the jurisdiction of a Court of equity, has no application here, as it appears to me."

[9] Learned Queen's Counsel for the Defendant submitted that under Part 15 of CPR 2000 the Defendant has to show that it has a real prospect of success and referred the Court to the case of ***Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.*** [1986] 2 Lloyds Rep. 221.

[10] Learned Queen's Counsel further referred the Court to Sections 46, 47, 49 and 50 of the Proceeds of Crime and Money Laundering (Prevention) Act 2001. Learned Queen's Counsel submitted that the legislation allows for the forfeiture of funds in circumstances where a financial institution is not guilty of an act which would justify forfeiture and the forfeiture is based on the misdeeds of the depositor. If the Applicants are correct in submitting that once a bank accepts a deposit of funds and these funds are subsequently

forfeited then the bank carries what amounts to a strict liability for the forfeiture, it would mean that banks could under any set of circumstances not even known to it be liable to refund monies to customers who had acquired these funds as a result of their own misdeeds.

LAW:

[11] Part 15 of CPR 2000 permits the Court to inter alia give summary judgment on a claim if it considers that the Defendant has no real prospect of successfully defending the claim. Part 15 is in similar terms to Part 24.2 of the UK CPR. Part 24.2 was considered by the Court of Appeal in ***Swain v Hillman*** (1999) EWCA 2251, where Lord Wolfe outlined the principles to be applied by the Court on an application for summary judgment as follows:

> "7. Under Part 24.2 the Court now has a very salutary power, both to be exercised in a Claimant's favour or where appropriate, in a defendant's favour. It enables the Court to dispose summarily of either claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or as Mr. Bidder submits, they direct the Court to the need to see whether there is a realistic as opposed to a "fanciful" prospect of success."

[12] It is the duty of the Defendant to show that he has a real prospect of success.

[13] As stated earlier the Defendant's defence to the claim for payment of the money that was deposited to it is that the cash was held by the Crown acting by the FIU under and pursuant to the Proceeds of Crime and Money Laundering (Prevention) Act.

[14] The question for the Court is whether this defence has a realistic as opposed to a fanciful prospect of success.

[15] The Defendant in his submission relied on Sections 46, 47, 49 and 50 of the Proceeds of Crime and Money Laundering (Prevention) Act.

[16] Section 46 requires all financial institutions to pay special attention to inter alia all complex large or unusual transactions and where it suspects that any such transaction could constitute or be related to money laundering, a financial institution must make a report to the Financial Intelligence Unit within fourteen days. Failure to make such a report is an offence. Under subsection (5) where a financial institution makes a report in good faith, then the financial institution, its employees, staff, directors and owners are exempt from liability arising as a result of the disclosure.

[17] Section 47 sets out inter alia the penalty which a court may impose on a person on conviction for an offence under Section 46.

[18] Section 49 provides for a police officer to seize and detain cash in Saint Vincent and the Grenadines if he has reasonable grounds for suspecting that it directly or indirectly represents any person's proceeds of criminal conduct, or is intended for use in any criminal conduct.

[19] Section 50 provides for the forfeiture of such cash whether or not proceedings are brought against any person for an offence with which the cash in question is connected.

[20] The Defendant's defence is based entirely on the Financial Intelligence Unit exercising authority under the Proceeds of Crime and Money Laundering (Prevention) Act. However, a careful reading of Sections 46, 47, 49 and 50 shows that the Financial Intelligence Unit which is a statutory body established pursuant to Section 3 of the Financial Intelligence Unit Act No. 38 of 2001 is responsible for receiving reports of suspicious transactions under Section 46. The functions of the Financial Intelligence Unit are outlined in Section 4 of the Financial Intelligence Unit Act. Sections 49 and 50 specifically provides for seizure of cash by a police officer, and for an application for forfeiture of such funds to be made by a police officer. Section 49 and 50 give no power to the Financial Intelligence Unit to seize cash from any person or institution or to make an application for forfeiture of such cash. The Defendant therefore cannot rely on any seizure and detention of cash by the Financial Intelligence Unit pursuant to Sections 49 and 50 to refuse to repay the Claimants their

deposit. I agree with the submission of Learned Counsel for the Applicants that the relationship between the bank and its customer is a relationship of debtor and creditor.

[21] Having reviewed the pleadings in this case and the relevant legislation being the International Bank Act, the Financial Intelligence Unit Act and the Proceeds of Crime and Money Laundering (Prevention) Act, I find that the Defendant has failed to show that it has a real prospect of success.

[22] On the issue of costs, this matter is determined before the first case management. It was a single issue and it was not a complex issue.

[23] Judgment is entered for the Claimants.

[24] It is ordered that:

(1) The Defendant shall pay the Claimants the sum of EC$135,500.20.

(2) Interest on the said sum at the rate of 6% per annum commencing from the 26th January 2006.

(3) Both parties to make submissions on the issue of costs on October 3, 2008.

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Gertel Thom
HIGH COURT JUDGE