EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GDAHCVAP2014/0002

CONSOLIDATED APPEALS

BETWEEN:

CLAIM NO. GDAHCV2008/0484

[1] DAVID HOLUKOFF
(Receiver of Capital Bank International Limited)
[2] V. NAZIM BURKE
(Minister of Finance in the Government of Grenada)
[3] THE ATTORNEY GENERAL OF GRENADA

Appellants

and

CAPITAL BANK INTERNATIONAL LIMITED

Respondent

CLAIM NO. GDAHCV2008/0496

[1] NAZIM BURKE
(Minister of Finance)
[2] THE ATTORNEY GENERAL

Appellants

and

CAPITAL BANK INTERNATIONAL LIMITED

Respondent

CLAIM NO. GDAHCV2009/0023

[1] DAVID HOLUKOFF
[2] NAZIM BURKE
(Minister of Finance)
[3] THE ATTORNEY GENERAL

Appellants

and

CAPITAL BANK INTERNATIONAL LIMITED
(IN RECEIVERSHIP)

Respondent

CLAIM NO. GDAHCV2008/0554

MINISTER OF FINANCE

Appellant

v

CAPITAL BANK INTERNATIONAL LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise E. Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Ms. Venescia Francis-Banfield for the Appellants
Mr. Raymond Anthony for the Respondent

2015: May 13.

Interlocutory appeal – Whether order of court below amounted to stay of winding-up petition – Whether court's power to grant stay of proceedings only exercisable on application made to court pursuant to Part 11 of Civil Procedure Rules 2000 – Whether learned judge erred in exercise of her discretion in granting adjournment/stay of winding-up petition pending determination of parallel proceedings

On 15th February 2008, Mr. David Holukoff was appointed receiver of Capital Bank International Limited ("Capital Bank"). Capital Bank challenged the validity of this appointment by commencing proceedings in the High Court. It was subsequently determined that the appointment was unlawful. On 18th September 2008, the Minister of Finance revoked the licence of Capital Bank and appointed Mr. Holukoff as receiver of the bank on the same day. As a result of this, Capital Bank instituted two claims in the High Court: claim number GDAHCV2008/0484 on 29th September 2008, in which it alleged that the appointment of the receiver was unlawful; and claim number GDAHCV2008/0496 on 3rd October 2008, in which it challenged the legality of the revocation of its licence. Subsequently, on 13th November 2008, the Minister of Finance instituted claim number GDAHCV2008/0554, in which he petitioned the court for the compulsory winding-up of Capital Bank, and on 22nd January 2009, Capital Bank instituted claim number GDAHCV2009/0023, in which it alleged infringement of its constitutional rights guaranteed by section 8 of the Grenada Constitution Order 1973.

On 9th December 2013, various applications were before the learned judge in relation to the above four sets of proceedings. With regard to claim number GDAHCV2008/0484, the application before the court was one for interim relief. This application had previously

been refused by Henry J, but the appeal against the learned judge's decision was allowed by the Court of Appeal and the matter was remitted to the High Court for the court to consider the test under rule 17.2(3) of the Civil Procedure Rules 2000 ("CPR 2000")) in determining the application. With regard to claim number GDAHCV2008/0496, the application before the court was one by Capital Bank for leave to appeal the decision of Henry J dated 13th April 2009, in which the learned judge found that the court had no jurisdiction to hear the claim on the ground that it was not properly before the court. With regard to claim number. GDAHCV2008/0554, the petition to wind-up Capital Bank was before the court, and with regard to claim no. GDAHCV2009/0023, the Attorney General's application to strike out the claim was before the court.

The learned judge dealt with the applications and petition before her by reserving the determination of the petition proceedings until the validity of the appointment of the receiver was determined. The appellants appealed the learned judge's order, contending that it essentially amounted to a stay of the petition proceedings, and such relief could only be obtained on application to the court under Part 11 of CPR 2000. They further submitted that there was no basis for the learned judge to make an order adjourning the petition proceedings until Capital Bank's parallel proceedings (challenging the lawfulness of the process leading to the petition to wind-up) were determined, since Capital Bank had not shown that the parallel proceedings had a realistic prospect of success. Capital Bank, in response, argued that the learned judge had correctly exercised her discretion under the inherent jurisdiction of the court and Part 26 of CPR 2000 in making the order and that the Court ought not to set it aside. To make a winding-up order without first determining the validity of the appointment of the receiver would cause irreparable harm to Capital Bank and its shareholders.

Held: dismissing the appeal and ordering that the appellants pay the respondent its costs in this appeal to be assessed if not agreed within 21 days, that:

1. Whether or not an order is a stay of proceedings is not dependent on whether the word 'stay' is mentioned in the order. An order would amount to a stay if the effect of the order is to prevent either party from taking any further steps in the proceedings until a particular time or event mentioned in the order. A careful examination of the order in the present case shows that the learned judge did not grant a stay of the proceedings but rather, decided that the application in relation to the validity of the appointment of the receiver would be determined before the petition to wind-up is determined. The effect of this order was that the petition was adjourned to a date after the determination of the validity of the appointment of the receiver. This was the course proposed by Capital Bank in its written submissions to the judge and the learned judge accepted it. The learned judge, therefore, did not err in this regard.

2. In Grenada, the appointment of a receiver is the first step to the application for compulsory liquidation of a bank by the Minister of Finance (save where there was initially a voluntary winding-up). In the present case, this very first step of the Minister was challenged by Capital Bank prior to the petition to wind-up being determined. The public interest and the interest of all stakeholders require that

such a petition be heard expeditiously. However, where the lawfulness of the process leading to the petition to wind-up is challenged, a failure to determine those proceedings prior to the petition could lead to a miscarriage of justice. It is not a requirement that the bank show that the parallel proceedings (challenging the lawfulness of the process leading to the petition to wind-up) have a realistic prospect of success in seeking an adjournment of the petition, pending determination of those parallel proceedings.

Section 43 of the **Banking Act**, Cap. 26A, Revised Laws of Grenada 2010 considered.

3. The Court of Appeal having allowed the respondent's appeal against the decision of Henry J and remitted the matter to the High Court for it to be determined in accordance with the provisions of CPR 17.2(3), it could not be said that the learned judge's decision to hear the respondent's proceedings challenging the validity of the appointment of the receiver prior to the petition to wind-up exceeded the generous ambit within which reasonable disagreement is possible and was blatantly wrong. There is, therefore, no basis upon which this Court can substitute its own discretion for that of the learned judge. In any event, even if there was such a basis, this Court would have exercised its discretion in a manner similar to that of the learned judge.

Dufour and Others v Helenair Corporation Ltd. and Others (1996) 52 WIR 188 followed; **Charles Osenton and Company v Johnston** [1942] AC 130 applied.

JUDGMENT

[1] **THOM JA.:** This is an appeal against the order of the learned judge made on 10th December 2013. The order reads:

> "IT IS HEREBY ORDERED THAT:-
>
> 1. The relief sought in the Petition filed 13th November, 2008 is not granted now.
> 2. The outcome of the Petition is reserved until the determination of the validity of the appointment of the Receiver.
> 3. Matter is adjourned to a date to be fixed by the Registrar."

[2] This appeal being a consolidated appeal it is necessary to provide a brief background of the proceedings to put the matter in context.

Background

[3] The respondent, Capital Bank International Limited ("Capital Bank"), is a bank licensed to conduct banking business in the State of Grenada.

[4] On 15th February 2008, Mr. David Holukoff was appointed receiver of Capital Bank. Capital Bank challenged the validity of his appointment in claim number GDAHCV2008/0109. The High Court determined the appointment was unlawful. The appellants' appeal to the Court of Appeal was discontinued by consent in August 2008.

[5] On 18th September 2008 the Minister of Finance revoked the licence of Capital Bank and appointed Mr. Holukoff receiver on the same day.

[6] As a result of the action of the Minister of Finance, Capital Bank, on 29th September 2008, instituted claim number GDAHCV2008/0484 in which it alleged that the appointment of the receiver was unlawful and on 3rd October 2008, it instituted claim number. GDAHCV2008/0496, in which it challenged the legality of the revocation of its licence.

[7] On 13th November 2008, the Minister of Finance instituted claim number GDAHCV2008/0554 in which he petitioned the court for the compulsory winding-up of Capital Bank.

[8] On 22nd January 2009, Capital Bank instituted claim number GDAHCV2009/0023 in which it alleged infringement of its Constitutional rights guaranteed by section 8 of the **Grenada Constitution Order 1973** and sought several declarations. Capital Bank also sought a stay of all other related proceedings until the hearing and determination of its claim.

[9] The four claims number GDAHCV2008/0484; number GDAHCV2008/0496; number GDAHCV2008/0554 and number GDAHCV2009/0023 were before the learned judge on 9th December 2013.

[10] In relation to claim number GDAHCV2008/0484, the application before the court was an application filed by Capital Bank on 29th September 2008 for interim relief. This application was previously refused by Henry J but on appeal to the Court of Appeal, the appeal was allowed on 16th June 2010, and the matter was remitted to the High Court for the court to consider the test under rule 17.2(3) of the **Civil Procedure Rules 2000** ("CPR 2000") in determining the application.

[11] In relation to claim number GDAHCV2008/0496, the application before the court was an application by Capital Bank for leave to appeal the decision of Henry J dated 13th April 2009 in which the learned judge, on the application of the Attorney General, found that the court had no jurisdiction to hear the claim on the ground that the claim was not properly before the court. This application for leave to appeal was opposed by the appellants. The application was made since 2nd March 2009.

[12] In relation to claim number GDAHCV2008/0554, the petition to wind-up Capital Bank was before the court.

[13] In relation to claim number GDAHCV2009/0023, the Attorney General's application to strike out the claim was before the court. This application was filed on 15th March 2009.

[14] Written submissions were filed by both sides and on 9th December 2013, oral submissions were made by the parties and the learned judge reserved her ruling. On 10th December 2013 she made the order which is the subject of this appeal.

Grounds of Appeal

[15] The appellants outlined several grounds in their notice of appeal. However, in their written submissions they identified two issues as arising from those grounds, being:

(a) Whether the order of the court amounted to a stay, and if so, whether the court's power to grant a stay is only exercisable on an application made to the court pursuant to Part 11 of CPR 2000.

(b) Whether the learned judge erred in the exercise of her discretion in granting an adjournment/stay of the winding-up petition pending the determination of the parallel proceedings.

Ground 1

[16] The appellants contend that the order was in effect a stay of proceedings of the petition for winding-up. The learned judge erred in granting a stay when there was no application for a stay made in accordance with rule 11(6), (7) and (8) of CPR 2000 which requires an application to be in writing with evidence in support. While the appellants acknowledged that the court on its own initiative could make the order, they argue that the parties would have had to be given seven (7) days' notice by the court pursuant to rule 26.2. This was not done. Before the learned judge was the respondent's request in its written submissions for an adjournment of the petition until the validity of the appointment of the receiver was determined.

Discussion

[17] It is common ground that a judge's powers under Part 26 are very wide and include a discretion to grant an adjournment, a stay of proceedings and to determine the order in which matters would be heard. Also, section 48 of the **Banking Act**[1] gives the court a wide discretion when considering an application for the winding-up of a bank. The section reads as follows:

> "48. (1) The High Court may make any order it thinks fit, including an order–
>
> (a) for the compulsory liquidation of the financial institution;
> (b) refusing the compulsory liquidation and terminating the appointment of the receiver; and
> (c) for the reorganisation of the financial institution.
>
> (2) Where the High Court orders either the compulsory liquidation or the reorganisation of the financial institution, it shall upon delivering its decision simultaneously order the appointment of the receiver to be terminated and appoint an Official Liquidator who will be responsible to the High Court to direct the compulsory

[1] Cap. 26A, Revised Laws of Grenada 2010.

liquidation, or as the case may be, the reorganisation of the financial institution."

[18] Whether or not an order is a stay of proceedings is not dependent on whether the word stay is mentioned in the order. An order would amount to a stay if the effect of the order is to prevent either party from taking any further steps in the proceedings until a particular time or event mentioned in the order. A careful examination of the order shows that the learned judge did not grant a stay of the proceedings but rather the learned judge decided that the application in relation to the validity of the appointment of the receiver would be determined before the petition to wind-up is determined. The effect of the order was that the petition was adjourned to a date after the determination of the validity of the appointment of the receiver. This was the course proposed by Capital Bank in its written submissions to the judge and the learned judge accepted it.

Ground 2

[19] I turn now to the critical issue in this appeal, whether the learned judge properly exercised her discretion. I agree with the submission on both sides and it is settled law that the principle on which an appellate court would set aside a decision of a judge made in the exercise of his/her discretion is the principle outlined in **Dufour and Others v Helenair Corporation Ltd and Others**.[2]

[20] The appellants contend that the learned judge erred in the exercise of her discretion in making the order. They argue that she failed to take into account relevant matters and took into account irrelevant matters and failed to apply the correct principles of law. Learned counsel argued that the learned judge was required to take into account the policy and objectives of the **Banking Act**, the rights conferred by the Act, the rights and interests of the public, the shareholders, and depositors of Capital Bank. In considering the interest of the public, the learned judge erred when she found that it was in the interest of the public to adjourn the petition despite the fact that the petition was pending for five years.

[2] (1996) 52 WIR 188.

To the contrary it was in the interest of the public for Capital Bank to be wound up in view of the receiver's report which showed that it was bankrupt and which report the learned judge failed to take into consideration.

[21] The appellants further argue that there was no basis for making the order, as the respondent did not show that the parallel proceedings had a realistic prospect of success or there were exceptional circumstances for the court to make the order. Also, there was no evidence before the court that the statutory preconditions for the grant of the petition were not satisfied. The mere existence of parallel proceedings challenging the validity of the appointment of the receiver was not a sufficient basis on which to make the order. They rely on the several authorities, including the cases of **In the matter of Demaglass Holdings Limited**,[3] **In re A. & B.C. Chewing Gum Ltd.**,[4] and **In the matter of BLV Realty II Limited**.[5]

[22] Capital Bank, in response, submitted that the learned judge correctly exercised her discretion under the inherent jurisdiction of the court and Part 26 of CPR 2000 in making the order and this Court ought not to set it aside. In view of the several issues relating to the appointment of the receiver and also the other issues that are pending between the parties, the learned judge was required to determine the order in which the issues would be dealt with. To make a winding-up order without first determining the validity of the appointment of the receiver would cause irreparable harm to the Bank and its shareholders. Capital Bank relied on the cases of **Dufour v Helenair Corporation Ltd.**; and **Norgulf Holdings Limited et al v Michael Wilson & Partners Limited**.[6]

[23] Capital Bank further argued that the learned judge could not have made a winding-up order based on the report of the receiver who admitted that the report was not audited and for which he gave a disclaimer with respect to its accuracy and use.

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[3] [2001] 2 BCLC 633.
[4] [1975] 1 WLR 579.
[5] [2010] EWHC 1791 (Ch).
[6] BVIHCVAP2007/0008 (delivered 29th October 2005, unreported).

Discussion

[24] While the appellants indicated in their submissions (and it is not disputed by Capital Bank) that the learned judge gave reasons for her decision in an oral ruling, the oral ruling was not reduced into writing and there is no transcript of the proceedings. Further, the learned judge is no longer a member of the Judiciary. This court therefore is without the benefit of learned judge's reasons for her decision.

[25] The learned judge had before her four applications, being, (i) the petition to wind-up Capital Bank – no. 554 of 2008; (ii) the application for interim relief in relation to the appointment of the receiver – no. 484 of 2008; (iii) the application for leave to appeal in relation to the revocation of the banking licence – no. 496 of 2008; (iv) the application to strike out – no. 23 of 2009. The judge was required to make a determination as to how to deal with the several applications.

[26] The **Banking Act** provides the legal framework for the regulation of banking business in Grenada. It contains measures to ensure that financial institutions (including banks) conduct business in a manner that is not detrimental to its customers, shareholders and the public. It also outlines the procedure to be followed to voluntary or compulsorily wind-up a financial institution. Section 43 empowers the Minister of Finance ("the Minister") to appoint a receiver for any financial institution–

> "(a) whose capital is impaired or whose condition is otherwise unsound;
> (b) whose business is being conducted in an unlawful or imprudent manner;
> (c) when the continuation of its activities is detrimental to the interests of its depositors;
> (d) that refuses to submit its accounting records and its operations for examination as provided for in section 20 or has otherwise obstructed such examination;
> (e) whose licence has been revoked in accordance with section 11 or 22(2); or
> (f) that is carrying on banking business without a licence."

[27] Where such an appointment is made, the Minister is mandated to institute proceedings within sixty (60) days of the appointment for compulsory liquidation or reorganisation after consultation with the Central Bank. Failing to do so would result in the appointment being deemed to have been terminated.

[28] The appointment of a receiver is the first step to the application for compulsory liquidation of a bank by the Minister (save where there was initially a voluntary winding-up). This very first step of the Minister was challenged by Capital Bank prior to the petition for winding-up by the Minister. Undoubtedly, the hearing of a petition for the winding-up of a bank must be heard expeditiously. The public interest and the interest of all stakeholders require this. This is also emphasised in the legal authorities referred to by the appellants. However where the lawfulness of the process leading to the petition to wind-up is challenged, a failure to determine those proceedings prior to the petition to wind-up could lead to a miscarriage of justice.

[29] I respectfully disagree with the submission of the appellants that Capital Bank was required to show that it had a realistic prospect of success in seeking the adjournment of the petition until the validity of the appointment of the receiver was determined. Those proceedings were remitted by a single judge of this Court on 16th June 2010, to the High Court for the High Court to determine in accordance with the provisions of CPR 17.2(3). In those circumstances, the learned judge's exercise of her discretion to hear the validity proceedings before the petition did not exceed the generous ambit within which reasonable disagreement is possible and cannot be said to be blatantly wrong. There is therefore no basis upon which this court can substitute its own discretion for the discretion of the learned judge. In **Charles Osenton and Company v Johnston**[7] the role of the appellate court in an appeal against the exercise of the discretion of a judge was outlined by the Lord Chancellor as follows:

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In

[7] [1942] AC 130.

other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way."[8]

In any event, if the learned judge had misdirected herself as contended by the appellants, then this court would have been required to exercise the discretion afresh. Having regard to the circumstances outlined above in my opinion the decision would have been the same. I find that there is no merit in this appeal.

[30] It is ordered that:

(a) the appeal is dismissed.

(b) the appellants shall pay the respondent its costs in this appeal to be assessed, if not agreed within 21 days.

Gertel Thom
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise E. Blenman
Justice of Appeal

[8] At p. 138.