THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

ANGUILLA

Claim Number: AXAHCV2016/0032

Between

(1) NATIONAL BANK OF ANGUILLA (PRIVATE BANK AND TRUST) LIMITED (In Administration)

First Claimant/ Respondent

(2) CARIBBEAN COMMERCIAL INVESTMENT BANK LIMITED (In Administration)

Second Claimant

And

(1) NATIONAL BANK OF ANGUILLA LIMITED (In Receivership)

First Defendant

(2) CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED (In Receivership)

Second Defendant

(3) NATIONAL COMMERCIAL BANK OF ANGUILLA

Third Defendant/Applicant

Before:

Justice Cheryl Mathurin

Appearances:

Mr. William Hare and Mr. Alex Richardson for the Applicant

Mr. Patrick Patterson and Ms. Eustella Fontaine for the Respondent

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2016: August 10th; 18th

RULING

[1] MATHURIN, J.; The Third Defendant, National Commercial Bank of Anguilla (NCBA) has applied for both an injunction and an anti-suit injunction against the First Claimant, National Bank of Anguilla (Private Bank and Trust) Limited (PBT).

By way of brief background, Mr. William Tacon was appointed as administrator of PBT on February 22nd, 2016 (the Order). Purportedly pursuant to his powers under the Order, he moved proceedings in the US Bankruptcy Court (US proceedings). He sought and was granted recognition of the local administration under Chapter 15 and having done so made a further application under Chapter 11 of the United States Bankruptcy Code.

[2] The US Bankruptcy Court for the Southern District of New York being seized of the US Proceedings granted an order for discovery against Bank of America (BOA) after the hearing. The US Attorneys for Mr. Tacon in the Bankruptcy proceedings, sent a letter to BOA telling them that *"Accordingly this correspondence serves as a demand to immediately freeze the Accounts and take any and all actions as necessary to prevent withdrawal, removal or dissipation of the funds until you receive further direction from the Debtor (PBT) or pursuant to court order. Please confirm to us in writing on or before July 8, 2016 that the Bank has frozen the Accounts."*

[3] BOA subsequently froze the relevant account. As the US lawyers for NCBA, Mr. David Molton deposed in his witness statement of July 22, 2016: *"Bank of America informed us that the letter formed part of the basis for its decision to freeze the Correspondent Account. In that regard, Bank of America stated to us that it was exercising its purported right, under the deposit agreement governing the account, to suspend the Correspondent Account, on the basis that there was a dispute as to the ownership of the funds."*

INJUNCTION

[4] NCBA filed its application for injunction on 20th July 2016. Therein it asked the Court to Order the following;

1. That PBT deliver a letter to Bank of America (BOA) withdrawing the demand letter of 5th July 2016 that BOA refrain from taking any action with respect to one or more accounts at the New York branch in the name of the NBA or its successor in interest, NCBA;

2. That PBT not correspond (either directly or via its agents) further with BOA in connection with the BOA accounts without the permission of the Court; and

3. That PBT pay costs of the application to be agreed or assessed.

PBT opposes the application for the injunction on several grounds:

The need for leave

[5] PBT states that NCBA has filed the applications for the injunction and anti-suit injunction without the permission of the court as purportedly required by a clause in the Order appointing Mr. Tacon as Administrator. The clause states:

> *"All actions and the execution of all writs, summonses and other processes are hereby stayed upon the application herein for the administration and shall not be proceeded with without prior leave of the Court herein."*

[6] NCBA responds that the requirement for leave is misconceived. It states further that in the present circumstances, PBT has filed a claim here in Anguilla on 6th May 2016 wherein the requested relief is premised on if and to what extent the court finds that PBT has a proprietary interest in traceable assets in NCBA. Counsel Mr. Hare therefore asserts that NCBA does not require the leave of the Court to take steps in protecting his client's interests where the Claim herein is being vigorously defended. I am in agreement with Mr. Hare's submission that leave of the court is not required for the applications at bar.

[7] Mandatory injunction

Counsel for PBT, Mr. Patterson in his arguments advanced that the nature of the remedy requires different considerations with respect to its grant or denial. The Privy Council in National Commercial Bank of Jamaica v Olint Corp Limited Appeal No.61 of 2008 however clarified the issue of the prohibitory injunction versus the mandatory injunction. Lord Hoffman stated at paragraphs 19 and 20 that:

> *"In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other;"*
>
> *"For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren; What matters is what the practical consequences of the actual injunction are likely to be."*

[8] On this point, Counsel for PBT, Mr. Patterson asserts that the practical consequence of the injunction is that it has no basis in these proceedings; Counsel asserts there is no issue on the pleadings or evidence that substantiates the right for an injunction. He further states that the grant of an injunction would be undermining of the Order granting powers to Mr. Tacon. He refers in this regard to paragraph 13(e) of the Order which, he states, is one of the relevant powers under which Mr. Tacon has taken the action in the US to freeze the account at BOA;

> *"To ascertain the assets of the offshore banks and their location and take all steps necessary including court actions where appropriate; to obtain possession of such assets including, without prejudice to the generality of the foregoing, receivables and to bring the*

same under his control and further where *appropriate bring the same under the jurisdiction of the honourable court and for that purpose to seek assistance of the courts of various jurisdictions in which the assets of the offshore banks are located."*

[9] Mr. Hare rebuts that the claim brought by PBT is for determination of any proprietary interest of PBT in NCBA by this Court. He says that the powers granted to Mr. Tacon are typical of directions given to insolvency practitioners when asked to gather in assets belonging to or said to be belonging to an insolvent entity. He submits that the Order does not require Mr. Tacon or his attorneys to demand that BOA freeze NBA/NCBAs accounts. Further he argues that the account freeze is not appropriate in the circumstance where PBT has moved this court in Anguilla to determine any proprietary claim it has in NCBA.

[10] Mr. Hare states further that the practical consequence of the injunction is stop the freeze on the commercial operations of NCBA and banking services that it provides to Anguilla. He prays in aid paragraphs 16 and 17 of the affidavit of M Dinning. He also relies on the exhibited letter from the Governor of the Eastern Caribbean Central Bank (ECCB) to the Governor of Anguilla wherein he states that "*The suspension of this banking relationship will hurt the customers of NCBA and has the potential to undermine customer confidence in this young institution and its viability going forward and ultimately impair the financial system in Anguilla."*

High degree of assurance and interest of justice.

[11] Mr. Patterson states that the Court cannot have a high degree of assurance that the injunction will be properly granted. It is he that the injunction not be granted as it would not serve the interests of justice. He states that the power of the Administrator permits him to take all steps that have been taken with respect to Bank of America. He further contends that the injunction has the potential to prevent the Administrator from carrying out his Court appointed duties pursuant to paragraph 13(b) of the Order which permits him to ascertain the assets of the offshore banks and their location and take all steps necessary including court actions where appropriate to obtain possession of such assets. He also states that moreover, the proper forum for the issues with respect to the BOA account is the US Bankruptcy Court; the grant of the injunction would interfere with the stay imposed by the US Bankruptcy Court.

[12] Mr. Hare responds that the injunction would not interfere with Mr. Tacon's administration powers. Those powers however he advances have to be constrained having regard to the claim for an accounting filed in Anguilla by PBT for the court in Anguilla to determine whether PBT has a proprietary interest in funds of NBA and NCBA.

[13] Mr. Patterson in response asked the Court to note that the US Bankruptcy Court was asked to recognise the proceedings in which Mr. Tacon was appointed Administrator and not the proceedings in this substantive proprietary claim. A perusal of the transcript of the US proceedings however, clearly indicates that Mr. Tacon makes specific reference to a damages suit filed in Anguilla and a US$175 million claim.

[14] Without prejudice to the present applications, the order of the US Bankruptcy Court was granted to the extent of permitting PBT to serve subpoena and document requests and oral examination on documents produced. The US Bankruptcy Court also retained jurisdiction on discovery disputes and to interpret, implement and enforce the provisions of the order.

[15] Mr. Hare submits that the letter to BOA claiming ownership of the funds is not a proper exercise of Mr. Tacon's powers. If he wanted to secure assets of NCBA, Mr. Hare says he ought to have approached the Anguilla Court, which is the Court that has been asked to determine the property rights of PBT in NBA and NCBA. Mr. Hare also states that the Anguilla Court is the proper forum which is evidenced by the fact that proceedings were brought in Anguilla for the determination of the proprietary interest in NBA/ NCBA.

[16] Having reviewed the application with the evidence before me and submissions of Counsel, I have given consideration to the following factors;

1. The applicable test in relation to the present application is the well-known formulation found in American Cyanamid Co (No 1) v Ethicon Ltd [1975] UKHL 1. In brief, is there a serious issue to be tried and if so, where does the balance of convenience lie.

`2. I am of no doubt that the issue as to whether the letter to BOA is the cause of the freezing of the correspondent banking account and the harm that this has or has not caused NCBA is a serious issue to be tried. Allied to this is the issue as to the ownership of funds in the BOA account; are those funds traceable property of BPT or exclusively those of NBA/NCBA. This too is a serious issue to be tried;indeed PBT has already taken the step of filing a claim for an accounting and determination of its interest, if any, before the Court in this matter. In this regard I note in passing that it is a matter of record that NBA is in receivership and the banking relationship between PBT and NBA may be determinative of PBT's interest.

3. The letter to BOA was more of a demand as opposed to a notification; it was a factor influencing BOA in suspending the disputed account.

4. The postulations in the letter as to PBT ownership are not supported by any judicial determination either in Anguilla or the US as to the interest of PBT in the funds in BOA, if any. Based on the evidence of Mr. Molton, it is however in evidence that the issuance of the letter was merely a factor in its decision. Moreover, despite the seemingly overstated claim therein, what BOA drew from the correspondence was that there is a dispute as to the ownership of the funds in the account. The impact of the withdrawal of the letter as sought is therefore equivocal; given that BOA of its own accord decided to exercise a contractual right to suspend the account having determined, seemingly on the advice of its own Counsel that the funds were in dispute pursuant, it has not been demonstrated to the Court that mere withdrawal of the letter would result in a restoration of the account.

5. The damage and harm to NCBA's reputation and operations as asserted in the evidence of M Dinning and the letter from the Governor of ECCB is unparticularised. Generalised statements of possible impacts are insufficient to establish credible and real harm. Indeed there is a palpable absence of evidence that there would be irreparable harm to PBT by the grant of the application

6. Indeed, the contrasting evidence by the Applicant is that NCBA has made and is able to make alternative arrangements. This is evident from the affidavit of M. Dinning of 29th July 2016 where he states:

> *"This service has not been stopped through the freeze that has been applied over the BOA accounts. NCBA has been forced to make other arrangements and thus disrupt a valuable service. Further NCBA has had to contact clients who would use the correspondent bank accounts and ask that they use an alternative correspondent bank to make future payments."*

While this suggests some inconvenience, this leads the court to believe that the damage and harm to the NCBA, while not necessarily trivial, has not been sufficiently established to the required standard.

7. Accordingly, there is no evidence that any impact upon PBT of the non-withdrawal by Mr. Tacon of the letter cannot be compensated in damages. .

[17] In light of the above, I am of the view that the balance of convenience in this matter does not lie with the issuing of the injunction sought by NCBA. I am also not inclined to order that Mr. Tacon cease correspondence with BOA without the permission of the Court. I am satisfied that it is within his power to do so and additionally it is in compliance with the Chapter 11 proceedings order in the US Bankruptcy Court for discovery.

Anti-suit Injunction

[18] NCBA states that following the listing of the application for the Injunction referred to hereinabove, PBT's US Counsel issued a Motion for an order to enforce the Automatic Stay (which arose they allege from the US Bankruptcy Court proceedings) and for damages for contempt (the Stay Motion). NCBA states that the reason behind the filing of the Stay Motion is to attempt to prevent it from pursuing its Injunction application in Anguilla, despite Anguilla being where the main proceedings for determination of PBT's proprietary interests in NBCA and NBA were commenced and also the seat of the main insolvency proceedings of PBT.

[19] NCBA accordingly filed an application for an anti-suit injunction on 2nd August 2016 against PBT acting through its Administrator or agents, for an order in the following terms;

(a) PBT must not take any further steps in relation to its motion for an order enforcing the Automatic Stay and for Damages for Contempt… other than to promptly withdraw the said motion with prejudice

(b) PBT must not assert to US Bankruptcy Court that NCBA is acting/has acted contrary to the Automatic stay imposed by virtue of NCBA's applications to, filings or participation in the Anguilla Court generally, and specifically in the matter herein

(c) PBT must forthwith take necessary steps to procure the immediate release of the freeze that BOA has applied over NCBA's accounts pursuant to a demand made by PBT on or about 5th July 2016.

[20] In the case of Stichting Shell Pensioenfonds v Krys and another (2014) UKPC 41. At para 17, the Privy Council stated as follows:

> *"The fundamental principle applicable to all anti- suit injunctions was stated at the outset of the history of this branch of jurisprudence by Sir John Leach V-C in Bushby v Munday (1821) 5 Madd 297,307, 56 ER 908 [1814-23] All ER Rep 304. The Court does not purport to interfere with any foreign court, but may act personally upon a Defendant by restraining him from commencing or continuing proceedings in a foreign court where the ends of justice require."*
>
> *"The "ends of justice" is a deliberately imprecise expression. It encompasses a number of distinct legal policies whose application will vary with the subject-matter and the circumstances."*

[21] Counsel for NCBA, Mr. Hare submits that the filing of the Stay Motion following the improper demand made to BOA constitutes vexatious and oppressive conduct on the part of PBT as it would require NCBA to incur unnecessary expense to contest the Stay Motion and will prevent NCBA from pursuing remedies in Anguilla. He submits that by the Stay Motion, PBT is seeking to prevent the Anguilla Court from dealing with ancillary applications to a claim that is already before the Court.

[22] Mr. Patterson asserts that there is no basis for the anti-suit injunction and that it is a device through which NCBA seeks to avoid being sanctioned by US Bankruptcy Court for failing to adopt the proper course in relation to challenging the Automatic Stay after the breach has occurred. Counsel also submits that the prevailing precondition is that such grant must fall within the Court's discretion as being just and equitable. He submits the following from Lord Justice Rix in Glencore International AG v Exter Shipping Ltd et al [2002] 2 AER Comm1;

> *"The following conditions are necessary. First, the threatened conduct must be "unconscionable". It is only such conduct which founds the right, legal or equitable but here equitable, for the protection of which an injunction can be granted. What is unconscionable cannot and should not be defined exhaustively, but it includes conduct*

which is "oppressive or vexatious or which interferes with the due process of the court"… The underlying principle is one of justice in support of the "ends of justice"… It is analogous to "abuse of process", it is related to matters which should affect a person's conscience…

"Secondly, to reflect the interests of comity and in recognition of the possibility that an injunction, although directed against the respondent personally, may be regarded as an (albeit indirect) interference in the foreign proceedings, an injunction must be necessary to protect the applicant's legitimate interest in English proceedings; he must be a party to litigation in this country at which the unconscionable conduct of the party to be restrained is directed, and so there must be a clear need to protect existing English proceedings… It follows that the natural forum for the litigation must be in England but this while a necessary, is not a sufficient condition."

[23] Mr. Patterson submits that it cannot be said that PBT has acted unconscionably where, as here, the actions have been taken pursuant to the powers granted by this Court to Mr. Tacon. He says neither can it be said that the injunction is necessary to protect NCBA's legitimate interests in PBT's claim seeking to establish its purported interest.

[24] Mr. Hare however submits that the anti-suit injunction is simply designed to enjoin Mr. Tacon from using the US courts to determine the matters rightly before the Anguilla Court. He states that it is vexatious and oppressive conduct to suggest that NCBA cannot defend itself against PBT in a local case in Anguilla. He states that the only forum for the determination of the proprietary rights is Anguilla and the Court in Anguilla has been asked by Mr. Tacon to determine these rights.

[25] Mr. Hare refers to the Affidavit of David J Molton, US Attorney for NCBA where he states at para 10 that the Automatic Stay provides "*protection against interference with "property of the estate", not property that the debtor nakedly asserts, without proof and based on speculation, may be, should be or through adjudication of a claim may become property of the estate. If the case were otherwise, a debtor in bankruptcy would have free reign to interfere with the property rights of others, solely on the basis of speculative claims to that property. That is exactly what the Debtor is seeking to do here*."

[26] Mr. Molton also states that PBT and Mr. Tacon are not seeking to use the Automatic Stay in good faith to protect established interests in the Debtor's property but instead, they are improperly seeking to use the Stay Motion to extract leverage over NCBA with respect to interests that are entirely in dispute and before any judicial determination regarding those interests.

[27] Mr. Hare further submits that it would be oppressive for NCBA to continue the Stay Motion because no proprietary interest has been judicially determined. He relies on the principles defined in Turner v Grovit [2002]1 WLR 107 para 23 where Lord Hobhouse of Woodborough explained the power of UK court to make restraining order in foreign proceedings;

"The present type of restraining order is commonly referred to as an "anti-suit" injunction. This terminology is misleading since it fosters the impression that the order is addressed to and intended to bind another court. It suggests that the jurisdiction of the foreign court is in question and that the injunction is an order that the foreign court desist from exercising the jurisdiction given to it by its own domestic law. None of this is correct. When an English court makes a restraining order, it is making an order which is addressed only to a party which is before it. The order is not directed against the foreign court."

[28] There is some force in Mr. Patterson's argument that the anti-suit injunction appears to be a device through which NCBA seeks to avoid being sanctioned by US Bankruptcy Court. Further, it is plainly wrong when Mr. Hare submits that the anti-suit injunction is simply designed to enjoin Mr. Tacon from using the US courts to determine the matters rightly before the Anguilla Court. NCBA has not it appears complained of the Chapter 11 and Chapter 15 proceedings. These are the proceedings that have given rise to the Stay Motion. The complaint lies against that Stay Motion, itself not a matter that is justiciable in this Court.

[29] Those observations aside, the Court is guided by the statement of principle expressed by Sopinka J as referred to by Lord Goff of Chieveley in Airbus Industrie GIE v. Patel and others [1998] CLC 702 and approved by our Court of Appeal in Kenneth M. Krys and another v. Sticting Shell Pensioenfonds HCVAP 2011/036. As Pereira CJ noted at paragraph 31 "…*Sopinka J expressed a preference for the formulation of the principle based simply on the 'ends of justice' without reference to oppression or vexation and opined that nonetheless the jusridiction must be exercised having regard to comity and accordingly must be exercised with caution.*" Her Ladyship, the Chief Justice commenting further at paragraph 32 stated "*…we do not understand the authorities to be suggesting that without a finding of oppressive or unconscionable conduct the jurisdiction is not available*." Finally and instructively at paragraph 33, the Chief Justice stated: "*It seems to us that both Lord Rix (in the Glencore case) and Lord Goff (in the Airbus case) tacitly recognised that the jurisdiction is available where the conduct of the claimant by pursuing the foreign proceedings would interfere with the 'due process of the court' or where it is required to protect the polices of the local forum, as a separate and distinct consideration although when looked at from the other end of the spectrum, it may very well be viewed as an abuse of process*."

[30] Applying these principles, the Court finds that NCBA is a party to a claim filed by PBT in this court. As a defendant it has the right to make such applications as it sees fit to advance its defence. In all the premises, it is my determination that it supports the ends of justice to not permit PBT to proceed with the Stay Motion in circumstances where steps are taken in this Court in connection with proceedings filed by PBT. Additionally whilst I am not however prepared to conclude on the evidence that it is vexatious and oppressive conduct i.e. to extract leverage over NCBA that motivates the Stay Motion, I am of the view that it meets the ends of justice and is equitable and in good conscience to have the proprietary interests which PBT is endeavouring to assert determined by the court without obstruction to NCBA in order to secure complete justice.

[31] I have already expressed my views with reference to the freeze on the BOA accounts and as such I decline to make any further order.

Costs

[32] Each party having succeeded on one injunction application, the Court hereby orders that each party is to bear its own costs.

Order

In summary, the Order of the Court is as follows;

(a) That the application for the injunction dated 20th July 2016 is hereby dismissed;
(b) That the application for the anti- suit injunction is granted in the following terms;

i. That PBT, either directly, through its Administrator, or through any of its agents must not take any further steps in relation to its motion for an order enforcing the automatic stay and for damages for contempt that was filed in the United States Bankruptcy Court for the Southern District of New York on 29th July 2016 (as part of Case Number 16-11806 (MG)) other than to promptly withdraw the said motion with prejudice.
ii. That PBT, either directly, through its Administrator, or any of its agents must not assert to the US Bankruptcy Court that NCBA is acting or has acted contrary to the automatic stay imposed by section 362(a) of the United States Bankruptcy Code by virtue of the Third Defendant's applications to, filings or participation in the Anguilla Court generally, and specifically in Claim No; AXAHCV2016/0032.

(c) That each Party bear its own costs of the proceedings herein.

Cheryl Mathurin

High Court Judge