

IN THE EASTEN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE

ANGUILLA
AXAHCV2014/0036

BETWEEN:

CHARTER CAPITAL LIMITED

Claimant/Applicant

and

NATIONAL BANK OF ANGUILLA LIMITED
EASTERN CARIBBEAN CENTRAL BANK

Defendants/Respondents

Appearances:

Ravi Bahadursingh of Counsel for the Applicant

Damian Kelsick with Navine Fleming of Counsel for the Respondent

2014: October 10th and 31st

DECISION

Introduction and History

[1] TAYLOR-ALEXANDER, M.: The applicant is a depositor with the National Bank of Anguilla Limited (NBA) the first defendant, and at all material times maintained deposits with the bank exceeding CAN\$5.75 million dollars. On 12th August 2013, the Eastern Caribbean Central Bank, the second defendant, (the Central Bank), in exercise of an emergency power under enabling legislation assumed exclusive control of NBA and placed the institution into conservatorship.

[2] The Central Bank was created by its members, the Participating Governments, being the OECS territories and affiliated members. Each territory has identical legislation giving effect to the bank and its authority. The function of the Central Bank is provided for under the Laws of Anguilla in Article 4, and it is described as being:—

- i) To regulate the availability of money and credit;
- ii) To promote and maintain monetary stability;
- iii) To promote credit and exchange conditions and a sound financial structure conducive to the balanced growth and development of the economies of the territories of the Participating

Governments;

iv) To actively promote through means consistent with its other objectives the economic development of the territories of the Participating Governments.

[3] Article 4 and the agreement giving effect to the Central Bank, is enacted in Anguilla by the Eastern Caribbean Central Bank Agreement Act of the Revised Statutes of Anguilla Chapter E5.

[4] The Central Bank's assumed control of NBA's operations by way of intervention pursuant to Part II A of the agreement, headed special emergency powers of the bank. Part II A gives effect to Article 4 of the agreement, and is exercisable according to Article 5B, where the Central Bank is of the opinion—

(a) that the interests of depositors or creditors of a financial institution are threatened;

(b) that a financial institution is likely to become unable to meet its obligations or is about to suspend or has suspended payment to its creditors or depositors; or

(c) that a financial institution is not maintaining high standards of financial probity or sound business practices,

[5] The intervention was issued under the hand of the Governor dated the 12th of August 2013, and was published by extraordinary issue of the Gazette Vol 40 No. 11. It states in its preamble that the bank is empowered pursuant to the directions of the Monetary Council, and after due consultation therewith, to assume control of and carry on the affairs of a financial institution and in the case of the NBA, the Central Bank was of the opinion that (a) the interests of depositors or creditors of a financial institution are threatened; or (b) the financial institution is likely to become unable to meet its obligations and (c) the financial system of Anguilla is in danger of disruption, substantial damage, injury or impairment as a result of circumstances giving rise to the exercise of such powers.

[6] The operative part of the intervention provides as follows:—

“with effect from 12 August 2013 and in accordance with the powers granted to the Central Bank under the Agreement the Central Bank has assumed control of the Bank. In the exercise of those powers the Central Bank intends to –

- (i) *Take exclusive custody and possession of all the funds, assets and other property and undertaking of the Bank wherever situated including but not limited to funds on deposit at the Bank;*
- (ii) *Carry on, manage or concur in carrying on and managing all of the business of the Bank and in furtherance thereof to enter into any agreements or incur any obligations in the ordinary course of business, pay any creditors of the Bank if any such payment is in the discretion of the Central Bank necessary or desirable for the efficient operations of the business or protection, preservation, maintenance or realization of the assets of the Bank or take any other steps incidental to these powers if in the opinion of the Central Bank it is necessary or desirable to do so;*
- (iii) *Further investigate the affairs of the Bank concerned and any of its affiliated institutions;*
- (iv) *Provide or cause to be provided such financial assistance to the Bank as it considers necessary;*
- (v) *Restructure the business or undertaking of the Bank or reconstruct its capital base if in the opinion of the Central Bank it is necessary or desirable to do so;*
- (vi) *Acquire or sell or otherwise deal with the property, assets and undertaking of or any shareholding in the Bank, at a price to be determined by an independent valuer, if deemed necessary;*
- (vii) *Receive and collect or cause to be received and collected all monies and accounts now owed or hereafter owing to the Bank;*
- (viii) *Take all steps it considers necessary to protect the interests and to preserve the rights of depositors and creditors of the Bank;*
- (ix) *Take such further steps as in the opinion of the Central Bank may be necessary to preserve and maintain the stability of the financial system of Anguilla;*
- (x) *Appoint such persons including companies as it considers necessary to assist in the performance of the functions specified in paragraphs (i) to (ix) above;*

Banking activities will continue. Customers are therefore required to continue to service their loans with the Bank."

- [7] As a consequence of the intervention the defendants did not accede to a request from the claimant for a draw-down on funds that it had deposited with the bank. There were however, negotiations between the parties, which the claimant asserts resulted in a concluded contract for staggered

draw-downs of its deposits. That too was not honoured and the claimant has filed an action for breach of the NBA's obligations to it, as a customer and for breach of the specific agreement, the claimant alleges, was entered into by the bank following conservatorship.

The Applications

- [8] The defendants did not file a defence instead they have filed an application under CPR 9.72 disputing the court's jurisdiction to try the claim. By application filed on the 2nd June 2014 the Central Bank avers that consequent upon Article 50 and article 5C of the Eastern Caribbean Central Bank Agreement Act (the Act) the court has no jurisdiction to try this claim against the defendants and the claim brought by the claimant should be struck out under Part 26.3 (1) (b), as it is a claim filed contrary to Article 5C of the Act and it discloses no reasonable grounds for bringing the claim against the Central Bank.
- [9] By further application dated the 11th August 2014, the claimant has applied to continue the claim against the Central Bank the second defendant, and it seeks a declaration that there is no legal impediment under the Laws of Anguilla prohibiting the claim from commencing or continuing, alternatively that leave be granted to the claimant to continue the claim against the first named defendant, the NBA.

The Relevant Law

- [10] Article 50 (1) and (2) of the Agreement provides :—
- (1) *"To enable the Bank to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territory of each Participating Government.*
- (2) *The Bank, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract."*
- [11] Article 5C (5) provides that no depositor shall have any remedy or commence or continue any action or other proceedings against a financial institution or the Central Bank in respect of which a notice has been published under Article 5C (1) of the Agreement, until the publication of a notification under Article 5E(1)of the Agreement without leave of the court, or unless the court directs otherwise.

[12] A notice under Article 5E (1) returns the bank to normal operation. It is agreed that this is a claim for which no notice has been published under Article 5E(1). The parties are agreed that this is a claim to which 5C (5) refers and as such leave of the court is required.

The Issues

[13] Two issues require the court's consideration. (1) Whether pursuant to CPR 2000 Part 9.72, the claim should be stayed against one or both defendants, or otherwise (2) whether leave ought to be granted to allow a claim to continue against the first named defendant.

The Immunities and Privileges afforded the Defendants

[14] This issue may have been dealt with by my brother Master. The claimant disagrees with the submission that the interpretation of Article 50 of the Agreement is to provide complete immunity from suit to the second defendant. Instead he submits that what Article 50 does is establish a potential defence available to the Central Bank rather than provide immunity from suit.

[15] I disagree entirely. That interpretation does not accord with the definition of immunity which as I understand it to be, is a freedom from legal obligation to perform actions or to suffer penalties. Further where a person raises the issue of immunity as a bar to continuing proceedings such application must of necessity be raised pre-emptively, before any step is taken in the proceedings. Any contrary action may be seen to be a waiver of that immunity. Filing a defence would be a step taken by the Central Bank in the proceedings.

[16] I gather the claimant to be submitting that on the issue of immunity a more nuanced or proportionate approach should be adopted by the court to be balanced by the court's exercise of its discretion as to whether in the circumstances of the case immunity is justified. I disagree. It has always been the case that even the court's own jurisdiction is circumscribed by legislative will where such immunity is legislated. I draw reference to the conclusions of Lord Bingham in the case of *Jones and Others v. The United Kingdom* [2006] UKHL 26 a House of Lords decision based on an appeal from the Court of Appeal of the United Kingdom where the issue being litigated was whether the English court had jurisdiction to entertain proceedings brought by the claimants against a foreign state and its officials at whose hands the claimants say that they suffered systematic torture, or whether the state and the officials were entitled to immunity, He said this :—

"...that jurisdiction should be governed by "appropriate use or development of discretionary principles" was to mistake the nature of state immunity . Where applicable, state immunity was an absolute preliminary bar and a state was either immune from the jurisdiction of a foreign court or it was not, so there was no scope for the exercise of discretion."

It is reasoning equally applicable to the immunities and privileges granted to the Central Bank, and it is reasoning with which I am in accord.

[17] The House of Lords found that the immunity granted was inviolable. That decision was later confirmed by the ECHR on an action brought that the immunity granted amounted to a disproportionate interference with their right of access to court under Article 6 of the European Convention on Human Rights.

[18] In any event our Court of Appeal has ruled conclusively on that issue in **Capital Bank International Limited V Eastern Caribbean Central Bank and Sir Dwight Venner Civil Appeal Nos 13 & 14 of 2002** when it interpreted an identical provision under the laws of Grenada. Sir Denis Byron Chief Justice of the OECS as he then was, said this:—

"The language is clear and unambiguous and the statutory intention unmistakable. The intent of section 50 is that the first respondent cannot be sued or be subject to any legal process unless it expressly waives the immunities and privileges and even if it does, its property, assets and archives are protected from execution."

[19] I accept that this is not an absolute immunity and that it cannot restrict access to the court for determination of a constitutional right or obligation. This is not the case here.

Has the ECCB waived its immunity?

[20] It is the claimant's submission that in the period after the intervention and before an amendment to the Anguilla legislation was issued, the conservators held a meeting with it at which time terms for the payment out of its deposits were agreed, and pursuant to which it was paid CAN\$ 1.9 million dollars with terms arrived at for the payment to it by monthly instalments of its deposits. These discussions the claimant submits resulted in an enforceable agreement on which he acted to his detriment. The claimant also asserts that this amounted to a waiver of the immunity granted to the Central Bank.

[21] Without considering whether the negotiations of the parties resulted in an enforceable agreement, I find the submission of the claimant that the action of the conservator in negotiating revised payout terms as constituting a waiver of immunity to be unsustainable in light of the particular wording of Article 50, that a waiver must be an express waiver of its immunity for the purpose of any proceedings or otherwise by the terms of any contract. Even taken at its highest, that what was negotiated between the conservator and the bank, resulted in an enforceable agreement, (which is denied by the Central Bank), there is no evidence before me to suggest any expression of waiver of immunity by the Central Bank whether orally or in writing. Consequently, I find the Central's Bank's immunity to be preserved and it is entitled to enjoy immunity from suit in these proceedings. As a consequence I order a stay of the proceedings brought by the claimant against the second defendant.

Constitutionality of the Intervention and Revised Legislation

[22] The claimant challenges the validity of the intervention and the subsequent promulgation of the legislation causing changes to Articles 5A and 5C of the agreement.

[23] The claimant avers that the language of the intervention fell short of the requirement of Article 5C and was consequently null, void and of no effect and that any subsequent legislation to empower the Central Bank and to act pursuant to the invention must as a consequence be of no effect. The claimant asserts that there are drafting inconsistencies with the notice of intervention and the Statutory Instrument with the consequence being that neither has met the compliance requirements of Article 55 of the Agreement. A review of the relevant provisions may provide some clarity:—

Article 55

"An amendment to this Agreement may be proposed to the Council by the Bank or by any Participating Government and shall be effective when it is agreed to by all the Participating Governments and each Participating Government deposits with the Bank an instrument stating that it has accepted the amendment in accordance with its law and has taken all steps necessary to make it effective in its territory."

Section 4

- "(1) *Where an amendment to the Agreement as envisaged under Article 55 of the Agreement becomes effective, the Governor shall, by order, amend the Schedule of this Act for the purpose of including the amendment.*
- (2) *Where the Schedule is so amended, any reference in this Act or in any other enactment or in any instrument having effect under any such enactment shall, unless the context otherwise requires, be construed as a reference to the Agreement as so amended."*

- [24] The claimant submits that an amendment to the Agreement under section 4 ,can only become effective, when it is agreed to by all the Participating Governments and on the part of each Participating Government, there is irrevocable commitment and reciprocity. Each Participating Government then deposits with the Bank, an instrument stating that it has accepted the amendment in accordance with its law and has taken all steps necessary to make it effective in its territory.
- [25] Whether this was done cannot be subject to investigation in this forum. There is always a presumption that enacted legislation has been validly enacted and has complied with the relevant laws. See the Interpretation and General Clauses Act R.S.A c 125 of Anguilla Section 29. In my view one needs to look no further that the order publishing the amendment to determine its validity. It is implied in section 4 that the amendment has become effective.
- [26] Further, the promulgation of legislation even subsidiary legislation is implemented in a stage process of which the executive may be responsible for only part. Final approval of the legislation and certain subsidiary legislation is within the purview of the Governor, and although it has become largely an automatic function, constitutional control of the final stage of implementation in most cases and certainly in this case rests with the Governor. The use of the language "has taken all steps" in Article 55 is no mere coincidence but could only be as a result of an understanding of the legislative process.

[27] During the proceedings I informed the claimant that his submissions had not found fertile ground with me. I agree with the defendants that in so far as the claimant asserts that the intervention was void and of no effect, he has not stated what more is required so as to give the notice of intervention efficacy. For my part I have found the notice to be in keeping with the requirement of the Act and of 5C. In any event there has been no challenge to the constitutionality of the legislation of Section 4, and until there is a successful challenge, there is no obligation on this court to assess the validity of the legislation. The amendment is alive and well and the claimant is bound by its provisions.

The question of leave to proceed against the First Defendant

[28] The defendant has now applied for leave pursuant to Article 5C so as to maintain the action against the NBA. The Act is silent as to the considerations when an application for leave under 5C is made. Nevertheless, the decision to provide the Central Bank with immunity and the institutions coming under it with conditional immunity is a decision agreed by all of the Participating Countries and in my view, it would be invidious without cogent reasons, to grant leave in circumstances where it would operate to undermine the precisely the purpose it is seeking to preserve.

[29] In so far as the claimant's basis for requesting leave is that actions by the bank after conservatorship resulted in the formation of a legally binding contract, which the bank has now breached, I find no purpose in that submission as a basis to continue the action against the NBA. In fact at the time the purported agreement was negotiated the NBA was under conservatorship with the implication being that it was incapable of entering any binding contract except by will of the conservator.

[30] A grant of an application for leave would be severely prejudicial to the defendants and would not only undermine the objectives of the parties to properly restore its financial system, but would encourage applications by other depositors in similar situations the effect of which I have stated would be to undermine the very financial system that the defendants are seeking to stabilise. I find no basis for the grant of leave and dismiss the claimant's application on this and other grounds.

Did the parties negotiate an enforceable contract or merely an arrangement following the intervention.

[31] This issue is now academic, given my findings at paragraph [29] above.

Conclusions

[32] I hereby grant a stay of all proceedings in this claim brought against the two defendants until such time as there is issued a notice pursuant to Article 5E of the agreement. I further award the defendants their costs to be assessed or otherwise agreed.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER