

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2012/0692

BETWEEN:

RETRO INVESTIVE INC

(Plaintiff)

AND

ABI BANK LIMITED
ANTIGUA OVERSEAS BANK LIMITED

(Defendants)

BEFORE:

Raulston Glasgow

(Judge)

Appearances:

Dr. Errol Cort along with Sharon Cort Tibbou for The Claimant
Kamilah Roberts for the First Defendant
Kwame Simon for the Second Defendant

2015: April 27
May 29; August 31

RULING ON APPLICATIONS TO STAY PROCEEDINGS AND FOR LEAVE TO CONTINUE PROCEEDINGS

- (1) **GLASGOW, M:** This ruling was prompted by two separate but interconnected applications, the first application (hereinafter the "stay application") was filed by the first defendant on February 2, 2015 seeking a declaration that the whole of these proceedings are stayed as a consequence of the publication of a notice of intervention by the Eastern Caribbean Central Bank (hereinafter referred to as "ECCB") pursuant to Articles 5B(1) and 5C(1) of the schedule to the Eastern Caribbean Central Bank Act, Cap. 142 of the laws of Antigua and Barbuda (hereinafter referred to as "the Act").
- (2) Article 5B(1) of the Act provides -
"Where the 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.
- the Bank shall, in addition to any other powers conferred on it by any other law and notwithstanding the provisions of any other law to the contrary, have power—
- (i) to investigate the affairs of the financial institution concerned and any of its affiliated institutions and to appoint a person or persons for that purpose,
 - (ii) to such extent as it thinks fit, to assume control of and carry on the affairs of the financial institution and, if necessary, to take over the property and undertaking of the financial institution,
 - (iii) to take all steps it considers necessary to protect the interests, and to preserve the rights of depositors and creditors of the financial institution,
 - (iv) to restructure the business or undertaking of the financial institution or to reconstruct its capital base,
 - (v) to provide such financial assistance to the financial institution as it considers necessary to prevent the collapse of the financial institution,
 - (vi) to acquire or sell or otherwise deal with the property, assets and undertaking of or any shareholding in the financial institution, at a price to be determined by an independent valuer,
 - (vii) to appoint such persons and to establish such companies or corporations as it considers necessary to assist in the performance of the functions conferred by subparagraphs (i) to (vi); and the provisions of article 50 shall apply to such persons, companies or corporations,
 - (viii) to ensure that the financial institution maintains high standards of financial probity and sound business practices and for that purpose to examine and supervise the operations of the financial institution, issue, cease and desist orders and stipulate prudential criteria to be followed by the financial institutions as it may deem necessary”.

[3] Article 5C(1) reads -

“Where the Bank proposes to exercise powers under of Article 5B (1)(i) and (ii) it shall publish in the Gazette and in such newspapers as it thinks appropriate, in the territory where it proposes to exercise such powers, a notification to that effect.

(2) The notification must state —

- (a) the property and undertaking the Bank proposes to take over;
 - (b) the powers of control the Bank proposes to exercise;
- and shall give such particulars as the Bank considers necessary for the information of persons having business dealings with the financial institution.

(3) Upon the publication of the notification the property and the powers of control stated therein shall vest in the Bank.

(4) A notification under this article may be amended or supplemented from time to time by subsequent notification in the Gazette and the notification shall have effect as so amended or supplemented”.

[4] Article 5C was amended by statutory instrument dated December 16, 2013 which amendment took effect from December 31, 2013. The amendment in contention is Article 5C(5) (a) which states —

“(5) On and after the publication of a notification under paragraph (1)-

(a) no creditor, shareholder, depositor or any other person shall have any remedy against the financial institution in respect of any claim, and without prejudice to the generality of the foregoing, no creditor, shareholder, depositor or any other person shall commence or continue any action, execution or other proceedings or seek to enforce in any way any judgment or order obtained against the financial institution or its successor or the transferee of the whole or any part of any property, assets or undertaking of the financial institution for the recovery of any claim or in respect of any other liability, until the publication of the notification under Article 5E(1) in relation to the financial institution or without the prior leave of the court unless the court directs otherwise”.

- [5] The second application (hereinafter referred to as the “leave application”) was filed by the claimant (hereinafter referred to as “Retro”) on March 3, 2015 seeking leave to continue the proceedings or leave to commence fresh proceedings pursuant to the same Article 5C(5)(a). Both sides have filed answers in which they vigorously oppose the other’s application.

BACKGROUND

- [6] An explanation of this ruling might be afforded by reciting the history of this claim. Retro is a company incorporated under the laws of the British Virgin Islands. The first defendant is a commercial bank licensed to operate and operating in Antigua and Barbuda. The second defendant is an international banking institution licensed and registered under the laws of Antigua and Barbuda. While it is not directly related to the facts in issue on these applications, Retro has pleaded a substantial connection between the two defendants but this is strenuously denied by the first defendant (hereinafter the bank).¹ The parties however agree that Retro is the owner of substantial sums of money deposited with both financial institutions.
- [7] Of relevance to the present ruling is the assertion that the second defendant holds funds on deposit under a certificate of deposit (hereinafter referred to as “the certificate”) in the name of Retro in the sum of USD 2,000,000 which sum is invested at an interest rate of 8% per annum. The interest is said to be payable quarterly and the maturity date was listed as August 28, 2010. At some point Retro entered into an agreement with officials of the bank in which a pledge was made that the bank would provide security as stated in the pledge document to secure the sums due to Retro by the second defendant. The consideration for this arrangement appears to be Retro’s consent to roll over the certificate for a further year after its date of maturity. The pledge agreement is in writing. It assures Retro that, in the event of the second defendant’s default in payment to Retro, the bank would repay the sums due by way of specified instalments. The pledge agreement contemplates that the bank would be in a position to make the said payments out of the returns that it is to receive from a substantial investment in Government bonds. Besides Retro, the pledge agreement is signed by officials of the bank and the second defendant. The bank has stated that it is not bound by this document because of a number of irregularities and improprieties which have no bearing on this discourse.

¹ The action against the second defendant has been stayed by order of the court dated June 4, 2013 which was granted further to an application brought by the liquidators of that entity.

- [8] It does appear that consistent with the pledge agreement, the certificate was rolled over for a one year period. Retro states that when the period ended on August 28, 2011, the parties agreed to a month to month rollover of the certificate with the pledge agreement as its security. On November 28, 2011, Retro gave (1) month's notice in writing to the second defendant that it would not be renewing the certificate. Retro expected to receive its money held with the second defendant along with the accumulated interest. The second defendant did not pay. Accordingly Retro pursued a claim with the bank pursuant to the pledge agreement. In this regard a formal notice to pay dated May 15, 2012 was issued to the bank. Suffice it to say that nothing was paid by the bank.
- [9] Retro issued this claim against both parties on October 24, 2012 in which it sought declarations of liability and orders that the bank produce accounts and make payment of the sums allegedly owed. The bank acknowledged the claim on November 9, 2012 and filed its defence thereto on December 21, 2012. A case management conference was held on May 21, 2013 in which directions were given for trial of the claim. Several of the directions were met by both sides. On July 24, 2014 Retro sought and obtained leave to amend its statement of claim. The amended statement of claim was filed on August 12, 2014. After two successful applications for extensions of time to file amendments to the defence, the bank filed an amended defence on December 3, 2014. As was said previously, the bank filed the stay application on February 2, 2015. Retro opposed that application and alternatively, sought leave to proceed with their action or leave to start fresh proceedings.

The ECCB's role in this affair

- [10] Before venturing to restate the various grounds advanced by the parties, a narration of the ECCB's role in this claim may be appropriate. While the ECCB is not a party to the claim much of what has brought us to these applications have their origins in actions taken by that institution. The ECCB is a multi-national monetary regulatory institution created by agreement of its participating members which members are also part of the Organisation of Eastern Caribbean States (hereinafter the OECS). The agreement establishing the ECCB is enacted as law by the legislature of each participating member. In Antigua and Barbuda, the agreement is made law by virtue of the provisions of the Act. Among the extensive powers granted by the Act is the ECCB's authority to intervene in and take over the operations of a local bank where it is of the opinion that—
- (1) the interests of depositors or creditors of a financial institution are threatened;
 - (2) 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
 - (3) a financial institution is not maintaining high standards of financial probity or sound business practices.²
- [11] The right to intervene is classified as 'special emergency powers' and permits the ECCB to perform a number of acts designed to bring stability to the ailing financial institution which has been subjected to the powers of intervention.³ Before it seeks to exercise the authority to intervene, the

² See Article 5B (1) of the Act

³ *Ibid*.

ECCB must issue a notice to that effect in the official gazette and local newspapers.⁴ An intervention remains in place until either the ECCB issues a further notice in the official gazette and local newspapers that the exercise of this authority has ended or the directors of the financial institution obtain an order of the High Court that the ECCB cease to control the said institution.⁵

[12] In this case, a notification of intervention in respect of the affairs of the bank was issued by ECCB in an extraordinary issue of the official gazette of Antigua and Barbuda published on July 22, 2011. Subsequent to the intervention, the Act was amended by statutory instrument dated December 18, 2013 to include, *inter alia*, Article 5C(5)(a) recited above. The amendment took effect from December 31, 2013.

[13] It is the amended Article 5 which has prompted the applications in this case. On the stay application, the bank says that Article 5C (5)(a) has the effect of staying any further steps in this claim or the bringing of a new claim. Retro, in response, says that the bank has forfeited or waived any opportunity to assert the existence of a stay and, even if a stay is in place, pursuant to the said Article, Retro is entitled to leave to continue the claim or to leave to bring a new claim.

Grounds for the applications

[14] Notwithstanding the issuance of the ECCB's notice of intervention and the subsequent amendment to the Act which brought Article 5C (5)(a) into force, the proceedings herein continued.⁶ It was only in February 2015 that the bank took the first step in recognition of the ECCB's intervention bolstered by Article 5C (5)(a) when it filed the stay application. That application is grounded in the following –

- (1) The ECCB issued a notice of intervention on July 22, 2011;
- (2) The amendment to Article 5C has an impact on the intervention and these proceedings to the effect that no further steps can be taken until a notice is issued by ECCB pursuant to Article 5E (1) of the Act or until the court grants leave or otherwise directs;
- (3) There has been no notification from ECCB or leave granted by the court. Accordingly, these proceedings are temporarily stayed until such notice is issued by the ECCB or leave is granted by the court.

[15] Retro did not file any affidavit or opposition to the bank's application. Rather, it filed the leave application pursuant to the same Article 5C (5)(a) seeking leave to continue these proceedings or to commence fresh proceedings. On the leave application, Retro asks the court to refuse the stay application. Most of the points raised in support of the leave application are also made in opposition to the stay application. On the affidavit in support of the leave application, Retro

⁴ Article 5C of the Act

⁵ Article 5E(1) and (4) of the Act

⁶ See paragraphs 13 to 24 of the affidavit of Sharilyn Cori filed on March 3, 2015 for details on the steps taken by the parties since July 2011

outlines the steps taken by the parties in these proceedings from its commencement⁷ and argues that –

- (1) The bank has waived any and all of its rights pursuant to Article 5C (5) (a) of the Act in respect of having these proceedings stayed;
- (2) Notwithstanding the fact that almost (4) years have elapsed from the ECCB's assumption of control over the bank, the intervention continues with no information as to when it is to terminate. Meanwhile, Retro continues to hold deposits with the bank in excess of ECD 20,000,000 00;
- (3) Retro is merely seeking to establish the bank's liability. If successful at trial, it is unlikely that Retro would withdraw the substantial sums held with the bank or otherwise enforce a judgment until such time as the ECCB relinquishes control of the said institution;
- (4) Great prejudice will be suffered by Retro if a stay is imposed or leave is not given to continue the claim or commence a new one. The prejudice will be particularly grave if the bank is liquidated during the intervention process as Retro would be prevented from obtaining any part of the moneys forming the subject of this claim.

(10) On April 21, 2015 the bank filed opposition to Retro's leave application. The opposition maintains the bank's stance in respect of the stay application and makes the following points on the leave application –

- (1) None of the bank's actions amount to a waiver of rights pursuant to Article 5C(5) a) since the proceedings were automatically stayed on the passage of the said Article and no further steps should have been taken by either party without the leave of the court;
- (2) The question of deposits held by the bank on behalf of Retro is irrelevant to this claim as the issue for the court's resolution at trial centres on the sums due by the second defendant to Retro. This ground is repeated in respect of the assertion that Retro merely wishes to establish liability at this point and not to remove its moneys held by the bank; in respect of this issue and in relation to Retro's complaint on the possible liquidation of the bank, it is said that liquidation would not deprive Retro of its money as is contended. Retro would be permitted to join all other creditors to prove its claim as part of the liquidation process;
- (3) The bank makes the further point that Retro has not shown that it will suffer any damage or prejudice if leave is refused. Rather, the bank will suffer substantial damage or prejudice if the proceedings continue or Retro is allowed to bring a fresh claim. In this regard it is said the *raison d'être* for the ECCB's intervention in the bank's affairs is its continuing liquidity shortages. The possible contagion effect on the local and regional financial systems are also significant factors which have not been

⁷ *Supra*, note ii

mitigated or eliminated. The ECCB continues to work with the bank and governmental entities to address the underlying reasons for its intervention.

- (4) Retro has failed to show that its position is any different from any other creditor or depositor or that there exists any 'special factors' which make it just and fair for these proceedings to continue or for a fresh claim to be issued. Indeed a fresh claim would amount to an abuse of the process in all the circumstances. There is the added caution that leave to this claimant may 'open the floodgates' for other depositors and creditors to commence or continue actions against the bank. Such a development would adversely affect the current efforts at rehabilitation.

Legal arguments

- (17) Notwithstanding the fact that the bank filed the first of these applications, it is Retro who first filed legal arguments on March 16, 2015. The bank responded in written submissions filed on April 21, 2015. Additional submissions were filed on May 22, 2015 by Retro and on May 26, 2015 by the bank.

Retro's Submissions

- (18) Retro's legal contentions can be summarised as follows—
 - (1) There is no absolute right at law for a stay and the court retains the discretion to grant leave or to direct that the matter proceed without leave;
 - (2) The amendment to the Act makes it plain that Article 5C (5) (a) took effect on December 31, 2013 and not on the publication of the intervention notice. As such Article 5C(5)(a) did not have retrospective effect. The ECCB's intervention was effective December 31, 2013 and not July 22, 2011 when the notice was published;
 - (3) These proceedings have been in place since October 12, 2012. The bank was required to seek a stay after the commencement of Article 5C (5)(a). The bank failed to apply for a stay but rather participated in the proceedings after the commencement of the said Article;
 - (4) Having failed to apply to apply soon after the commencement of Article 5C(5)(a), the bank must now seek redress pursuant to Part 9.7 of the Civil Procedure Rules 2000 (hereinafter the 'CPR') if it wishes to dispute the jurisdiction of the court to hear the claim. An application pursuant to CPR 9.7 ought to have been brought after the filing of the acknowledgment of service but before the expiration of the period for filing a defence. The failure to so act is fatal to the stay application. **Charter Capital Limited v National Bank of Anguilla Limited et al**⁸ was cited as authority for this view;

⁸ AXAHCV 2014/0036. Retro also cites the Caribbean Civil Court Practice, page 110 and the Court of Appeal decision in Pacific Electric Wire & Cable Co. Ltd v Tokan Management Ltd, BVICAP 2006/0019.

- (5) The alternative view is posited that, in any event, the stay application must be found to have been brought without promptitude. The failure to act promptly amounts to a waiver of the bank's right to dispute the court's jurisdiction and/ or an acquiescence to the jurisdiction of the court to hear the matter;⁹
- (6) Article 5C (7) obligates the ECCB to make quarterly reports to the court regarding the actions taken at the bank. The ECCB has failed to comply and as such the court should not entertain the stay application;
- (7) The court can and ought to entertain an application for leave to be granted retrospectively. The case of **Re Saunders (A bankrupt)**¹⁰ is pleaded in aid of this proposition;
- (8) The court ought to grant leave because –
 - (a) The bank has been under conservatorship for almost (4) years with no date identified for a termination. This is a highly unusual length of time for such a course of action. Conservatorships (as with administrative orders) are usually for short periods of time and no more than (6) months to (1) year. **Re Atlantic Computer Systems PLC**¹¹ is provided as the basis for this argument;
 - (b) The ECCB's failure to comply with Article 5C(7) of the Act;
 - (c) The fact that Article 5C(5)(a) came into force after Retro's action was filed;
 - (d) The conduct of the parties from the filing of the claim including the bank's full participation in the proceedings;
 - (e) Retro has large deposits with the bank from which the bank continues to benefit;
 - (f) There can be no prejudice to the bank if leave is granted but Retro will suffer greatly if the claim is not allowed to proceed;
 - (g) The bank is not being asked to find new money to pay Retro as it has a substantial investment with the government of Antigua and Barbuda from which the claim can be paid;
 - (h) Retro is prepared to accept conditions on the return of its money so as to avert any adverse effect on the bank;
 - (i) It would be inconsistent with the rule of law if the bank is allowed to remove a range of claims from the court's jurisdiction. A fair balance must be drawn between the

⁹ Halsbury's laws of England, 4th edition, paragraph 439 is presented for the proposition that a stay application must be made promptly

¹⁰ [1997] Ch. 60

¹¹ [1992] 1 A.C. 426

demands of the general interest of the community and the requirements of the individual's fundamental rights as provided for in the constitution. **Capital Bank International Limited v Eastern Caribbean Central Bank and Sir K. Dwight Venner**.¹²

- (j) Retro argues that the **Charter Capital Limited**¹³ case is distinguishable from the present case since the applicants in that case filed their application shortly after the claim was filed and before filing a defence. It is argued that the case is further distinguishable because the ECCB was a party to that claim.

The Bank's Submissions

[19] The bank's submission, filed in support of the stay and in opposition to the grant of leave to Retro, are as follows –

- (1) The effect of Article 5C (5)(a) is to stay the further proceedings. The claim may only continue with the leave of the court or after a publication by the ECCB under Article 5E(1). Judicial pronouncements in this jurisdiction have settled the statutory posture that the legislation operates as an immediate stay of legal proceedings. In this regard, it does not matter whether or not a stay application was filed. The proceedings were immediately halted by the statute;
- (2) The bank has not waived its right to object to the grant of leave. There was no expressed waiver of the bank's right and no participation in the proceedings to date can amount to such intent;
- (3) The bank is not in a position to waive the effect of the statutory provisions as this would amount to an impermissible attempt to thwart parliamentary intention. The cases of **Soho Square Syndicate Limited v E. Pollard and Company**¹⁴ and **Bowmaker Limited v Tabor**¹⁵ were cited as authorities in support of this argument. In **Soho** the legislation in question obligated a mortgagee to obtain the court's leave before appointing a receiver for the mortgaged property. The issue was whether the mortgagor could consent to the mortgagee's appointment of a receiver without the court's leave. Farwell J had this to say

"In my judgment, ... this Act is an Act not merely passed for the purpose of dealing with the individual rights of private persons, it has a more far-reaching scope than that, and it was intended as a matter of public policy to deprive the mortgagee of the powers which he otherwise could have exercised, and to impose upon him as a condition of the exercise of those powers that he should first obtain the leave of the Court. If that be the true view of this Act, then it is immaterial to consider whether there was a consent, or whether it was a proper consent, because if the leave of the

¹² GDHCVP 2002/0013 and 0014

¹³ AXAHCV 2014/0035

¹⁴ [1980] Fy 628

¹⁵ [1941] 2 KB 1

*Court is necessary, whether there be consent or not, and it being admitted that there was no such leave obtained, it must necessarily follow that the appointment was an invalid appointment.*¹⁶

In **Bowmaker Limited**, the question was whether a hirer of a car under a hire purchase agreement could consent to the owners taking back the car in circumstances where statute expressly mandated that the leave of the court must be obtained before the owners exercised such a right. Goddard LJ had this to say

*But we do not think that anything turns on this, as whether it be a case of contracting out or of waiver the same principles apply. The maxim which sanctions the non-observance of a statutory provision is *culibet licet renuntiare juri pro se introducto*. Everyone may waive the advantage of a law made solely for the benefit or protection of him as an individual in his private capacity, but this cannot be done if the waiver would infringe a public right or public policy.*¹⁷

(4) The provisions of the legislation could not be waived in this case as it is apparent that the legislation was enacted to address matters of wide public interests and not individual rights. The rights of all depositors and creditors, the Antiguan society and the interconnected sub regional financial system were the subjects of the statute,

(5) In opposing the grant of leave, the bank asks the court to consider the following matters –

(a) The legislation is silent on the criteria the court should employ when deliberating on whether leave should be granted. Recent judicial pronouncements in Antigua and Barbuda and the Eastern Caribbean offer some guidance. In **PDV Caribe Antigua and Barbuda Ltd v ABI Bank Ltd**¹⁸ Collie J was asked to consider leave to commence a claim against this same bank under the Article 5C(5) (a) of the Act. His Lordship ruled that the court *would require very cogent reasons to permit one potential claimant leave to bring a claim against a financial institution under emergency management. This would amount to preferential treatment of that applicant solely on the basis that they were first to approach the court. A race to the court office to file applications is akin to a run on a bank in difficulties. It is not to be encouraged*¹⁹

(b) The dictum of Master Taylor Alexander in the **Charter Capital**²⁰ case is also presented in support of the bank's contention. That case dealt with the issue of the ECCB's immunity from suit. The court also

¹⁶ [1940] Ch. 638 at page 647

¹⁷ [1941] 2 KB 1 at page 5

¹⁸ ANUHCV 2014/0643

¹⁹ AXAHCV 2014/0036 at paragraph 12

²⁰ *Ibid* at paragraph 28

considered whether it would be proper to grant leave in all the circumstances. The learned master ruled that

"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."²¹

In refusing leave the court opined that

"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."²²

- (c) It is for Retro to demonstrate that the circumstances exist for the grant of leave. In this context, exceptional and cogent reasons must be offered.²³
- (d) The court ought to consider the objects of the intervention and adopt a strict approach to the grant of leave as any other disposition would undermine the objects of the intervention with deleterious consequences for the financial systems of Antigua and Barbuda and the wider OECS currency union. For instance, a flood of applications from depositors and creditors may ensue.
- (e) The court ought to also consider the degree of prejudice to be suffered by both sides if leave were to be granted or refused. It is submitted that for the reasons previously stated the bank and indeed the currency union may suffer severe prejudice.
- (f) Retro has presented insufficient or no evidence of damage or prejudice if the leave application is refused.

²¹ AXAHCV 2014/0036 at paragraph 25

²² *Ibid* at paragraph 30

²³ The bank has asked the court to adopt the approach to the request for leave in the cases of *Fashoff (UK) Limited and another v Linton* [2008] EWHC 527 (Ch) and *Re Atlantic Computer Systems* [1992] Ch. 505. Retro has also relied on the *Re Atlantic Computer Systems* approach.

- [20] Further submissions were filed on May 22 and 26, 2015 by both sides. In my view the further submissions do not advance the issues beyond the previous submissions. The further submissions merely expanded on the points already extensively narrated above in this judgment and as such do not bear repetition.

Analysis and conclusion

- [21] I will first address the bank's posture on the stay application then the issue of leave if the stay application is successful.

The stay application

- [22] Shortly stated, the bank's position on the stay application is that from the commencement date of the enactment of Article 5C(5)(a), the claim herein was stayed and should not proceed. Retro takes the opposite view that the application should have been brought pursuant to CPR 9.7 or in any event in a timely manner.
- [23] Some of the inherent difficulty in Retro's posture might have been removed by reference to the Privy Council ruling in **Texan Management Ltd v Pacific Electric Wire & Cable Company Ltd**²⁴ which makes it clear that the court retains its inherent discretionary jurisdiction to stay proceedings notwithstanding the timeline restrictions set out in CPR 9.7. A useful exposition in this regard is set out at paragraphs 69 to 77 of the Privy Council ruling which was summarised in paragraph 77 in the manner –

"The overall position is this: (1) if at the time the proceedings are first served, there are circumstances which would justify a stay, the application should be made promptly under EC CPR r. 9.7/English CPR Part 11; (2) any failure to comply strictly with time-limits may be dealt with by an extension of the time-limits, and any formal defect in the application may be cured by the court; (3) if circumstances arise subsequently which would justify an application for a stay, the application would be made under the inherent jurisdiction or EC CPR r. 26.2(q)/English CPR r.3.1(2)(f)."

- [24] I would think that this is entirely the reason the CPR was amended to include the rule styled 9.7A which reads –

"9.7A (1) A defendant who contends that the court should not exercise its jurisdiction in respect of any proceedings may apply to the court for a stay and a declaration to that effect.
(2) A defendant who wishes to make an application under this paragraph 1 must first file an acknowledgment of service if he has not previously done so.
(3) An application under paragraph (1) of this Rule may be made at any time.
(4) An application under this Rule must be supported by evidence on affidavit.
(5) If on application under this Rule the court does not make a declaration, it –
(a) may-
(i) fix a date for a case management conference; or

²⁴ [2009] UKPC 46.

(ii) treat the hearing of the application as a case management conference; and
(b) must make an order as to the period for filing a defence if none has yet been filed.”

- [25] It is immediately evident that CPR 9.7A seeks to restate the court's power to stay proceedings generally. There is no requirement in CPR 9.7A that the application to stay proceedings must be made within the period for filing a defence. This is plainly distinguishable from CPR 9.7 which enjoins parties who wish to raise a challenge to the court's jurisdiction to make the application before the time for filing a defence. In my view, while the bank and all other applicants for a stay ought to make such requests promptly, there is no requirement that the extant application should have been filed before the time for filing the defence. Reference is made to the application made under CPR 9.7 in the **Charter Capital**²⁵ case. My understanding is that the application in **Charter Capital**²⁶ was made challenging the court's jurisdiction to hear the case on the grounds of statutory immunity which is altogether different from a request asking the court to stay proceedings pending the outcome of certain regulatory procedures.
- [26] There is a larger and more relevant point which was not addressed by *Retro*. **Halsbury's Laws of England**²⁷ expresses the view that ‘...the court's power to stay proceedings may be exercised under particular statutory provisions, or under the Civil Procedure Rules or under the court's inherent jurisdiction, or under one or all of these powers: since they are cumulative, not exclusive, in their operation.’
- [27] The matter of the stay in this case is circumscribed by Article 5G (5)(a) which is quite explicit in its terms and effect. I would venture to say, without deciding the issue, that even if the CPR 9.7A jurisdiction or other inherent powers were being applied, the discretion would be closely circumscribed by the nature and object of the statute. But this is not an issue which is overly complicated. As succinctly explained by Cottle J in **Schiedmayer v Willaims and ABI Bank Ltd** in respect of this very provision – ‘There is no discretion that the court is being asked to exercise. It is merely confirmation of the application of the statutory provisions to the instant proceedings that is being sought.’²⁸ His Lordship also found that ‘This Court is not being called upon to exercise a discretion. The legislature has decided that this matter should be stayed.’²⁹ I could not put my view on the effect of the statute more eloquently than his Lordship. There can be no other finding on this matter other than that a stay is in place as stipulated by statute. Since the underlying notice of intervention is still in effect this claim can only proceed with the leave of this court.
- [28] Before departing from the issue of the stay I must perforce address a few other points raised by the parties on the issue of the stay. There can be no argumentation that by continuing to take action in this case the bank or indeed the parties waived or consented to proceed in such a manner that the statutorily mandated stay is rendered nugatory or inapplicable. As I have found above, the terms of the statute are imperious and unequivocal. Even if this was not the case and there was some room to argue the court's discretion whether or not to grant a stay, it cannot be said that the parties or a

²⁵ AXANCV 2014/0036

²⁶ AXANCV 2014/0036

²⁷ (5th edn. 2009) vol. 11, para 529

²⁸ ANUHCV 2013/0063 at paragraph 5; See also *Straz Jr. v ABI Bank Ltd* 2011/0702

²⁹ ANUHCV 2013/0063 at paragraph 17

party to this claim could have waived or consented to the action continuing when the objects of the statute are indubitably imposed for the public benefit as opposed to private interests³⁰.

- [29] It is also clear that Article 5C(5)(a) is broad in its application and operates to temporarily halt proceedings which have commenced as well as prohibit the initiation of fresh proceedings after the statute's commencement except where leave has been obtained from the court or the intervention has been terminated by notice from the ECCB. This means that nothing turns in this case on to the date from which the enactment was to take effect or its retrospective connotations. A notice of intervention was in place. All the statute intended was to halt or prevent the initiating of court action until that intervention was terminated by further notice from the ECCB or until such time as a court order was obtained to allow court proceedings to be commenced or to continue.

The leave application

- [30] The arguments on this aspect of the proceedings are extensive and have been replicated above in this judgment. A number of judicial pronouncements have also been proffered. The OECS cases of **PDV Caribe**³¹ and **Charter Capital Ltd**³², take the position that in the absence of specific criteria to guide the court's deliberation on whether to grant leave pursuant to Article 5C(5)(a) and in view of the statutory objectives, very cogent reasons would have to be provided to allow a claim to be issued and I would add, to equally permit a claim already filed to continue. Or as was said in **PDV Caribe**, *'good reasons must be advanced to take one applicant out of the class of other potential applicants.'*
- [31] Both sides have asked the court to consider the guidelines recommended by the English Court of Appeal case of **Re Atlantic Computer Systems PLC**³³, which was applied in the case of **Fashoff (UK) Limited and another v Linton**.³⁴ In **Re Atlantic Computer Systems PLC**, the court deliberated on whether leave should be granted to bring claims involving matters of proprietary interests which claims were being pursued against a company in administration. In **Fashoff** the applications were brought to permit proceedings for the repossession of goods held by a company under administration. As was said in **Fashoff**, while the guidelines are no more *'general observations'*, they are both *'helpful and persuasive'*. I find this description of the guidelines to be quite compelling. I will attempt to apply the guidelines to the leave application as far as permissible being mindful of the differing facts and legislative regime in this case.
- [32] The guidelines are as follows -

(1) *It is in every case for the person who seeks leave to make out a case for him to be given leave.*

³⁰ See *Soto Square Syndicate Limited v E. Ballard and Company and Downsker Limited v Taboc*, [1997] Ch. 60 and [1992] 1 A.E.R. 476 respectively

³¹ ANJHCV 2014/0643

³² AXJHCV 2014/0045

³³ [1992] 1 A.E.R. 476

³⁴ [2006] FWHC 537 (Ch). Astaphan J considered the guidelines in **Fashoff** in *Social Security Board v Clife International Insurance Limited (in judicial management)* 5KBHCV2017/0712

- (2) *The prohibition against other steps being taken or other legal process being instituted to enforce security is intended to assist the company under the management of the administrator to achieve the purpose for which the administration order was made. If granting leave to a hirer of goods to exercise his proprietary rights to repossess the goods is unlikely to impede the achievement of that purpose, leave should normally be given (see s 11(3)(c) and (d) of the Insolvency Act 1986).*
- (3) *In other cases the court may need to balance the legitimate interests of the applicant with the legitimate needs of other creditors of the company. 'The purpose of the power to give leave is to enable the court to relax the prohibition where it would be inequitable for the prohibition to apply.'*
- (4) *In carrying out the balancing exercise, great importance or weight is normally given to the proprietary interests of a lessor.*
- (5) *Thus it will normally be a sufficient ground for the granting of leave if significant loss would be caused to the lessor by a refusal. For this purpose, loss comprises any kind of financial loss, direct or indirect, including loss by reason of delay and may extend to loss which is not financial.
'But if substantially greater loss would be caused to others by the grant of leave or loss which is out of all proportion to the benefit which leave would confer on the lessor, that may outweigh the loss to the lessor caused by a refusal.'*
- (6) *In assessing the respective losses the court will have regard to matters such as: the financial position of the company, its ability to pay the rental arrears, the administrator's proposals, the period for which the administration order has already been in force, the effect on the administration if leave was given, the effect on the applicant if leave was refused, the end result sought to be achieved by the administrator, the prospect of that result being achieved and the history of the administration so far.*
- (7) *In considering these matters it will often be necessary to assess how probable the suggested consequences are.*
- (8) *The conduct of the parties may also be a material consideration in a particular case: 'It behoves a lessor to make his position clear to the administrator at the outset of the administration and, if it should become necessary, to apply to the court promptly.'*

[33] Before embarking on an assessment of the guidelines, it may be useful to recall the competing interests at stake on this application. For the bank, I must for obvious reasons classify the statutory objectives as replicated on the notice of intervention as critical imperatives. In this regard the notice explicitly indicates that the conditions precedent to intervention as set out in Article 5B of the Act¹⁰ existed at the bank and thus prompted the ECCB to act. The relevant elements of the notice outline the objectives of the intervention –

¹⁰ See paragraph 6 above for the text of Article 5B of the Act

"With effect from July 22, 2011 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 Antigua;

(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."

- [34] The bank's evidence as disclosed on the affidavits of Kennedy Brown filed on February 2, 2015 and by Hyassis Mullin on April 21, 2015 informs that the ECCB's reasons for intervention still subsist. The concerns for the bank's liquidity and its inability to meet its obligations to all creditors and depositors including Retro have not been redressed. It is said that the grant of leave at this juncture would not only have consequences for the bank but indeed the local and sub regional financial sectors. In this regard, the ECCB continues to work not only with the bank but other stakeholders including the Government of Antigua and Barbuda to address the ongoing difficulties. There is the fear that the grant of leave in this case will lead to other claims. The bank deposes that the latter state of affairs will not advance but impede the resolution of the situation. The bank's view is that no great harm or prejudice has been pleaded by Retro if leave is refused.
- [35] For Retro, affidavit evidence has been given by one Shanlyn Cort who states that the ECCB has intervened in the affairs of the bank for almost (4) years. There is no date for termination of the ECCB's control. Meanwhile the bank continues to hold significant deposits belonging to Retro. Further, Retro accepts that, if successful at trial, it is unlikely that it would be able to withdraw its money held by the bank until such time as the ECCB relinquishes control thereof. For this reason

the claim is being pursued merely to establish the bank's liability. In its submissions Retro makes the further observation that the ECCB has not complied with Article 5C(7) which obligated that institution to file quarterly reports with the court on its relations with the bank. Further it is submitted that the bank is not being called upon to find 'new money' to satisfy the claim as it has the long term investment with the Government as set out in the pledge agreement.

- [36] When viewed compendiously I hold the opinion that the guidelines in **Re Computer Systems PLC** require the court to conduct a balancing exercise between the competing interests. I must therefore put it shortly that I do not find that there is evidence available to me that Retro's interest in being granted leave outweighs the bank's interest in having the stay against further proceedings remain against all creditors and depositors including Retro. That the statutory imperatives exist in this case has not and cannot be seriously questioned. There is no evidence placed before this court that the situation does not continue to be grave or does not have the implications often repeated in this judgment. I am equally satisfied that, as found by Master Taylor Alexander in **Charter Capital**²⁶

"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 ... would be to undermine the very financial system that the defendants are seeking to stabilise."

- [37] The words of Collie J in **PDV Caribe** are also apposite –

"Very cogent reasons to permit one potential claimant leave to bring a claim against a financial institution under emergency management. This would amount to preferential treatment of that applicant solely on the basis that they were first to approach the court. A race to the court office to file applications is akin to a run on a bank in difficulties. It is not to be encouraged"

- [38] Retro has tried to persuade me otherwise. I have not been so persuaded to change my position. I will agree that a conservatorship of almost (4) years is cause for disquiet and even alarm. But it is not for this court to speculate on such matters without more. I have already stated my acceptance of the bank's evidence that the reasons for the intervention were serious, continue to subsist and have not remedied. Accordingly I do not accept that the length of the exercise is a factor that ought to propel this court to grant leave when it is weighed against compelling, uncontroverted evidence that the reasons for intervention continue to exist and that adverse consequences may flow from claims being made against the bank.

- [39] I would add that Retro has not provided any cogent evidence that any loss (or properly put, damage or prejudice) to be suffered by the bank if leave was granted would not be out of proportion to the loss it would incur if leave was refused. There is great sympathy for the fact that Retro is out of pocket for quite significant sums held by the bank. However, this fact by itself does

²⁶ AXAMCV 2014/0036

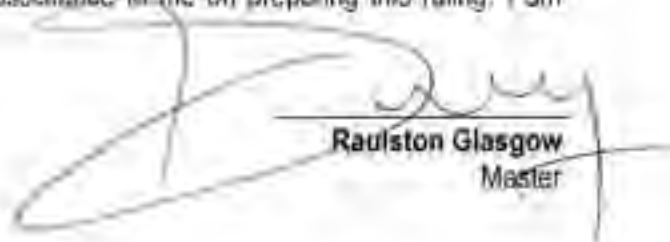
²⁷ *ibid* at paragraph 30

not separate Retro from any other creditor or depositor who has to bear the obviously distressing inconvenience of administrative actions of this sort.

- [40] Further I cannot see any benefit in allowing the claim to proceed on the assertion that Retro will not seek to enforce a judgment if it is successful at trial. This approach appears to be an attempt to jump ahead of other creditors and as such cannot form any credible ground on which leave ought to be granted either to continue this action or to bring a fresh claim. In all the circumstances, there can be no utility in permitting such an approach.
- [41] On the question of ECCB's non compliance with Article 5C (7), there is no connection with this issue to the criteria for granting leave. While it is the ECCB's intervention that has prompted this application, it is not a party to this application or even the underlying claim. Its purported inaction will have to form the subject of other discourse. In any event, what impact, if any, this purported inaction has on the continuation of this claim has not been made apparent to the court. In the absence of any such evidence I find that this ground offers no assistance to Retro on the application for leave.

Conclusion

- [42] The application requesting a declaration of a stay of these proceedings is granted. The bank should however bear its own costs on that application since it is my view that there was noticeable delay in bringing this application. While neither side was in a position to ignore or waive Article 5C(5)(a), if the bank felt it necessary to bring a stay application it ought to have done so much sooner. The delay has, undoubtedly, added costs to these proceedings which costs may have otherwise been avoided.
- [43] The application for leave to continue this claim or to bring a fresh claim is refused for the reasons stated above. As with my ruling on costs on the stay application, Retro ought to have acted with more promptness once the commencement date of Article 5C(5)(a) was issued. There was no assumption that could be made by either party that the proceedings could continue without the leave of the court. The statute states what was to transpire. Both sides continued to act without regard to its stipulations. In Retro's case, action was not taken until March 2015 to seek the court's approval to continue this claim or to bring a fresh claim. Based on these findings and on the fact that Retro was unsuccessful on its application for leave, it is to pay the bank's costs in the sum of \$500,00.
- [44] As a final word, I commend both sides for their thorough pleadings, submissions (both written and oral) and authorities which were of tremendous assistance to me on preparing this ruling. I am indeed grateful.



Raulston Glasgow
Master