THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

Claim No. ANUHCV2014/0420

In the Matter of Antigua Overseas Bank Limited (In Receivership)
And
In the Matter of the International Business Corporations Act Cap 222 of the Laws of Antigua and Barbuda
And
In the Matter of Section 11 of the Supreme Court Act
And
In the Matter of the UK Insolvency Rules 1986
And
In the Matter of an Application for the Liquidation and Dissolution of Antigua Overseas Bank Limited (in Receivership) and the Appointment of Liquidators

BETWEEN:

AOB HOLDINGS LIMITED

Applicant

And

[1] FINANCIAL SERVICES REGULATORY COMMISSION
[2] ANTIGUA OVERSEAS BANK LIMITED (IN RECEIVERSHIP)

Respondents

Appearances:
Dr. Sir Richard Cheltenham, K.A., Q.C., Ph.D., Ms Jacqueline Walwyn, Ms Shelly-Ann Seecharan, Counsel for the Applicant;
Mrs Eleanor Solomon, Ms Jasmine Wade, Counsel for the First Respondent;
Mr Kendrickson Kentish, Ms Kathleen Bennett for the Second Respondent.

2015: November 16, 18, 30

International Business Corporations Act, Cap.222 of the Laws of Antigua and Barbuda - Liquidation – approval of bank reorganization plan by Financial Services Regulatory

Commission ("FSRC") – whether Court has jurisdiction to approve a reorganization plan rejected by FSRC – exercise of discretion to postpone winding up date.

[1] **Wallbank J (Ag)**: These are the written reasons for the Court's ruling upon hearing an application filed on 12 November, 2015 by the Applicant sole shareholder of Antigua Overseas Bank (in Receivership) ("the Bank").

[2] The terms of the order made on 18 November, 2015, were as follows:

1. The Order of 24th July 2015, previously varied by the Order of 16th October, 2015, be varied as follows:
2. Unless the Financial Services Regulatory Commission shall have confirmed its approval to AOB Holdings Limited in writing of a plan for reorganization by the close of business on Monday 30th November, 2015, Antigua Overseas Bank Limited (In Receivership) shall be wound up as of 9 a.m. Tuesday 1st December 2015.
3. Reasons for this decision shall follow.
4. There is no order as to costs.

[3] The sole shareholder sought orders that a reorganization business plan dated 25 September, 2015 ("the Oklahoma Plan") be approved by the Court. The Applicant also sought consequential orders and directions for the reorganization plan to be implemented, with a suspension of this Court's Order made on 24 July 2015. That Order ordered the Bank to be wound up on grounds that it is unable to pay its debts as they fall due, with its liabilities exceeding its assets, but suspended the time at which the winding up order would come into effect.

[4] The purpose of this suspension, recorded in the preamble to that Order, was to grant the sole shareholder a "final chance", within a "limited time", to present its "final plan" for the reorganization of the Bank. This "final plan" was intended to be capitalized by a Brazilian investor, although, at the request of the sole shareholder's Counsel, the Order left it open for another plan to be presented. We shall refer to the plan involving the Brazilian investor as "the 2015 Brazilian Plan".

[5] By the terms of the Order of 24 July 2015, unless the Financial Services Regulatory Commission (the "FSRC") approved a reorganization plan presented by the sole shareholder by 15 October 2015, the winding up Order was to come into effect as at 9 a.m. on 16 October 2015 without further action by any parties. That deadline was extended to 16 November 2015 by an Order made on 16 October 2015, and further extended on 16 November 2015 to 18 November 2015, pending this decision.

[6] The application was supported by an Affidavit of Mr Eugene Abbott, a director and the chairman of the Board of AOB Holdings Limited. Mr Abbott explains that the Brazilian investor behind the 2015 Brazilian Plan had to withdraw its participation in early October 2015, after a radical devaluation of the Brazilian currency.

[7] Mr Abbott explains that another investor group, based in Oklahoma, United States of America, would fund a reorganization plan. The Oklahoma Plan was dated 25 September 2015, when, upon Mr Abbott's evidence, the 2015 Brazilian Plan was still progressing. It would appear that the sole shareholder was working with the Oklahoma investor to have them in the wings if the 2015 Brazilian Plan were to fail, in the hope of then being able to persuade the Court to put off the liquidation once more, with a yet further "final chance".

[8] Mr Abbott complains in his Affidavit that the FSRC has "continually moved the goal post in several areas related to the reorganization". He cites as an example the capital requirements set by the FSRC. He complains that the FSRC has increased the required capital injection figure to US$76million, in circumstances where the Bank's audited accounts showed a capital deficit of US$39million as at the end of 2012, and where an audit by Messrs Baker Tilly Hulse, commissioned by the sole shareholder, found a capital deficit of US$40million as at the end of 2013 and US$50.5million as at the end of 2014. The US$76million figure adopted by the FSRC was a figure reported by the Joint Receiver Managers (the "JRMs") of the Bank as the deficit as at the date of their appointment in April 2012. Mr Abbott complains that the JRMs did not request an independent audit although required to do so by the IBC Act, and that they valued the Bank's assets on a liquidation basis even though they had been appointed to carry on the activities of the Bank as a going concern.

[9] Mr Abbott explains that the Oklahoma investors had been prepared to inject US$62million to correct the US$50.5million deficit as found by Messrs Baker Tilly Hulse, but that the FSRC rejected this and requested an adjustment to correct a presumed deficit of US$76million in accordance with the findings of the JRMs.

[10] The sole shareholder argued that this requirement was both irrational and unreasonable.

[11] Mr Abbott claims the FSRC had misunderstood a considerable number of aspects of the plan, which the sole shareholder sought to address by submitting an explanatory "Aide Memoire", dated 19 October 2015, prepared by a Dr Grenville Phillips. To a certain extent a dialogue between the sole shareholder and the FSRC occurred since the Oklahoma Plan was raised with the FSRC in early October.

[12] Mr Abbott recounts that the FSRC had intimated that it wished the sole shareholder to seek guarantees from the investor for repayment of the Bank's depositors. Mr Abbott says

the sole shareholder "deems such a request unreasonable at best". He says that "the Plan guarantees the Depositors a potential repayment far superior to the repayment in a liquidation scenario" and secondly, such an irrational request would "spook" any investor and deter him from continuing, also on account of "the ever changing landscape" which would "hardly evoke confidence to do business in the jurisdiction".

[13] Mr Abbott adds that on 9 November 2015 the FSRC informally and verbally requested of the sole shareholder that the Oklahoma investor should transfer an amount of US$40million, which was held in a segregated or "blocked" account at JP Morgan Chase in New York, into a bank in the jurisdiction within two days. This, says Mr Abbott, is a request which is impossible to fulfill in today's world of banking with its high compliance requirements. The sole shareholder submitted that it is irrational and unreasonable for the FSRC to require the investor to make such a transfer, from a well-known and respected financial institution in a global financial centre, to a bank unknown to the investor in a small offshore jurisdiction such as Antigua.

[14] The sole shareholder concludes that the FSRC is determined to drive the Bank into liquidation. It therefore asks this Court to take the task of approving the Oklahoma Plan out of the FSRC's hands by approving it directly. They proffer Dr Grenville Phillips to address each of the concerns raised by the FSRC in the course of oral testimony to the Court.

[15] The sole shareholder points out that the FSRC was favourable towards the Oklahoma Plan until recently before the hearing, and also that the Bank's current Receiver Manager recommends approval upon certain conditions being met.

[16] The Oklahoma Plan has, as its principal financial components, a capital injection of US$76million into the bank, with US$40million segregated, and US$2million in escrow for the purpose of reorganizing the bank, together with a loan of US$85million for the redevelopment of Jolly Beach Resort, Antigua. The Oklahoma investor offered this loan by way of a Letter of Intent dated 14 September 2015 (prior to the Brazilian devaluation on or about 22 September 2015 (as publicly reported in the international financial press and hence a matter of which I take judicial notice) cited as the reason for the Brazilian investor's withdrawal). The loan would not be made to the Bank, but to the holding company which owns the Resort, a corporation incorporated in the Territory of the Virgin Islands, and secured by charges against the property. Such charges would rank behind charges held by the Bank. The Court is told by Counsel for the sole shareholder that the investor is happy to rank behind the Bank's charges.

[17] The Oklahoma Plan would leave the majority shareholding in the Bank with the current sole shareholder, a matter on which the FSRC has expressed concern. The JRMs

reported that the Bank owns approximately 85% of the shares in Jolly Beach Resort, but that the Bank's investment in the Resort was accounted for as a receivable from a related party. In an Affidavit filed on behalf of the FSRC on 22 January 2015, it is stated that the holding company that owns the Resort is itself in a negative equity position, with the further subsidiary which runs the Resort having liabilities of in excess of US$50million. The Resort's holding company, the Bank, an insurance company and certain other real estate all form part of a business conglomerate controlled, again broadly speaking, by the same people. Other entities which I understand to belong to the same conglomerate also appear to have been troubled. The registered office and agent of the Bank, at least as at 24 July 2014, ABI Trust (Antigua) Limited, is stated in the winding up petition of the Bank to be insolvent, no longer licensed to operate a Trust Company and not registered under the Corporate Management and Trust Service providers Act No. 20 of 2008. Whilst this latter aspect does not appear to be directly relevant to the Bank's financial position and the present reorganization attempt, it is a relevant to the overall context of the Bank and those who organized and controlled it prior to its receivership.

[18] I understand the Oklahoma Plan envisages that Jolly Beach Resort would be redeveloped to enable parts to be sold off, thereby generating revenue. There is nothing extraordinary with such a redevelopment model and many examples can be found in the Caribbean. What makes the present instance unusual is combination with reorganization of an insolvent bank.

[19] In response to the application, the FSRC has filed an Affidavit of its Acting Chief Executive Officer, Mr Ted Lewis. Mr Lewis states that the FSRC declined to approve the Oklahoma Plan because it does not provide satisfactory evidence that the Bank can operate as a viable entity based upon core banking activities. He states further that this plan has not been approved for "various reasons including" that in its current form it does not address the capital adequacy and liquidity issues of the Bank and the plan is heavily based on real estate redevelopment which is highly speculative and is contrary to section 240 of the International Business Corporations Act, Cap.222 of the Laws of Antigua and Barbuda (the "IBC Act"), which requires a bank to operate as a banking corporation engaged in generally accepted international banking activities.

[20] None of the investors behind any of the reorganization plans appear to have been financial institutions with a banking track record. Very little information is currently before the Court concerning the Oklahoma investor group. Their reorganization plan includes brief profiles of banks with which the re-organized Bank hopes to have correspondent arrangements, but no similar profile for the investor. This investor may be a suitable candidate, but it is, at least as far as the Court is aware, a completely unknown quantity. The Court knows nothing about the many factors on which due diligence would need to be done. Also, the

Court has no means to knowing how the Oklahoma investor arrived at its financial projections for the Bank, nor whether its assumptions are valid.

[21] There is no need to set out in detail the extensive prior procedural history of this matter, save for the following.

[22] The Bank was incorporated pursuant to the IBC Act. It was granted, and held, until at least 13 May 2015, a license to conduct international banking business. It is regulated by the FSRC. On 10 April 2012 the FSRC appointed JRMs over all the undertaking, property and assets of the Bank pursuant to section 287(1) of the IBC Act. Their appointment was extended and a Receiver Manager remains in office. The JRMs conducted an investigation and uncovered a shocking array of irregularities and abuses. They concluded that the Bank had an average deficit of approximately US$76million. Their estimated deficit ranged from a lower to a higher figure than this. The FSRC have not pitched their current capital injection requirement at the higher figure. The JRMs were mandated to present a proposal for reorganization or liquidation of the bank within a certain time frame. On 20 September 2013 the JRMs prepared and submitted a summary of their findings analyzing certain re-organization plans and detailing the financial condition of the Bank.

[23] Three plans were put forward, including one in which the sole shareholder itself would be the main proponent, and a plan proposed by a facilitator of Russian origin (the "Russian Plan"). The FSRC approved the Russian Plan. By an Order of this Court dated 25 October 2013, this Court approved the Russian Plan, after this Court was satisfied that the FSRC had satisfied themselves that this plan was in order. At no time did the Court go behind the FSRC's work to double check the detail of the FSRC's vetting effort. When the Russian investor failed to inject the cash envisaged by that plan, the FSRC and JRMs considered that they had no other viable reorganization alternatives to take forward. The FSRC thereupon petitioned the Court on 24 July 2014 for the Bank to be wound up.

[24] The hearing of the winding up petition was adjourned variously, and was ultimately determined a year later on 24 July 2015. The sole shareholder hotly opposed the petition. It is easy to see why. Upon a liquidation of the Bank the liquidators would move to exercise the Bank's rights pursuant to the charges it holds over the Jolly Beach Resort. That would see that core asset removed from the control of the persons behind the conglomerate.

[25] The Order made on 24 July 2015 granted the winding up petition but suspended the winding up until 16 October 2015. Unless the FSRC approved a plan (not necessarily the 2015 Brazilian Plan) by 15 October 2015 the winding up order was to come into effect automatically on 16 October 2015.

[26] At the hearing on 24 July 2015 the sole shareholder indicated that those behind the 2015 Brazilian Plan would require some little time in which to complete their work. They had proposed a time-table, which this Court viewed as clearly over- optimistic, although the Court expressed itself prepared to hold them to the dates which they themselves had put forward as feasible. The sole shareholder asked for time beyond that, and this Court accorded it the October deadline date as offering an amply generous margin.

[27] Whatever may have been the full reasons behind the sudden switch from the 2015 Brazilian Plan to the (apparently already well developed) Oklahoma Plan in the first half of October, what can only be described as a frantic scramble on both sides ensued. The liquidation deadline was impending.

[28] At the hearing on 16 November 2015 Dr Cheltenham, for the sole shareholder, argued forcefully that the Court should intervene to approve the Oklahoma Plan on grounds of irrational and unreasonable positions taken by the FSRC. He urged that this Court had jurisdiction to do so, because, he argued, the Court's jurisdiction had been triggered by the fact that the Court had previously approved the Russian Plan as an alternative to liquidation. Dr Cheltenham contended that although the sole shareholder could theoretically invoke judicial review remedies to challenge decisions of the FSRC, such remedies would be only declaratory in nature and not assist the sole shareholder. Dr Cheltenham sought to persuade the Court to set the matter down for a very short – one day possibly – trial, at which Affiants on behalf of the FSRC could be cross-examined (it is clear that the sole shareholder did not consider the FSRC was acting in good faith), and the Court could establish whether the FSRC's requirements were rational, reasonable, and whether they had in fact been met.

[29] Dr Cheltenham urged that the new evidence relating to the Oklahoma Plan, the state of the discussions between the parties, and what he contended was the FSRC's irrational and unreasonable behavior in response thereto, enables the Court to grant the relief prayed for in this application and to order a trial of the issues in dispute between the parties concerning the Oklahoma Plan.

[30] Learned Counsel for the FSRC and the Receiver Manager both argued that the Court lacks jurisdiction to undertake upon itself the statutory tasks of the FSRC, that effective administrative law remedies are available to the sole shareholder if it is aggrieved at a decision of the FSRC or its decision making processes, and that those remedies must be considered in the context of their own dedicated procedure, not in the context of the Court's insolvency jurisdiction.

Discussion

[31] I am not persuaded that I have jurisdiction to take over the FSRC's task of approving a corporation reorganization plan. The FSRC is the Bank's regulator. It is for the FSRC, not the Court, to regulate the Bank.

[32] The FSRC was established by section 316 of the IBC Act. It has a broadly expressed remit, pursuant to section 316(3), to administer the IBC Act, to issue certificates of incorporation and to regulate international business corporations and financial institutions. Sections 229 to 234 are instructive of how an IBC's licensing procedure is to operate. These sections concern the process of obtaining a license to conduct business pursuant to the IBC Act. The appropriate official may cause such investigations and inquiries as he considers required in the public interest. He must issue or refuse a license within a certain time. If a license is refused, he must inform the applicant for the grounds of his refusal but he need not give the reasons upon which the grounds were determined. If he states that the refusal is in the public interest, he need give no other grounds for his refusal. There is a two-tier appeal process, with the ultimate arbiter being the Minister of Finance, whose decision is final. It is clear from this that the Court's role is intentionally very limited. This must be right, because the emphasis of the statute is discernment of the public interest, which is predominantly socio-political and not a legal matter.

[33] The fact that the Court has previously approved the Russian Plan does not entail that the Court can now displace the FSRC and directly approve a reorganization plan that the FSRC rejects. Concerning the Russian Plan, the FSRC, not the Court, had conducted the due diligence. The Court approved the Russian Plan because it was satisfied that the FSRC itself was satisfied. None of the parties contested this. In relation to the latest plan, the sole shareholder wants the Court to engage upon an exercise which goes beyond endorsing or rejecting the FSRC's decision. It wants the Court in effect to overrule the FSRC, satisfy itself that the plan fulfils the requirements laid down by the FSRC and then directly approve the plan.

[34] This approach, in my view, inappropriately conflates elements of the Court's administrative law jurisdiction with its insolvency jurisdiction. I agree with Learned Counsel for the FSRC and the Receiver Manager that administrative law remedies have their own procedure. Those procedures have been established for good reasons, which include filtering out hopeless applications or those which are an abuse of legal process. The established procedures are to be followed and the Court cannot simply dispense with these at will.

[35] I also agree with the FSRC's and Receiver Manager's Learned Counsel that available administrative law remedies go beyond mere declaratory relief and adequately protect an aggrieved party.

[36] The sole shareholder's approach also ignores the underlying procedural context, in particular the way in which the Court's orders were framed. The winding up order was deliberately expressed (a) to order the Bank to be wound up, but (b) to provide a final opportunity for reorganization (c) within a short but generous time, (d) with a reorganization plan to be approved by the FSRC, not the Court, (e) failing which the winding up would automatically take effect.

[37] Even if I do have jurisdiction directly to approve a reorganization plan, or order that the FSRC should treat the Oklahoma Plan as approved, I decline to exercise any such discretion. There are very many factors that the FSRC has to take into account in considering whether to approve a bank reorganization plan. Some are in the specialized domain of accounting and finance. Others concern the myriad public policy considerations which treat with the probity, qualifications and experience of those who would control the bank. These are not within the Court's remit, but that of the FSRC.

[38] In this case there is also the element of the Oklahoma Plan which involves redevelopment and unit sales of the Jolly Beach Resort. Such a redevelopment scheme inevitably involves a cats' cradle of contractual obligations, formal understandings and terms of reference between many parties, including different Government departments and the developer, to ensure that the scheme will serve what the Government perceives to be its public interest goals. It would be unrealistic of the Court to approve the plan on the basis that the Court can restrict itself to ruling whether those behind the Oklahoma Plan had in fact fulfilled the FSRC's requirements, contrary to the FSRC's interpretation. It stands to reason that the FSRC's requirements can evolve and develop as they look deeper into a plan.

[39] The factors the FSRC have to take into account go beyond the short term result of a reorganization. The FSRC have to take a long term view. Section 371(2) of the IBC Act states the purposes of the Act to be:

> *2. The purposes of this Act are –*
> *(a) to encourage the development of Antigua and Barbuda as a responsible off-shore financial, trade and business centre;*
> *(aa) to prevent the international financial, trade and business centre from being utilized for money laundering or other activities illicit under the laws of Antigua and Barbuda;*

[40] In this case, as it would involve a substantial real estate development component, other Government departments would have to work closely with the FSRC so that all the

relevant public policy considerations are satisfied to the best of their skill and knowledge. Careful and specialized vetting is therefore essential.

[41] I am not swayed by Mr Abbott's contention that the Oklahoma plan guarantees the depositors a potential repayment far superior to repayment in a liquidation scenario. The "guarantee" of a "potential repayment" is self-contradictory. Even if the current depositors might receive a bigger payout on account of the capital injection than would be the case in a liquidation, the FSRC must look beyond that to address the eventuality that the reorganized bank could collapse due to flaws in the plan that may appear over time. The result of that might have a far more serious effect than liquidation now.

[42] No investor is owed approval by the FSRC. All aspects of banking are heavily regulated. A bank is not an ordinary business. A high degree of professionalism, trustworthiness and probity is required. It is for the FSRC to make itself entirely comfortable that a reorganization proposal is in order. It can set a sufficiently high threshold to include a generous margin for error on the basis that it is better to be safe than sorry. If the FSRC is in serious doubt on any aspect, it can always apply to the Court for directions. If the investor is not satisfied with the FSRC's decision, it can seek permission to apply for judicial review and the Court will then consider whether the complaint can be heard, whether it has merit and which administrative law remedy may be appropriate.

[43] In relation to the accusation that the FSRC has set an impossible condition, in the shape of requiring US$40million to be transferred to Antigua within 48 hours, I do not think the FSRC can necessarily be criticized for this, if indeed they made such a request. There is no evidence before the Court that a transfer in such a short time is impossible for an established financial institution. Nor would it appear necessary for that money to be transferred from the JP Morgan account if the investor can provide the funds from another source. This request and the sole shareholder's reaction to it raises questions how financially strong the investor is and whether it enjoys the capabilities of an established financial institution. It also raises questions whether the investor itself is dependent upon third party finance. These are legitimate lines of enquiry for the FSRC to pursue.

[44] However, since the FSRC has embarked upon a decision making process concerning the Oklahoma Plan, it is incumbent upon the FSRC to pursue this in accordance with the IBC Act and accepted administrative law principles. I am not certain that they have done so. The sole shareholder may have a valid complaint that the FSRC has not acted fairly. , Whilst it is open to the sole shareholder to apply for judicial review of the FSRC's decision, and a possible stay of the liquidation pending the Court's determination, a simple and proportionate way of obviating the expense and delay of such a challenge is for the Court to postpone the liquidation deadline one last time, for a period which the Court considers sufficient for the FSRC to make its position and/or requirements unambiguously clear to

the sole shareholder. Directing such a postponement falls clearly within the Court's jurisdiction.

[45] For these reasons the application as presented did not succeed and a different order was made which would enable discussions between the parties concerning the Oklahoma Plan to be brought to an orderly conclusion.

[46] I thank all parties' Learned Counsel for their assistance.

Gerhard Wallbank
High Court Judge (Acting)

30 November 2015