THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2015/0038

BETWEEN:

AOB HOLDINGS LIMITED

Appellant

and

[1] FINANCIAL SERVICES REGULATORY COMMISSION
[2] MR. HORDLEY FORBES, RECEIVER-MANAGER OF ANTIGUA OVERSEAS BANK LIMITED (IN RECEIVERHSIP)

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise E. Blenman	Justice of Appeal
The Hon. Mr. Mario. Michel	Justice of Appeal

Appearances:

Sir Richard L. Cheltanham, KA, QC, PhD with him, Ms. Jacqueline Walwyn and Ms. Shelly-Ann W. Seecharan for the Appellant
Mr. Justin L. Simon, QC with him, Ms. Eleanor Solomon for the First Respondent
Mr. Anthony Astaphan, SC with him, Mr. Kendrickson Kentish and Ms. Kathleen Bennett for the Second Respondent

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2016: February 11;
April 18.

Civil appeal – Winding up proceedings – Separation of powers doctrine – Jurisdiction – International Business Corporations Act – Reorganisation plan for bank in receivership – Winding up of bank postponed on several occasions by court to allow successive reorganisation plans presented by appellant to be put to first respondent for approval – Whether learned judge erred in refusing to conduct his own evaluation of final reorganisation plan presented by appellant and grant approval of same notwithstanding that plan had

not been approved by first respondent – Whether learned judge breached doctrine of separation of powers by conferring upon first respondent his judicial discretion by placing in hands of first respondent power to decide whether winding up order of court would come into effect – Whether learned judge erred in failing to conduct trial on issues in dispute between appellant and first respondent – Whether as a result learned judge's decision was irrational, it not having been founded on a proper evidential basis

The appellant ("AOB") is the sole shareholder of Antigua Overseas Bank Limited ("the Bank"), which had gone into receivership. The first respondent ("the Commission") has the function of regulating banks, financial institutions and other companies carrying on business in Antigua and Barbuda. The second respondent is the receiver-manager of the Bank, appointed pursuant to section 287 of the International Business Corporations Act ("the Act"). The second respondent replaced two joint receiver-managers ("JRMs") who had been previously appointed by the Commission in April 2012. Section 287 provides that a receiver-manager may be appointed to take control of the business and assets of a corporation where it is of the view that the business of the corporation is being conducted in a manner inimical to the public interest and that of its depositors and like interests.

After the JRMs had assumed control of the Bank and discovered that its financial situation was dire, various rescue plans were considered. The Commission applied to the court for an order sanctioning a plan (which it had approved) for the reorganisation of the Bank. Various investors with the ability to make a large capital injection into the Bank were sought, but ultimately, none of these efforts proved successful. The JRMs produced a report to the Commission which stated that there was no longer any justification for continuing the receivership, having regard to the absence of a viable funding proposal and reorganisation plan. The Commission, after consideration of the report and others before it, determined that it was not in the interest of the public and the Bank's depositors that the receivership continue.

The Commission petitioned the court for the winding up of the Bank on 24th July 2014. However, before the petition was heard, AOB filed an application seeking the court's approval for a new reorganisation plan proposed by it for consideration. The parties agreed to an adjournment of the hearing of the winding up proceedings to afford the JRMs an opportunity to consider the new plan. Having reviewed it however, the JRMs were not satisfied that the plan met the threshold capital adequacy and liquidity necessary to reorganise the Bank. On the adjourned date of the hearing of the winding up petition, AOB advised the court of a new plan involving another investor, and the winding up proceedings were again adjourned with fixed timelines to allow for delivery, review and report by the Commission on or before 1st June 2015. However, these delivery timelines were not met and a further application was filed by AOB, seeking another adjournment, so as to allow another investor to inject US$50 million into the Bank in an effort to end its receivership.

AOB's further adjournment application was heard along with the winding up petition, on 24th July 2015. The court found that the Bank was indeed insolvent and ordered that it be wound up. AOB did not object to this course of action but merely asked that the effective date of the order be postponed, so as to allow it to present a reorganisation plan acceptable to the Commission. The learned judge acceded to AOB's request and accordingly suspended the effect of the winding up order until 16th October 2015. Failing approval of the plan by the Commission, the winding up order would have automatically taken effect as from 9:00 a.m. on that date. Subsequently, a further two plans were presented by AOB, both of which turned out to be unsuccessful. In order to present the second of these, AOB had once again requested from the court, some additional time. The effective date of the winding up order was varied to 16th November 2015 by the consent of the parties. Just before this new deadline however, AOB filed yet another application, this time seeking directly from the court, as opposed to the Commission, approval of a reorganisation plan involving another investor. In that application, AOB was also complaining that the Commission was making unreasonable demands and had, without sound reason, failed to approve this latest plan. AOB was essentially urging the court to conduct its own evaluation of the latest reorganisation plan and grant approval of it notwithstanding that the Commission had not approved it. AOB stated that the court was required to resolve or adjudicate on the divide which was then in play between the Commission and AOB and for itself determine whether the new plan was viable and, on so finding, grant approval of the plan.

The learned judge heard AOB's application on 16th November 2015 and delivered his decision two days later. He declined to adopt AOB's approach but suspended the effect of the winding up order one last time, to 1st December 2015, thereby allowing AOB a final opportunity to obtain the Commission's approval of a reorganisation plan. AOB, dissatisfied with this decision, appealed. It argued that the learned judge had erred in refusing to conduct his own evaluation of the reorganisation plan presented by the appellant and grant approval of same notwithstanding that the plan had not been approved by the Commission. AOB also argued that the learned judge had breached the doctrine of the separation of powers by conferring upon the Commission his judicial discretion, by placing in the hands of the Commission the power to decide whether the winding up order of the court would come into effect. Furthermore, AOB argued that the learned judge erred in failing to conduct a trial on the issues in dispute between it and the Commission and as a result, his decision was irrational, it not having been founded on a proper evidential basis.

Held: dismissing the appeal with costs to be paid by AOB to the respondents, such costs to be assessed unless agreed within 28 days, that:

1. Prior to the amendments made to the Act in 2007,[1] section 288 of the Act required the receiver-manager to begin proceedings in the High Court for the reorganisation of a corporation after he had seized the administration and control of the corporation. There was, however, a legislative shift with the enactment of the amendments to the Act in 2007. The amendments made it clear that Parliament no longer wished for the court in the first instance to determine whether a corporation should be permitted to reorganise its affairs. Parliament placed that determination in the hands of the Commission, who had the requisite expertise to make such a determination. Section 288(2)(c) of the amended Act provides for a reorganisation plan to be approved by the Board of the Commission. In the circumstances, it was proper that the terms of the stay of the winding up order were to allow AOB to put forward a reorganisation plan for the Commission's approval rather than for the court's approval. The learned judge therefore properly exercised his judicial function while ensuring that the exercise of this function did not trespass on the executive function of reorganisational approval given to the Commission and vice versa. This was a clear demonstration of the application of the separation of powers doctrine, rather than a breach of it. The doctrine does not only operate to protect the judiciary from encroachment by the other branches of government but also to protect the executive and legislative branches of government from encroachment by the judiciary.

   Section 288 of the **International Business Corporations Act** (as amended) applied.

2. AOB's assertion that the learned judge was in error in not conducting a trial on the issues which AOB says were in dispute between it and the Commission and that the court has broad powers under the Act permitting it to disregard the disapproval by the Commission of a reorganisation plan and itself engage in an evaluative analysis of the plan and approve it, seeks to eschew the abovementioned decided policy shift made by Parliament when it amended section 288 of the Act. The task of the approval of a reorganisation plan has been expressly given by Parliament to the Commission and it is not, therefore, open to the court to arrogate to itself this task.

3. While it has always been, and remains, the court's function to review administrative actions so as to ensure that bodies such as the Commission or such persons are not acting in excess of their powers, or in a manner which is irrational or unreasonable or contrary to the basic principles of procedural fairness, a wholly different and comprehensive procedure is provided for addressing such complaints, namely, the administrative claim. The learned judge was quite right not to entertain AOB's suggested approach in these proceedings, which are insolvency proceedings. It was open to AOB to bring administrative proceedings which could have adequately addressed its

[1] International Business Corporations (Amendment) Act, 2007 (Act No. 10 of 2007, Laws of Antigua and Barbuda).

complaints in respect of the Commission's alleged unreasonableness or irrational conduct in considering AOB's proposed reorganisation plan with the full opportunity for obtaining adequate relief. It was inappropriate to seek to have the court engage in such a course in the context of having made a winding up order which had been stayed only for the purpose of being able to obtain the Commission's approval of one of its (AOB's) reorganisation plans. Accordingly, the learned judge was right in declining to do so and did not deprive AOB of its right of access to the court in holding that he lacked the jurisdiction to deal with the requests made by AOB.

REASONS FOR DECISION

[1] **PEREIRA, CJ:** Following the hearing of this appeal, the Court ordered that the order made by the learned judge on 24th July 2015 for the winding up of Antigua Overseas Bank Limited ("the Bank") be confirmed, with said order to take effect as from 4:00 p.m. on 11th February 2016 with the usual consequential orders appointing joint liquidators over the Bank. We undertook to provide written reasons for so ordering at a later date. These are now given.

The Background

[2] The appellant ("AOB") is the sole shareholder of the Bank. The first respondent ("the Commission") is a creature of statute tasked with the regulation of banks, financial institutions and other companies carrying on business in the State of Antigua and Barbuda. The second respondent is the current receiver-manager of the Bank, replacing the joint receiver-managers ("the JRMs" who were appointed by the Commission in April 2102). This appointment was made pursuant to section 287 of the **International Business Corporations Act (as amended)** ("the Act").[2] Section 287 sets out a number of circumstances in which the appropriate official may appoint a receiver-manager to take control of the business and assets of a corporation where it is of the view, among others, that the business of the corporation is being conducted in a manner inimical to the public interest and that of its depositors and like interests.

[2] Cap. 222, Revised Laws of Antigua and Barbuda 1992.

[3] The JRMs discovered, after assuming control of the Bank, that the financial situation of the Bank was dire. Various rescue plans were floated and considered. On 26th September 2013 the Commission, pursuant to section 288 of the Act, applied to the court for an order, in essence, sanctioning a plan for the reorganisation of the Bank as had been approved by the Commission. The reorganisation plan called for a large capital injection into the Bank. Investors with the ability to make such an injection were sought. Ultimately, these efforts were unsuccessful. The JRMs, in their report to the Commission dated 3rd July 2014, opined that there was no longer any justification for continuing the receivership, having regard to the absence of a viable funding proposal and reorganisation plan. The Commission, after consideration of the report and other reports before it, determined that it was not in the interest of the public and the Bank's depositors that the receivership continue.

[4] On 24th July 2014, the Commission, through its Supervisor of International Banks and Trusts, petitioned the court for the winding up and dissolution of the Bank. The petition was fixed for hearing on 9th October 2014. However, seven days before the Commission filed its winding up petition, AOB had filed an application, in an earlier directions application[3] made by the JRMs for sanctioning the temporary suspension of the operations of the Bank until such time as a reorganisation plan could be approved or an order made for winding up, seeking, among other things, to put forward a new reorganisation plan proposed by it for consideration. AOB's application was stayed with liberty for it to be restored for hearing on the winding up petition so as to enable AOB an opportunity to present its reorganisation plan. Consequent on the court's order of 31st July 2014, AOB filed another application on 1st October 2014 and, on this occasion, within the winding up proceedings,[4] putting forward its reorganisation plan. The JRMs had not, prior to the plan being filed with the court, had sight of the plan. The parties accordingly, by consent, adjourned the hearing of the winding up proceedings to afford them an opportunity to consider that

[3] This was in Claim No. ANUHCV2013/0180.
[4] Claim No. ANUHCV2014/0420.

plan. On their review, the JRMs were not satisfied that the plan met the threshold capital adequacy and liquidity necessary to reorganise the Bank.

[5] On the adjourned date of the hearing of the winding up petition, AOB advised the court of a new plan involving another investor. The hearing of the winding up petition was then further adjourned to a date not earlier than 18th June 2015 with fixed timelines to allow for delivery, review and report by the Commission on or before 1st June 2015.

[6] The delivery timelines were never met. AOB then filed yet another application on 16th July 2015 seeking a further adjournment so as to allow another investor identified by AOB to invest some US$50 million on the terms of an implementation plan to end the Bank's receivership.

[7] AOB's July 2015 application was heard along with the petition on 24th July 2015. The court, finding that the Bank was indeed insolvent, ordered that the Bank be wound up. AOB put forward no objection to this course but merely asked that the effective date of the order be postponed, so as to allow it one final chance to present a reorganisation plan acceptable to the Commission. The learned judge (Wallbank J [Ag.]), was so inclined and he accordingly suspended the effect of the winding up order until 16th October 2015. Accordingly, failing approval of the plan by the Commission, the winding up order was to automatically take effect as from 9:00 a.m. on 16th October 2015.

[8] A plan involving yet another investor had been put forward but this did not materialise. One day before the winding up order was to take effect, AOB filed yet another application seeking further time to consider yet another plan involving a different investor. Lanns J [Ag.], by consent of the parties, further extended the time by which the winding up order would take effect, to 16th November 2015. This also turned out to be unsuccessful.

[9] As the eve of the deadline dawned, on 12th November 2015, AOB filed yet another application, this time seeking directly from the court, approval of a reorganisation plan involving an Oklahoman investor. In that application, AOB was now also complaining that the Commission was making unreasonable demands and were shifting the goal posts in respect of the requirements to be fulfilled for its approval of the plan and that the Commission, without sound reason, had failed to approve this latest plan. AOB urged that the court ought to engage, in essence, on an investigation or a trial on the merits of the reorganisation plan as presented by it, and determine whether the Commission's requirements for approval of the reorganisation plan were reasonable. AOB urged the court, in essence, to conduct its own evaluation of the latest reorganisation plan put forward by AOB and grant approval of same notwithstanding the Commission's lack of approval. AOB says that the court was required to resolve or adjudicate on the divide which was then in play between the Commission and AOB and for itself determine whether the reorganisation plan was a viable one and on so finding, grant its approval of the plan.

[10] AOB's latest application was heard by the learned judge on 16th November 2015. He reserved his decision and suspended the effect of the winding up order further, pending delivery of his decision. He gave his decision on 18th November 2015 and declined to adopt the approach urged by AOB. He, however, suspended the effect of the winding up order one last time, to 1st December 2015, thereby allowing AOB one last opportunity to obtain the Commission's approval of a reorganisation plan. He gave written reasons for his decision on 30th November 2015. It is from this order of 18th November 2015 that AOB appealed.

The Appeal

[11] AOB raised two grounds of appeal against the learned judge's order of 18th November 2015:

(a) Firstly, it says that he breached the doctrine of separation of powers by conferring upon an entity of the executive and one of the parties before him, namely the Commission, his

judicial discretion by placing in the Commission's hands the power to decide whether the order of the court would come into effect. In so doing, says AOB, the learned judge compromised his independence and thus violated the Constitution and the right of AOB to a fair trial by an impartial tribunal ("the separation of powers issue").

(b) Secondly, that the learned trial judge erred in not conducting a trial in respect of the issues on which the Commission and AOB were at variance, as he was urged to do, and accordingly, his decision of 18th November 2015 was irrational, it not having been founded on a proper evidential basis. AOB says that the learned judge erred in holding that he was without jurisdiction to approve directly (i.e. without the Commission's approval), a reorganisation plan ("the jurisdiction issue").

Matters not in Issue

[12] Before proceeding to treat with the complaints made by AOB, it is worth making a few observations in the context of this appeal:

(a) Firstly, all further orders following on the winding up order made on 24th July 2015 ending with the order of 18th November 2015 which is the subject matter of this appeal are substantively in the same terms save for the further extensions granted, at the behest of the appellant, for the coming into effect of the winding up order.

(b) The winding up order itself has never been appealed nor could it with any conviction have been sensibly appealed. The transcript of the hearing on the winding up petition, clearly shows that AOB did not vigorously oppose the petition. It led no evidence in opposition nor did it seek to test or controvert the evidence led by the Commission in support of the petition. AOB, by its counsel, merely asked that the order be 'suspended for six weeks to two months'[5] seemingly in the hope of finding even at the last minute a "financial

[5] See Transcript of Proceedings of 23rd July 2015, pp.79-88.

godfather" who could save the Bank. It is reasonable to infer that AOB tacitly accepted that a winding up order was necessary and inevitable at that stage, given the undisputable and seemingly hopeless insolvency of the Bank.[6]

[13] The learned judge recited, among others, the following in making the winding up order and in deciding to suspend its operation until a later date:

> "**AND UPON** the request of AOB Holdings to be granted a final chance to present another plan of reorganisation to the Financial Services Regulatory Commission for its consideration
>
> "**AND UPON THE COURT BEING MINDED TO** grant AOB Holdings Limited a limited time within which to present its final plan for the reorganisation of the Bank"[7]

[14] These recitals show that the staying of the effect of the winding up order was the grant of an indulgence to AOB to place before the Commission a plan of reorganisation that may, even at that late stage, have found favour with the Commission and which may have enabled it to apply for an appropriate order which may have included a further stay on terms. Apart from seeking in later applications (save the last) to extend the time for the winding up order to take effect for the same purpose as the first, it is only in its last application of 12th November 2015, consequent on the winding up order, that AOB sought to obtain directly from the court the approval of its last reorganisation plan. It is not clear which provision of the Act it was then invoking, although, in argument before this Court, there was an oblique reference to section 304 which deals with the court's powers on a dissolution or winding up of a corporation to 'make any order it thinks fit'. Further reference will be made to section 304 of the Act later.

The Separation of Powers Issue

[6] The order of 24th July 2015 recited that the Bank's liabilities exceeded its assets and that the Bank was unable to pay its debts as they fell due.

[7] See winding up order dated 24th July 2015.

[15] As counsel for the receiver-manager very helpfully submitted, the Act allows the court to stay a liquidation order on such terms and conditions as it thinks fit. This is captured in section 304(n) of the Act which states, in effect, that upon the application of the Administrator, the appropriate official, any director, officer, shareholder, or debenture holder, creditor or liquidator, the court may make an order staying the liquidation on such terms and conditions as the court thinks fit. It is a power to grant a stay expressed in the widest of terms. Here, the condition was to allow AOB an opportunity to put forward a reorganisation plan to the Commission. There can be no argument that the court made a winding up order which was clear and final on its face. And it certainly cannot be said, without seeking to unduly stretch the language that the judge left it up to the Commission to make a winding up order. He certainly did not. Rather, the learned judge, having made the winding up order, merely, at the request of AOB, in seeking to accommodate it for the purpose for which it was sought, stayed the effect of the winding up order as he was empowered to do until a specified date. The granting of a stay on terms is in every respect the exercise of a judicial power and function.

[16] As it relates to the terms on which the stay was granted, the scheme of the Act may also be considered. Prior to the 2007 amendments to the Act,[8] section 288 of the Act required the receiver-manager to begin proceedings in the High Court for the reorganisation of a company. The original section read as follows:

> "**288.** (1) Within thirty days after a receiver-manager has seized the administration and control of a corporation … the receiver-manager shall begin proceedings in the court for the liquidation … of the corporation … **or for the re-organisation** of the corporation under this Act, as the circumstances require." (Emphasis added)

This provision was replaced with the following:

> "288(1) A person appointed under section 287[9] … shall … within three months of the date of his appointment … prepare and furnish a report to the appropriate official of the affairs of the corporation and of his recommendations thereon.
>
> (2) On receipt of a report under subsection (1) … the appropriate official may –

[8] International Business Corporations (Amendment) Act, 2007 (Act No. 10 of 2007, Laws of Antigua and Barbuda).
[9] Section 287 of the Act speaks to the appointment of a receiver-manager.

(a) revoke the appointment of the person appointed under section 287;

(b) extend the period of his appointment;

(c) **subject to such conditions as the appropriate official may impose, allow the corporation to reorganise its affairs in a manner approved by the Board**; or

(d) revoke the licence and apply to the court for an order that the corporation be forthwith dissolved or liquidated by the court in which case the court shall apply the powers under section 304." (My emphasis)

[17] As counsel for the receiver-manager submitted, this legislative change showed a significant shift in policy. Parliament no longer wished for the court in the first instance to determine whether a corporation should be permitted to reorganise. It wished to place that determination in the hands of the Commission who was staffed with the requisite expertise to make such a determination. Indeed, section 288(2)(c) of the Act (as amended) provides for a reorganisation plan to be approved by the Board of the Commission. In short, the power to approve a reorganisation plan was placed by the legislative branch in the hands of the executive branch of government. Section 288 gives the power to the appropriate official to move the court for an order to wind up the company where that official forms the view that the circumstances in respect of the affairs of the corporation so warranted.

[18] In the circumstances of this case, the receiver-manager had reported on the affairs of the Bank, had considered reorganisation plans which turned out to be futile. The Bank's licence had not been renewed since May 2015. The Commission had formed the view that the financial position of the Bank was dire and ought to be wound up. The learned judge, with little or no opposition by AOB, ordered the winding up of the Bank, but clearly felt that he should allow AOB to explore, if there was a sliver of chance of rescuing the Bank, one last chance to put forward a reorganisation plan to the Commission being the entity charged under the Act with the function and power of approving a plan to reorganise a corporation. Against this background, it is clearly understandable,

and in our view proper, that the terms of the stay were to allow AOB to put forward a reorganisation plan for the Commission's approval rather than AOB directly presenting to the court a reorganisation plan for the court's approval. This approach is very much in consonance with the provisions of the Act. The court was empowered to grant a winding up order (which it did) and to stay that order until a specified date (which it did) on terms for obtaining the Commission's approval to a reorganisation plan (which approval was within the purview of the Commission). The terms of the order then were the proper exercise of a judicial function while ensuring that the exercise of the judicial function did not trespass on the executive function of reorganisational approval given to the Commission and vice versa. This was a clear demonstration of the application of the separation of powers doctrine rather that a breach of it. Accordingly, the complaint that the learned judge breached the doctrine of the separations of powers and thus contravened the constitution is wholly without merit.

The Jurisdiction issue

[19] AOB asserts that the learned judge was in error in not conducting a trial on the issues which AOB says were in dispute between it and the Commission. AOB urges that the court had jurisdiction on AOB's application made directly to the court to approve the reorganisation plan put forward by AOB even if that plan had not been first approved by the Commission. AOB insists that the court has broad powers under section 304 of the Act and that the broad powers granted thereunder permitted firstly, the making of an application for reorganisation directly to the court and secondly, that the court could disregard the lack of approval by the Commission of a reorganisation plan and itself engage in an evaluative analysis of the plan and approve it.

[20] This approach urged by AOB seeks to eschew, in our view, the decided policy shift made by Parliament when it amended section 288 of the Act, placing the approval function of a reorganisation plan squarely within the domain of the Commission. The new section 288 has already been set out above and is clear. It places the responsibility of approving a reorganisation plan with the Commission, whose officials would no doubt possess specialised knowledge, skill

and experience in evaluating the feasibility of any proposed reorganisation plan in the context of the nature of the business of the corporation concerned. This is an imminently sensible and reasonable approach as judges are not necessarily seized with such specialised knowledge or necessarily versed with all the intricacies attending commercial arrangements nor, may I add, are they required to be. Parliament would have been aware of this and wisely provided that such an exercise be left to the experts within the Commission.

[21] Further, it is not accepted that the court, on exercising its winding up powers under section 304, permits the appellant, as a shareholder of the Bank, to seek to have the court entertain such an application for reorganisation at that stage as was sought by AOB. Section 304 of the Act warrants setting out in full:

> "**304.** In connection with the dissolution or the liquidation and dissolution of a corporation, the court may, **if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations**, make any order it thinks fit, including, without limiting the generality of the foregoing,
>
> (a) an order to liquidate;
> (b) an order appointing a liquidator, with or without bonding, fixing his remuneration and replacing a liquidator;
> (c) an order appointing inspectors or referees, specifying their powers, fixing their remuneration and replacing inspectors or referees;
> (d) an order determining the notice to be given to an interested person, or dispensing with notice to any person;
> (e) an order determining the validity of any claim made against the corporation;
> (f) an order, at any stage of the proceedings, restraining the directors and officers of the corporation from
> (i) exercising any of their powers, or
> (ii) collecting or receiving any debt or other property of the corporation, and from paying out or transferring any property of the corporation except as permitted by the court;
> (g) an order determining and enforcing the duty or liability of any present or former director, officer or shareholder of the corporation
> (i) to the corporation, or
> (ii) for an obligation of the corporation;
> (h) an order approving the payment, satisfaction or compromise of claims against the corporation and the retention of amounts for such purpose, and determining the adequacy of provisions for the payment or discharge of obligations of the corporation, whether liquidated, unliquidated, future or contingent;

(i) an order disposing of or destroying the documents and records of the corporation;
(j) upon the application of a creditor, the inspectors or the liquidator, an order giving directions on any matter arising in the liquidation;
(k) after notice has been given to all interested parties, an order relieving a liquidator from any omission or default on such terms as the court thinks fit and confirming any act of the liquidator;
(l) subject to section 309, an order approving any proposed interim or final distribution to shareholders in money or in property;
(m) an order disposing of any property belonging to creditors or shareholders who cannot be found;
(n) **upon the application of the Administrator, the appropriate official, any director, officer, shareholder**, or debenture holder, creditor or liquidator –
  (i) an order staying the liquidation on such terms and conditions as the court thinks fit,
  (ii) an order continuing or discontinuing the liquidation proceedings, or
  (iii) an order to the liquidator to restore to the corporation all its remaining property;
  (iv) an order to remove the liquidator" (Emphasis added)

The emphasised portion of the general power to make orders as the court thinks fit is qualified by the words 'if it [the court] is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations'. Here the Commission had petitioned to wind up the Bank as it was satisfied that the Bank was highly and indisputably insolvent. It was abundantly clear that the Bank could not satisfy the court that 'it [was] able to pay or adequately provide for the discharge of all its obligations'. The evidence was to the contrary. The learned judge so found. Also, when the entirety of section 304 is read in context, it is clear that section 304 does not contemplate the court making an order for reorganisation at that stage, at the instance of a shareholder of the corporation. Indeed, this would run counter to the very position expressly provided for by the section 288 amendment.

[22] Additionally, it is only at paragraph (n) of section 304 that a shareholder is permitted to make certain applications. These are limited to the orders set out at sub-paragraphs (i) to (iv) of paragraph (n). AOB sought none of these orders in its last application. It sought to have the court

approve a reorganisation which the Commission had declined to approve, having found it unsatisfactory, and to adjudicate on the merits or demerits of the Commission's refusal to approve the plan – in essence, to review the exercise of the Commission's functions leading to its decision to refuse approval of the plan. The learned judge at paragraph 28 of his judgment made reference to the forceful arguments made by counsel for AOB for the court to intervene to approve the "Oklahoma Plan" on grounds of irrational and unreasonable positions taken by the Commission and for the court to engage in a trial so as to determine whether the Commission's requirements were rational and reasonable. At paragraph 31 of the learned judge's written reasons for the decision of 18th November 2015, he opined as follows:

> "I am not persuaded that I have jurisdiction to take over the FSRC's [the Commission'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."

At paragraph 32 he made reference to the statutory remit of the FSRC provided under sections 316 and 229 to 234 of the Act from which he concluded that the court's role was intentionally limited. At paragraph 33 he made plain that the court had approved the earlier plan[10] because it was satisfied that the Commission itself was satisfied. He then opined:

> "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."

He then concluded at paragraph 34 that AOB was seeking inappropriately to conflate the court's administrative law jurisdiction with its insolvency jurisdiction and that it was open to AOB to seek such administrative relief as clearly no obstacle was in its way preventing or limiting the pursuit of such a course. In any event, the learned judge went on to consider the plan put forward by AOB and opined that even were he to hold that he had jurisdiction he would not on the facts and circumstances before him, have exercised his discretion and approve the plan last put forward by AOB and gave his reasons for so holding.

[10] Called the "Russian Plan".

Discussion

[23] As explained above, the tenor of the Act as to who is tasked with the approval of a reorganisation plan is abundantly clear. The task has expressly been given by Parliament to the Commission. It is not therefore open to the court to arrogate to itself the task which Parliament, in its wisdom, gave to the Commission. That would amount to an improper encroachment by the judiciary unto the executive's domain. The separation of powers doctrine does not only operate to protect the judiciary from encroachment by the other branches of government but similarly protects the executive and legislative branches of government from encroachment by the judiciary. This doctrine is too well known to require any further exposition. The learned judge was right to hold that he had no jurisdiction to entertain such a request as was being made by AOB in the manner being urged.

[24] That said, it has always been and remains the court's function to review administrative actions so as to ensure that such bodies or persons are not acting in excess of its powers, or in a manner which is irrational or unreasonable or contrary to the basic principles of procedural fairness. However, a wholly different and comprehensive procedure is provided for addressing such complaints and that is by way of an administrative claim. The learned judge was quite right not to entertain such complaints in the insolvency proceedings. It was open to AOB to bring administrative proceedings which could have adequately addressed its complaints in respect of the Commission's alleged unreasonableness or irrational conduct in considering AOB's proposed reorganisation plan with the full opportunity for obtaining adequate relief. It was inappropriate to seek to have the court engage in such a course in the context of having made a winding up order which had been stayed only for the purpose of being able to obtain the Commission's approval to its reorganisation plan. The learned judge was right in declining to do so. In so doing, it cannot be said that his refusal to himself approve AOB's reorganisation plan in the context of determining the reasonableness or otherwise of the Commission's actions within the insolvency proceedings amounted to a deprivation or restriction of AOB's right of access to the court. This complaint, for the reasons given, is wholly without merit. Shortly put, AOB simply failed or chose not to engage

the procedure for accessing the court for the purpose of ventilating its complaints relating to the irrationality or unreasonableness of the Commission's actions in refusing to approve its reorganisation plan. Such complaints are essentially engaging the court's powers of review. The insolvency proceedings is not the venue for determining such issues. Adequate provision is made under the law and the rules of court for accessing the court for the purpose of ventilating and remedying such wrongs where established.

[25] In any event, even were I to hold that the learned judge was wrong in concluding that he had no jurisdiction (which I do not), it has not been shown that any good reason existed for disturbing the way he would have exercised his discretion given the facts and circumstances placed before him. It is highly doubtful that this Court would have arrived at any different conclusion.

Conclusion

[26] For the foregoing reasons it has not been shown either that the learned judge contravened the separation of powers doctrine, or, that by holding that he lacked jurisdiction to deal with the requests being made by AOB, that he thereby deprived AOB of its right of access to the court. The appeal was accordingly dismissed with costs to be paid by AOB to the respondents, such costs to be assessed unless agreed within twenty eight (28) days.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario Michel

Justice of Appeal