THE EASTERN CARIBBEAN SUPREME COURT

ANGUILLA CIRCUIT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

CLAIM NUMBER: AXAHCV 2016/0051

BETWEEN:

SATAY LIMITED

UNITED DUTY FREE CONCESSIONARIES LTD.

HELEN BAYER CONSTABLE, PATRICK CONSTABLE AND WALTER BAYER II

HELEN BAYER CONSTABLE, TERESA BAYER AND WALTER BAYER II

CADIZ HOLDINGS LTD

CHANTAL CLOUTIER

CMS MANAGEMENT LTD

DAVID CROWLEY

D.N.A PATENTS, INC.

DCIPHER INC.

VODACO LIMITED

DIAMONT COMPANY N.V.

DUNA HOLDING LIMITED

EQUIPMENT LEASING LTD

VAN VEEN CARIBBEAN HOLDINGS

JASON FREEMAN

HBM (ANGUILLA) LTD

HEIDI HOBGOOD

HOPE-ROSS AND THOMPSON

IHATSU FUDOSAN CAPITAL LIMITED

SEAN KENNELLY

A&A LIMITED

EDOUARD LEDEE

ANTHONY MARINI

MARS EXPLORATION INC

LISA MARSHALL

LATIN RETREATS

DOMINIQUE NOIRE

FRANK OLIVIERO

COLIN PERCY

FRANCIS RAINEAU

NECOL LIMITED

RHINO LLC

FSC MANAGEMENT ATTORNEY LLC

CANON LIMITED

SUNNY DAYS MANAGEMENT COPRORATION

SYNETICS CAPITAL CORP LIMITED

GLENYS TAILLON

TSS LLC

ROBERT VELASQUEZ

ANNETTE KRABBE

SIMON DRAKE

JOHN MICHAEL VICTORY

LORRAINE TYSON

STEPHEN JOSEPH CAVAGNARO

GARY CHARKHAM

SUNSHINE PROPERTIES LIMITED

LAURA F.E. VAN HOEVE

VANITA MIRCHANDANI

SHARRON YUAN-SAM

GILLIAN LOOSER

ANGELA TYLER

THE LITTLE SHIP COMPANY LTD

JERRI – LUN ZIMMERMAN

RAYMOND LONGBOTTOM

MANNING KONG

PAMELA YEE LAWRENCE

ISABELLE PATRY

MARIA INES ALMEIDA

MARLAM LTD

DARLINE DESTEPHENS

HOLLY HAVEN, LTD

HABIB JIHA

MENAVIA LANGLAIS

HIROKO YOSHIDA

CLAIMANTS/RESPONDENTS

AND

MARTIN DINNING

HUDSON CARR

SHAWN WILLIAMS

ROBERT MILLER

EASTERN CARIBBEAN CENTRAL BANK

DEFENDANTS/APPLICANTS

APPEARANCES:

Mr. John Carrington QC, Mr. Henry Wiggin and Ms. Rayana Dowden for the claimants/respondents
Ms. E. Ann Henry QC, Ms. C. Debra Burnette and Ms. Navine Fleming for the 1st to 3rd and 5th defendants/applicants

---

2016: October 13;
November 9
2017: February 22

JUDGMENT

[1] **GLASGOW, M**: On 12 August, 2013 the 5th defendant/applicant ("the 5th applicant") published the following Notice of Intervention in the Official Gazette of the Government of Anguilla–

WHEREAS *the National Bank of Anguilla Limited ("the Bank") is duly licensed to conduct banking business in Anguilla under the Banking Act, R.S.A c. B II of the laws of Anguilla;*

AND WHEREAS *the Eastern Caribbean Central Bank ("the Central Bank") is empowered under the provisions of Part IIA, Article 5B of the Schedule to the Eastern Caribbean Central Bank Act, R.S.A, c.E5 of the laws of Anguilla ("the Agreement') establishing the Central Bank to, pursuant to the directions of the Monetary Council and after due consultations therewith, assume control of and carry on the affairs of a financial institution and if necessary to take over the property and undertaking of a financial institution if the Central Bank is of the opinion that –*

(a) the interests of depositors or creditors of the financial institution are threatened; or

(b) the financial institution is likely to become unable to meet its obligations; and

(c) the financial system of a member territory is in danger of disruption, substantial damage, injury or impairment as a result of the circumstances giving rise to the exercise of such powers.

AND WHEREAS *the Central Bank is of the opinion that –*

(a) the current situation at the Bank has threatened the interests of depositors and creditors of the Bank;

(b) the Bank is likely to become unable to meet its obligations should the situation persist; and

(c) the financial system of Anguilla is in danger of disruption, substantial damage, injury or impairment as a result of the prevailing circumstances.

NOW THEREFORE *with effect from 12th August 2013 and in accordance with the powers granted to the Central Bank under the Agreement the Central Bank has assumed control of the Bank.*

In the exercise of those powers the Central Bank intends to –

(i) *take exclusive custody control and possession of all the funds, assets and other property and undertaking of the Bank wherever situated including but not limited to funds on deposits at the Bank;*

(ii) *carry on, manage or concur in carrying on and managing all of the business of the Bank and in furtherance thereof to enter into any agreements or incur any obligations in the ordinary course of business, pay any creditors of the Bank if any such payments is in the discretion of the Central Bank necessary or desirable for the efficient operations of the business or protection, preservation, maintenance, or realization of the assets of the Bank or take any other steps incidental to these powers if in the opinion of the Central Bank it is necessary or desirable to do so;*

(iii) *further investigate the affairs of the Bank concerned and any of its affiliated institutions;*

(iv) *provide or cause to be provided any such financial assistance to the Bank as it considers necessary;*

(v) *restructure the business or undertakings of the Bank or reconstruct its capital base if in the opinion of the Central Bank it is necessary or desirable to do so;*

(vi) *acquire or sell or otherwise deal with the property, assets and undertakings of or any shareholding in the Bank, at a price to be determined by an independent valuer, if deemed necessary;*

(vii) *receive and collect or cause to be received or collected all monies and accounts now owed or hereafter owing to the Bank;*

(viii) *take all steps it considers necessary to protect the interests and to preserve the rights of depositors and creditors of the Bank;*

(ix) *take such further steps as in the opinion of the Central Bank may be necessary to preserve and maintain the stability of the financial system of Anguilla;*

(x) *appoint such persons including companies to assist in the performance of the functions specified in paragraphs (i) to (ix) above .*

Banking activities will continue. Customers are therefore required to continue to service their loans with the Bank.

[2] A notice in respect of the Caribbean Commercial Bank (Anguilla) Limited was issued on the same date in similar language. The two notices are hereinafter referred to as "the notices".

[3] The 5th applicant's authority to issue the said notices emanated from Part IIA, Article 5B of the schedule to the Eastern Caribbean Central Bank Act, R.S.A. c. E5 of the laws of Anguilla which reads –

> *5B. (1) Where the Bank is of the opinion –*
>
> *(a) that the interests of depositors or creditors of a financial institution are threatened;*
>
> *(b) that a financial institution is likely to become unable to meet its obligations or is about to suspend or has suspended payment to its creditors or depositors; or*
>
> *(c) that a financial institution is not maintaining high standards of financial probity or sound business practices; the Bank shall, in addition to any other powers conferred on it by any other law and notwithstanding the provisions of any other law to the contrary, have power –*
>
> *(i) to investigate the affairs of the financial institution concerned and any of its affiliated institutions and to appoint a person or persons for that purpose;*
>
> *(ii) to such extent as it thinks fit, to assume control of and carry on the affairs of the financial institution and, if necessary, to take over the property and undertaking of the financial institution;*
>
> *(iii) to take all steps it considers necessary to protect the interests, and to preserve the rights of depositors and creditors of the financial institution;*
>
> *(iv) to restructure the business or undertaking of the financial institution or to reconstruct its capital base;*
>
> *(v) to provide such financial assistance to the financial institution as it considers necessary to prevent the collapse of the financial institution;*
>
> *(vi) to acquire or sell or otherwise deal with the property, assets and undertaking of or any shareholding in the financial institution, at a price to be determined by an independent valuer;*
>
> *(vii) to appoint such persons and to establish such companies or corporations as it considers necessary to assist in the performance of the functions conferred by sub-paragraphs (i) to (vi) and the provisions of Article 50 shall apply to such persons, companies or corporations;*

(viii) to ensure that the financial institution maintains high standards of financial probity and sound business practices and for that purpose to examine and supervise the operations of the financial institution, issue cease and desist orders and stipulate prudential criteria to be followed by the financial institutions as it may deem necessary.

(2) The powers of the Bank under paragraph (1) shall not be exercised unless the Bank is also of the opinion that the financial system of any of the territories of Participating Governments is in danger of disruption, substantial damage, injury or impairment as a result of the circumstances giving rise to the exercise of such powers.

(3) Pursuant but without prejudice to its powers under paragraph (1), and notwithstanding the provisions of any other law, the Bank may appoint any person or persons to act as Receiver or Manager and such appointment shall take effect as though made by the depositors and other creditors of the financial institution pursuant to a charge over all the fixed and floating assets of the financial institution and without prejudice to any other powers vested in such Receiver or Manager the Receiver or Manager shall have power –

(a) to take possession of, collect and get in any property of the financial institution and for that purpose to take any proceedings in the name of the financial institution or otherwise as may seem expedient;

(b) to carry on, manage or concur in carrying on and managing the business of the financial institution or any part thereof and for any of those purposes to raise or borrow any money that may be required on the security of the whole or any part of the property of the financial institution;

(c) forthwith to sell or concur in selling (but where necessary with the leave of the Court) and to let or concur in letting and to accept surrenders of leases or tenancies of all or any of the property of the financial institution and to carry any such sale, letting or surrender into effect by conveying, leasing, letting or accepting surrenders in the name and on behalf of the financial institution; and
any such sale may be for cash, debentures, other obligations, shares, stock or other valuable consideration and may be payable in a lump sum or by instalments spread over such period as the Bank shall think fit and plant machinery and other fixtures may be severed and sold separately from the premises containing them without the consent of the financial institution being obtained thereto;

(d) to make any arrangement or compromise which he shall think expedient;

(e) to make and effect or repair renewals and any improvements of the financial institution's equipment and effects and to maintain or renew all insurances;

(f) to appoint managers, agents, officers, servants and workmen for any of the aforesaid purposes at such salaries and for such periods as he may determine;

(g) to do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid and which he or they lawfully may or can do as agent for the financial institution.

[4] Article 5C (1) to (4) stipulates the requirement for the issuance of the notices and matters related thereto –

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

(2) The notification must state –

(a) the property and undertaking that the Bank proposes to take over,

(b) the powers of control that the Bank proposes to exercise, and shall give such particulars as the Bank considers necessary for the information of persons having business dealings with the financial institution.

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

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

[5] Pursuant to the statutory powers stated in the notices and Article 5C, the 5th applicant, at various periods between 12 August, 2013 and 22 April 2016 appointed the 1st to 4th defendants to the office of conservators of the Caribbean Commercial Bank (Anguilla) Limited ("CCB") and the National Bank of Anguilla Limited ("the NBA"). The conservatorship subsisted until the two entities were placed into receivership on 22 April 2016.

[6] On June 28, 2016 the claimants/respondents ("the respondents") filed a claim in which they aver that further to the 5th applicant's intervention into the affairs of NBA and CCB, it authorized the 1st to 4th defendants/applicants (the 1st to 4th applicants and the 5th applicant are together referred to herein as "the applicants") to take over the management of the National Bank of Anguilla (Private Bank & Trust) Limited ("PBT") and the Caribbean Commercial Investment Bank Limited ("CCIB"). The pleadings state that the intervention into the affairs of PBT and CCIB continued until 19 April 2016 when the respondents were informed that, pursuant to the Anguilla Financial Services Act,

R.S.A, c.F28, Mr. William Tacon was appointed to the office of administrator of PBT and CCIB with effect from February 22, 2016.

[7] The respondents' claim that when the applicants took over the affairs of PBT and CCIB and indeed for the period during which the intervention into the two banks subsisted, the applicants acted without authority and so negligently managed the said institutions that the respondents suffered loss and damages.

The specific complaints are that -

(1) Article 5B does not endow the 5th applicant with the authority to take control of PBT and CCIB which were affiliates of NBA and CCB;

(2) The notices could not and did not extend to PBT and CCIB as these institutions were separate legal entities which were not regulated by the 5th applicant;

(3) By taking control of the management of PBT and CCIB, the applicants acted as de facto directors of the said entities and owed a fiduciary duty to the respondents who are creditors of the same, to act in good faith and with due diligence in the custody and control of the property of the PBT and CCIB. This responsibility was paramount as the applicants knew or ought to have known that PBT and CCIB along with their parent banks, NBA and CCB were in a state of insolvency, on the brink thereof or were in doubtful solvency;

(4) By their conduct the applicants acted negligently in the management of PBT and CCIB and in breach of trust thereby causing loss to the respondents. The respondents seek special damages in the amount of US$13,028 846.17 plus interests and costs.

The application disputing the court's jurisdiction

[8] By way of recital of how the proceedings unfolded, the applicants filed an acknowledgement of service on July 22, 2016 in which they denied the claims made by the respondents and signaled

their intention to defend the same. On July 26, 2016 the applicants filed an application to extend the time to file their defence. This application was never dealt with by the court as the parties reached consensus and filed a consent order on July 29, 2016 in which the respondents agreed to an extension of the time for the applicants to file their defence.

[9] No defence was filed as agreed. Rather, the applicants filed an application dated August 12, 2016 pursuant to rule 9.7 of the Civil Procedure Rules 2000 ("CPR") disputing the court's jurisdiction to try the claim. The application is supported by the affidavit of Shawn Williams, the 3rd applicant who depones that he is authorized by the 1st, 2nd and 5th applicants to depose to the matters set out in the said affidavit.

The grounds of the application

[10] The grounds for the application are that –

(1) Article 50 (7) of the agreement grants the 2nd and 3rd applicants immunity from legal process with respects to acts performed by them in their official capacity save where the said immunity has been waived by the bank;

(2) The conjoint effect of Articles 50 (7) and 5B(1) (vii) of the agreement clothes the 1st applicant with immunity from legal process in respect of acts performed by him in his official capacity consequent upon his appointment pursuant to Article 5B(1)(vii) of the agreement. The immunity further applies to the 1st and 4th applicants since at all material times they acted in their official capacity further to their appointment pursuant to Article 5B(1)(vii).;

(3) The immunity applies to the 2nd and 3rd applicants since at all material times they were acting in their official capacity as employees of the 5th applicant. All the applicants benefit from the immunity save where it is waived by the bank;

(4) Article 50(2) of the agreement grants the 5th applicant immunity from all forms of judicial process except where the said immunity has been expressly waived by the 5th applicant. There has been no such waiver of immunity by the 5th applicant.

[11] At paragraphs 14 – 16 of the affidavit, the 3rd applicant explains the rationale for the 1st to 4th applicants' appointment as conservators (managers) of PBT and CCIB –

> *14. The principal and overarching objective of the Interventions… was and remained … the stability of the banking system in Anguilla and the interests of depositors and creditors of the intervened Banks, given that the financial system of the territories of Participating Governments was in imminent danger of disruption, substantial damage, injury or impairment as a result of the circumstances giving rise to the exercise of the emergency powers.*
>
> *15. …the decisions taken by me were driven by these objectives at all times acting according to the mandate which I was given and guided by the Oversight Committee of the 5th defendant which to my knowledge guided the process of the Conservatorship from the dates of Intervention to the dates of Resolution of NBA and CCB;*
>
> *16… the 1st and 2nd defendants… acted according to the mandates given them by the 5th Defendant and guided by the Oversight Committee of the 5th defendant…*

[12] Paragraphs 17 to 19 of the 3rd applicant's affidavit describe the actions taken in respect of PBT and CCIB. The 3rd applicant deponed that the two companies maintained accounts in NBA and CCB, which accounts fell under "the purview" of the applicants by reason of the intervention. He further elucidates that on taking up office as conservator of NBA and CCB, he observed that the operations of PBT and CCIB *"were managed … by the NBA and CCB and their respective staff under the terms of Service Agreements made … between the NBA and the PB&T and the CCB and CCIB."*[1] The 3rd applicant also observed that[2]

> *the funds held in the NBA and the CCB for the PB&T and the CCIB were significantly co-mingled with the funds of the NBA and the CCB so as to render it impossible to segregate*

[1] 3rd applicant's affidavit filed August 12, 2016 at para. 17
[2] Ibid at para. 18

the same without adverse repercussions for financial stability. Given that time was needed to formulate a resolution plan, source funding while maintaining banking stability …, the 5th defendant formed the opinion that maintenance of the status quo was in the best interest of achieving the objectives of the intervention. As such and having regard to the objectives of the intervention…, the funds of the PB&T and the CCIB continued to be managed as part respectively of the NBA and CCIB throughout the Intervention period.

[13] The affidavit concludes by asking the court again to find that the involvement of the 1st to 4th applicants in the management of PBT and CCIB was done in their official capacities either as employees or appointees of the 5th applicant. The court is also asked to find that the immunities conferred on the applicants as set out above have not been waived. Accordingly the jurisdiction does not exist for the claim to be tried in this court.

The respondent's opposition to the application

[14] The respondents' opposition to the application is narrated in the affidavit of Walter Bayer II, attorney at law who was authorized by the respondents to swear the same on their behalf. In it, he depones that he read the notices along with the terms and conditions of the appointment of the 1st to 4th applicants. He notes that the reference to banks in the letters of appointment is limited to NBA and CCB. He further complains that –

(1) Mr. William Tacon, the receiver for NBA and CBB has indicated that PBT and CCIB never made deposits to NBA and CCB but rather placements were made to the latter institutions by PBT and CCIB;

(2) Although the gazette copy of the notices *"did not extend to PBT and CCIB, the Applicants still assumed control of PBT and CCIB and notified depositors that they had done so.";*

(3) The 1st and 2nd applicants registered themselves variously as directors and/ or officers of PBT and CCIB. The 1st and 2nd applicants had no authority from the 5th applicant or

under the terms of the Act to manage the affairs of PBT and CCIB and thus they acted wrongly in so doing;

(4) The applicants are all responsible for the adverse consequences *"of the continuation of the co-mingling of the funds of these institutions with those of the NBA and CCB…"*

[15] The respondents' response concludes by asking the court to dismiss the application disputing its jurisdiction.

The applicants' legal submissions

Waiver

[16] The application is brought pursuant to CPR 9.7(1) which prescribes the following –

> **Procedure for disputing court's jurisdiction**
>
> *9.7 (1) A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.*
>
> *(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.*
>
> *(3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed to extend the time for filing a defence.*
>
> *(4) An application under this Rule must be supported by evidence on affidavit.*
>
> *(5) A defendant who –*
>
> *(a) files an acknowledgement of service; and*
>
> *(b) does not make an application under this Rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim.*
>
> *(6) An order under this Rule may also –*
>
> *(a) discharge an order made before the claim was commenced or the claim form served;*
>
> *(b) set aside service of the claim form; and*

(c) strike out a statement of claim.

(7) If on application under this Rule the court does not make a declaration, it –

(a) may –

(i) fix a date for a case management conference; or

(ii) treat the hearing of the application as a case management conference; and

(b) must make an order as to the period for filing a defence.

(8) Where a defendant makes an application under this Rule, the period for filing a defence is extended until the time specified by the court under paragraph (7) (b) and such period may be extended only by an order of the court.

[17] The applicants argue that they have brought the application within the period for filing a defence. In this regard it is said that the period for filing a defence includes any period by which the time for filing a defence has been extended by the court or the parties have agreed to extend the time for filing a defence. Reliance is placed on **Charter Capital Limited v National Bank of Anguilla Limited and Eastern Caribbean Central Bank**[3] to underscore the point that a defence or other step taken in the proceedings would amount to a submission to the jurisdiction of the court and by extension, a waiver of the immunity. The applicants argue that the application having been filed within the period agreed to be extended by the parties, the application has been brought preemptively and before any step is taken in the proceedings. The application to dispute the court's jurisdiction is therefore properly before the court.

Immunity

[18] The assertion of immunity from suit is raised pursuant to Article 50(1) of the Act which "*confers certain status, immunities and privileges on various persons, entities and things in order to enable the Bank to fulfill the functions with which it is entrusted.*"[4] In particular Articles 50(2) and 50 (7) are pleaded in aid of the objection –

[3] AXAHCV2014/0036

[4] Applicants' submission dated October 27, 2016 at para. 16

50. (1) To enable the Bank to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territory of each Participating Government.

(2) The Bank, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.

(7) The Governor, the Deputy Governor, the appointed Directors, officers and employees of the Bank -
(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity;
(ii) not being local nationals, shall be granted the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by Participating Governments to the representatives, officials and employees of comparable rank of other Participating Governments;
(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by Participating Governments to representatives, officials and employees of comparable rank of other Participating Governments.

[19] The court is urged to consider the dictum in **Capital Bank International Limited v Eastern Caribbean Central Bank and Anor**[5] where it was instructed that the court ought to "*look at the express terms in which the immunity has been granted."* In this context, Sir Dennis Byron CJ articulated the following in respect of Article 50[6] –

The language is clear and unambiguous and the statutory intention unmistakable. The intent of section 50 is that the first respondent cannot be sued or be subject to any legal process unless it expressly waives the immunities and privileges and even if it does, its property, assets and archives are protected from execution. The second respondent is immune from legal process once he acts in his official capacity, unless the first respondent waives the immunities and privileges conferred on him

[20] Each of the applicant claims the said immunities in varying capacities. For the 1st applicant it is said that Article 5B(1)(vii) of the Act applies to his appointment. The applicants submit that the words "the provisions of Article 50 shall apply to such persons, companies or corporations" in Article 5B (1)(vii) make clear the parliamentary intent that the immunities stated in Article 50 extends to the persons or entities appointed on the terms of Article 5B(1)(vii). The 1st applicant was such a person

[5] GDACAP 2002/0013 and 0014
[6] Capital Bank International Limited v Eastern Caribbean Central Bank and Anor GDACAP 2002/0013 and 0014

appointed further to the provisions of Article 5B (1)(vii) and as such he is covered by the immunities conferred by Article 50.

[21] In respect of the 2nd and 3rd applicants, the immunities granted by Article 50(7) are extended to them as employees to the extent that such persons are "immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives the immunity." The argument runs further that the 1st applicant is on equal footing with the 2nd and 3rd applicants as employees of the 5th applicant and they are all bestowed with the immunity from legal process enacted at Article 50(7).

[22] In respect of the 5th applicant, reliance is placed on Articles 50(2),(3) and (4) for the view that the 5th applicant, its assets and its property are immune from legal process except for the instances where the 5th applicant expressly waives the said immunity. The above recited dictum in **Capital Bank** case is restated as authority for the proposition on the breadth of the said immunity. The applicants reiterate that there is no pleading or evidence before the court that this immunity has been waived by the 5th applicant in respect of itself or any of the other applicants.

[23] The applicants also address the affidavit in opposition to their application. It is said that the affidavit in opposition merely details acts of breach of authority against the 1st and 2nd applicants. No *"allegations supporting the essential claims in the Statement of Claim are made against either the 3rd or 5th Defendants"*[7].

[24] Regarding the complaints made against the 5th applicant, the applicants note that such allegations can only be made against individuals and not a legal entity such as the 5th applicant. In light of the paucity of allegations against the 5th applicant and considering the "breadth" of the immunity afforded by Article 50 (2), it is said that *"it is clear that the Court should not exercise its jurisdiction to hear the claim against the 5th Defendant."*[8]

[7] Supra, note 4 at para. 38
[8] Supra, note 4 at para. 41

[25] Where the immunity of the 1st to 3rd applicants is concerned, the argument is made that the only qualification to the immunity afforded to them by Article 50 of the Act, is that the immunity extends to acts performed in their official capacity. The submission is that [9]

> *The Court may only go as far as to determine whether the acts complained of were performed by the Applicants in their official capacity. That, the Applicants submit, is the clear and unambiguous meaning of the statute. In particular, the language of the statute does not foreshadow or contemplate an examination by a Court as to the propriety of the acts performed by the Applicants.*
>
> *…so long as the Court is satisfied that the acts performed by them were done in their capacities as Conservators appointed by the Bank pursuant to the Notice of Intervention the Court should properly conclude that those acts are done in their official capacity and as such, are protected by the immunity…*

[26] The applicants challenge the respondents' assertion that the acts of the 1st to 3rd applicants were not performed in their official capacity since those actions were taken in respect of PBT and CCIB which entities were separate legal personalities and were not capable of falling within the scope of the notices. The applicants rejoin that the court could only examine this complaint if it first finds that the immunity does not extend to the applicants. In any event, the applicants continue, when all the pleadings, documentation and testimony are considered by the court, it will be inevitably found that the actions complained of were performed by the applicants in their official capacity as conservators of the intervened banks.

[27] The applicants have no issue with the assertion that PBT and CCIB are wholly owned subsidiaries of NBA and CCB and are thus to be treated as "affiliated institutions" as defined in the Act. It is, however, the applicants' position that PBT and CCIB are to be considered the property of NBA and CCIB by reason of the definition of "affiliated institutions" set out in Article 5B.

[28] In terms of the remit of the notices, the court's attention is drawn to Articles 5B(1)(i) to ((iii) recited above. The argument is that the powers set out in Article 5B are not confined merely to *"the financial institutions under intervention but extend to affiliated institutions and the property and*

[9] Supra, note 4 at para. 43

undertakings of the Bank under intervention."[10] The powers therefore extend to *"investigate the affairs of the financial institutions concerned and any of the affiliated institutions and to take all steps necessary to protect the interests and preserve the rights of depositors and creditors of the financial institutions. Also the power is expressly included for the takeover of the property and undertaking of the financial institutions under intervention*."[11] The applicants urge that the involvement by the 1st to 3rd applicants in the management of PBT and CCIB in the capacity of appointees and employees of the 5th applicant demonstrates the exercise of no more than the precise powers set out under the Act, notices of intervention and the individual letters of appointment. The will and intent of parliament, while seemingly "broad and far reaching" is aimed to "*meet the overarching objective, namely to protect the stability of the banking system in Anguilla and the currency, financial system and economies of the participating territories of the Central Bank."*[12] This was indeed the approach taken by the court in the **Capital Bank** case and the same is commended to this court.

The respondents' submissions in response

[29] The respondents contend that the applicants are not entitled to rely on the immunities recited in the Act. It is the respondents' case that while the NBA and CCB are sole shareholders of PBT and CCIB respectively, the latter entities are licensed and regulated under the Trust Companies and Offshore Banking Act Cap T60. The licences were granted by the Anguilla Financial Services Commission which is the statutory body clothed with the responsibility to issue such licences and to regulate them pursuant to the Trust Companies and Offshore Banking Act. NBA and CCB are otherwise licensed and regulated under the provisions of the Banking Act Cap B11 and are thereby local banks which fall under the regulatory jurisdiction of the 5th applicant.

[30] The respondents further explain that when the 1st to 4th applicants took over control of the PBT and CCIB they conducted the affairs of the said institution in a negligent manner and in breach of trust thereby causing loss to the respondents. Compounding matters, the respondents say, the Government of Anguilla implemented a resolution plan sanctioned by the 5th applicant, whereby

[10] Supra, note 4 at para. 56
[11] Supra, note 4 at para 57
[12] Supra, note 4 at para 61

assets belonging to PBT and CCIB were transferred to a new entity, National Commercial Bank of Anguilla thereby causing loss to the depositors of funds with the two entities. The applicants are said to have assisted the Government of Anguilla "to deprive the Claimants of their deposits."

[31] The respondents argue that the applicants cannot be heard to claim immunities pursuant to the Act for 2 reasons –

(1) The issue of immunity must be dealt with preemptively and before any step is taken in the proceedings. Having filed the request for an extension of time to file the defences without reservation, the applicants clearly signaled their intention to defend the claim and have expressly waved immunity. They should not be permitted to raise the right to immunity;

(2) Even if the steps taken by the applicants are not considered a waiver of the immunity, *"the plea of immunity is available only with respect to acts done in performance of the statutory powers and does not extend to acts purporting to be done within those powers but which are in fact outside of such powers."*[13]

Waiver of immunity

[32] Regarding the first reason, the respondents filed further submissions in which they elaborated that **Charter Capital** is authority for the view that the immunity plea is one contesting the jurisdiction of the court. It follows, they continue, that where the persons seeking such immunity invoke the jurisdiction of the court, they have acknowledged and accepted the same and cannot afterwards sustain a challenge thereto. The court is to look at the applicants' conduct objectively and if it is found that they have taken an unequivocal step such as the application for an extension of time without reserving their position or their jurisdictional challenge, the court ought to find that they waived their right to challenge the jurisdiction. **Global Multimedia International Ltd v ARA Media Services**[14] is cited as authority for this approach.

[13] Respondents' submissions filed October 11, 2016
[14] [2006] EWHC 3612

The immunity point

[33] In respect of the immunity point, Articles 50 (7) is said to extend only to the acts performed by the class of persons named in the subsection and further only to such acts performed in their official capacity. In light of the fact that there is nothing in the Act permitting the 5th applicant to intervene in and take over the management of PBT and CCIB, none of the conduct of the other applicants as managers of the institutions could be described as acts done within their official capacity. At its highest, PBT and CCIB can be described as "affiliated institutions" according to the definition set out in Article 5A. Article 5B limits the 5th applicants' authority to intervene in affiliated bodies to the power to investigate the affairs of such institutions as affiliates of NBA and CCB. To the extent that the 5th applicant was permitted to take over the property belonging to NBA and CCB, this would have been limited to taking over the shareholding held by NBA and CCB in PBT and CCIB. The respondents rely on the guidance stated in **Capital Bank**, that the immunity "must be strictly construed to ensure that no greater immunity is granted than intended". The court should not give[15]

> *Too wide a construction in applying immunity provisions also to acts which purported to be in the performance of functions conferred by the Act but which were in fact outside the powers which it conferred… provisions of this nature should be strictly construed. They should not be treated as a licence for unlawful expropriation without compensation, provided only that the acts are done in good faith and without negligence.*

[34] The applicants are said to have acted outside of the scope of the immunity with respect to PBT and CCIB since the acts they performed as managers of the two entities were not covered under the range of statutory powers stated in Article 5B. Article 5B powers are limited to actions which "are done in good faith and without negligence as required under Article 5F."

[35] In closing submissions, the respondents expanded on these arguments. Article 50 is said to contain two different types of immunities. Article 50 endows the 5th applicant with complete immunity while a "limited" immunity is conferred on the Governor, Deputy Governor, appointed

[15] Gulf Insurance Limited v Central Bank of Trinidad and Tobago [2005] UKPC 10 at para. 53

directors, officers and employees of the 5th applicant to the extent that they acted within their official capacity. The 5th applicant in either instance could expressly waive the immunity.

[36] The arguments continue that the 1st applicant will not benefit from the Article 50 (7) immunity as he does not fall within the class of persons to whom the section applies. The respondents dispute whether the terms of Article 5B(1)(vii) can "widen" the terms of Article 50 to assist the 1st applicant who is not one of the named persons in Article 50(7).

[37] Several submissions are proffered for the respondents' expanded argument that Article 5B(1)(vii) cannot be widened to confer the 1st applicant with the benefit of the immunity set out in Article 50

(1) Such an approach to interpreting Article 5B(1)(vii) gives a strained meaning to Article 50 which "clearly delimits the persons to whom the immunity is granted." A proper construction of the conjoint meaning of Articles 5B(1) (vii) and Articles 50 would lead to the conclusion that the persons specified in Article 50(7) are the only persons who could benefit from the immunity stated in the said article. Other appointees of the 5th applicant must have recourse to Article 5F for immunity;

(2) The applicants' construction is incompatible with the statutory principle of construction viz. *expressio unius est exclusio alterius.*

(3) The posture is inconsistent with the learning in **Capital Bank** and **Gulf Insurance** that the immunity must be strictly construed to ensure that no greater immunity is granted than is contemplated.

[38] A larger contention is that none of the applicants are entitled to rely on the Article 50 immunity because Article 5F specifically addresses immunity with respect to the exercise of powers under Part IIA. The court is urged to apply the principle *generalibus specialia derogant* (the situation was intended to be dealt with by the specific provision) to the facts of this case to find that Article 5F is

applicable to the applicants' case. In that regard it is said that the 5th applicant and persons appointed by it [16]

> *are not subject to any action or liability to any person where (i) such action is in respect of anything done or omitted to be done in good faith and without negligence; and (ii) the action is in respect of something that is done or omitted to be done in the performance or connected with the performance of functions conferred on the Bank under Part IIA of the ECCB Act.*

[39] The applicants are unable to benefit from the Article 5F immunity as the allegations of negligence and breach of trust are yet to be answered in these proceedings. In any event, the 5th applicant had no authority to manage the affairs of PBT and CCIB under its Article 5B powers and as such it cannot be said that the impugned acts or omissions were done in pursuance of functions of the 5th applicant. For this latter reasoning, the expanded arguments posit that one must look to the powers set out in Article 5B to ascertain whether the acts performed by the applicants were indeed conducted in their official capacity since this is the extent of the remit of the immunity conferred by Article 50(7). The powers of intervention granted to the 5th applicant are not at large. When one looks at the conditions stipulated for the same it appears that the 5th applicant has the power to take any of the steps set in Article 5B(1) (i) to (vii) only after it is satisfied that the *"three threshold requirements are met and the 5th applicant holds the opinion stated at Article 5B(2)"*[17]. The 5th applicant's powers of intervention are therefore circumscribed and its discretion to act is *"limited to the exercise of statutory powers either under the ECCB Act or some other enabling Act."*[18] The court is asked to find that Article 5B(1)(i) is the only provision which stipulates the actions to be taken in respect of affiliated institutions. The power granted thereunder to the 5th applicant is limited to the investigation of affiliated institutions. The statutory construction principle *expressio unius* applies to this situation since it is apparent that no other power than one to investigate affiliate institutions arises under Article 5B(1).

---

[16] Supra, note 4 at para. 17
[17] Supra, note 4 at para 22
[18] Supra, note 4 at para 23

[40] The respondents submit that

(1) The affiliated institutions are regulated by another institution. One cannot presume that the 5th applicant is permitted to "trespass" on areas of the regulatory regime set up by the Government of Anguilla unless specific provisions have been stated to that effect;

(2) The subparagraphs of Article 5B which enact the 5th applicant's powers of intervention refer specifically to financial institutions which expression is defined;

(3) No recourse could be made to Article 5B(1)(iii) since no evidence has been led that the 5th applicant ever invoked the powers conferred thereunder. Indeed the applicants provide evidence that they were merely seeking to preserve the status quo that the funds of NBA and CCB were comingled with those of their affiliates PBT and CCIB. To take steps as required by Article 5B(1)(iii) would require positive action and not merely preserving an existing state of affairs as claimed by the applicants;

(4) The notices did not state any power of management of PBT and CCIB but instructed investigation of their affairs. Paragraph (ix) of the notice of intervention is stated in excess of the powers set out in Article 5B(1) and as such cannot be used to confer a non-existing power;

(5) Consistent with the learning in **Capital Bank** and **Gulf Insurance**, the 5th applicant is obligated to show that it is entitled to claim the broad immunity stated in Article 50. The 5th applicant has failed to do so since the court cannot assume that the appointees of the 5th applicant were acting pursuant to any of the statutory powers granted to the 5th applicant under Article 5B(1) of the Act.

Issues for consideration

[41] This application can be determined by examining the following two questions –

(1) Have the applicants waived the right to claim the statutory immunities by applying for an extension of time to file in these proceedings? (the waiver issue);

(2) If the answer to issue one is no, have the applicants made out a case that the statutory immunities apply to the case brought herein against them (the immunity issue).

ANALYSIS

Waiver

[42] An application to dispute the jurisdiction to try a claim is governed by the procedure outlined in CPR 9.7. CPR 9.7 is set out above in this judgment along with the full arguments of the parties. In short, the respondents urge the court to find that, by filing an application for an extension to file a defence without reservation, the applicants have waived the immunity. The applicants argue the converse and answer that CPR 9.7 itself states that an application to dispute the court's jurisdiction can be brought during any period by which the time to file the defence has been extended by accord or by an order of the court. Accordingly the applicants have not waived the right to dispute the court's jurisdiction by filing an application for an extension of time to file a defence.

[43] The cases of **Charter Capital Limited v National Bank of Anguilla Limited and Eastern Caribbean Central Bank** and **Global Multimedia International Ltd v ARA Media Services** offer some guidance on the approach that the court should adopt to resolving this issue. In **Charter Capital** the learned master said this about the waiver of immunity[19]

> *where a person raises the issue of immunity as a bar to continuing proceedings such application must of necessity be raised pre-emptively, before any step is taken in the proceedings. Any contrary action may be seen to be a waiver of that immunity. Filing a defence would be a step taken by the Central Bank in the proceedings.*

[19] AXAHCV 2014/0036

[44] A more fulsome discourse on the relevant test may be found in **Global Multimedia International Ltd v ARA Media Services.** As did Sir Andrew Morritt C in that case[20], I reproduce the full exposition of Patten J in **SMAY Investments Ltd v Sachdev [2000] 1 WLR 1973 at p.1976,** quoting from Colman J in **Spargos Mining NL v Atlantic Capital Corporation [1995]**

> *In approaching the question of submission, I have in mind the following authorities. In Astro Exito Navagacion S.A. v. W.T. Hsu , otherwise known, more pronounceably, as The 'Messiniaki Tolmi' , [1984] 1 Lloyds Reports, 266, Lord Justice Goff (as he then was) at page 270, said this:*
> *Now a person voluntarily submits to the jurisdiction of the Court if he voluntarily recognizes, or has voluntarily recognized, that the Court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in the proceedings which in all the circumstances amounts to a recognition of the Court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the Court, amounts to a voluntary submission to the jurisdiction must depend upon the circumstances of the particular case.'*
>
> *In Sage v. Double A Hydraulics Ltd, [1992] Times Law Reports, 165, Lord Justice Farquharson said (and this is a report of the judgment which is not reported in oratio recta):*
>
> *'A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the Defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge.'*
>
> *In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission.*
>
> *If the well-informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning.*

[20] [2006]EWHC 3612 at para 27

[45] The facts of **Global Multimedia** disclose that the applicant took several steps in the proceedings including applying for an extension of time to file his defence, advancing a defence on the merits in the form of settlement agreements and threatening the claimant to apply to strike out the claim if the same was not discontinued. In arriving at the conclusion that the several actions of the applicant indicated that he had submitted to the jurisdiction of the court, Sir Andrew Morritt C opined that "*the test to be applied is an objective one and what must be determined is whether the only possible explanation for the conduct relied on is an intention on the part of the defendant to have the case tried in England.*"[21]

[46] The following guidance emerges from the case –

(1) a party voluntarily submits to the jurisdiction of the court if he voluntarily takes a step in the proceedings which, in all the circumstances, amounts to a recognition of the court's jurisdiction to try the claim;

(2) The effect of the submission to the jurisdiction is that the party is thereafter precluded from objecting to the court's jurisdiction to try the claim. Whether an application to the court amounts to a voluntary submission would therefore be determined by considering all the circumstances;

(3) In arriving at the conclusion that a party has voluntarily submitted to the court's jurisdiction, it is useful to ask whether a disinterested bystander with knowledge of the case would have regarded the acts of the applicant to be inconsistent with making and maintaining a challenge to the court's jurisdiction to try the claim;

(4) In this context, the disinterested bystander must have concluded that the step taken by the applicant cannot be explained except on the basis that the applicant has submitted to the jurisdiction of the court;

[21] [2006] EWHC 3612 at para. 28

(5) If the step taken, although consistent with the acceptance of the court's jurisdiction, is a step that is explained as being necessary or useful for some other purpose than acceptance of the court's jurisdiction, there can be no submission thereto;

(6) The representation derived from the conduct of the party must be unequivocal and capable of only one meaning. If it is explicable on other grounds in addition to the submission to the court's jurisdiction, then there is no submission thereto.

[47] Applying the foregoing to the facts of the case, I must disagree with the respondents' submissions that the applicants have submitted to the jurisdiction of the court. In the **Global Multimedia** case several distinguishing features were evident which together indicated that the applicant who was disputing the court's jurisdiction had previously submitted himself thereto. These actions included sending letters to the claimant in which he acknowledged previous orders of the court, requesting an extension of time to file a defence to the claim, indicating on the acknowledgment of service form that he intended to defend the claim rather than an indication that he intended to dispute the court's jurisdiction which was an option available to him on the form, by way of correspondence challenging the merits of the claim based on settlements agreement and demanding that the respondent withdraw the claim based on the terms of the settlement agreements. The applicant also threatened to apply to strike out the claim if the respondent did not withdraw the claim further to the terms of the settlement agreement. It was also found that he took an inordinate length of time to apply to extend the time within which he applied to challenge the court's jurisdiction. The totality of these actions or inactions led the court to conclude that the applicant had submitted himself to the court's jurisdiction and the application to dispute the same therefore failed.

[48] The facts and procedure being considered in Global Multimedia are somewhat different than the facts and procedure on the present application. For one thing, the English CPR being considered in **Global Multimedia** gave the applicant the specific option of signaling an intention to challenge the court's jurisdiction on the acknowledgment of service form. Even though failing to exercise this option was not by itself fatal against the applicant who wished to contest the court's jurisdiction, it was found that in all the circumstances, the applicant would have been well advised to tick the box on the acknowledgment of service form signaling an intention to contest the court's jurisdiction.

This inaction coupled with the other features of the case mentioned above indicated that he had submitted to the court's jurisdiction. No such feature appears in our CPR. Our CPR requires the applicant to file an acknowledgment of service form which, among other things, enjoins him or her to indicate whether or not the claim is accepted in whole or part or is to be defended. There is no such requirement for an early indication of an intention to dispute the court's jurisdiction.

[49] There is an added and more prominent distinguishing procedural feature on this application that was not present on the application in **Global Multimedia.** The provision in the English CPR under discussion therein enjoined an applicant applying to dispute the court's jurisdiction to file the necessary application within 14 days of filing an acknowledgment of service (CPR 11.4(a). Our CPR 9.7(3) permits the applicant to apply to dispute the court's jurisdiction during "any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed." In **Global Multimedia** the rules permitted an applicant to apply to extend the time to file a defence, but did not concomitantly expressly permit the applicant to apply to dispute the court's jurisdiction during a period that time was extended to file the defence. On the other hand, the applicants in this case were doing precisely what the rules permitted them to do whether for tactical reasons or otherwise. The rules permit - (1) the applicant to apply to extend the time to file a defence (CPR 10.1(5) – (9)); and (2) allows the applicant to apply to dispute its jurisdiction during the period during which it permits an extension. It ought not to be said therefore that the application to extend the time to file the defence is an unequivocal act of submission to the court's jurisdiction when the rules themselves permit the applicant to dispute the court's jurisdiction during the period in which time to file the defence has been extended[22].

[50] I therefore find that merely filing an application to extend the time to file a defence is not a step submitting to the court's jurisdiction. I will now deliberate on whether the applicants can rely on the immunities they assert.

[22] See Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46 for a close analysis of CPR 9.7 prior to its amendment in 2011.

Immunity issue

[51] I must confess that on this issue I find the applicants' position difficult to accept. The applicants state that they rely on Articles 5B (1)(vii), 50(2) and 50 (7) to establish the immunity. The terms of the provisions and the extensive arguments thereon have been set out above.

[52] The relevant tests to be applied when interpreting legislation of this nature have been set out in the various authorities provided. In **Capital Bank** Sir Dennis Byron CJ instructed that[23]

> *The primary approach to statutory conferment of immunity is that it must be strictly construed to ensure that no greater immunity is granted than intended, as explained in 4th Halsbury Vol. 18 at para.1608. This requires that we look at the express terms in which the immunity has been granted.*

[53] The Privy Council had reason to consider immunity provisions in the **Gulf Insurance** case and offered the following insight to construing immunity provisions similar to Article 50 [24]

> *the question is whether the Central Bank is, as the judge and the Court of Appeal thought, immunised from liability by section 44H. That section applies to acts done "in the performance, or in connection with the performance of functions conferred on the Bank under this Part". The Board considers that the judge and the Court of Appeal gave it too wide a construction in applying it also to acts which purported to be in performance of functions conferred by the Act but which were in fact outside the powers which it conferred. This is particularly true when the acts in question deprived TCB of its property.* ***The Board considers that provisions of this nature should be restrictively construed. They should not be treated as a licence for unlawful expropriation without compensation, provided only that the acts are done in good faith and without negligence.*** (Bold emphasis mine)

[23] GDAHCAP 2002/0013 and 0014 at para.8
[24] [2005] UKPC at para 53

[54] Based on the foregoing it is apparent that the entirety of the immunity provisions relied on by the applicants, namely Article 50(2) and 50(7) must be read in such a manner as to extend the protections stated in these two sections only to conduct explicitly permitted by the Act. Put another way, if the authority to do what was done by the applicants is not expressly covered by the legislative provisions, the applicants would have acted in excess of their authority and cannot rely on the immunity provisions.

[55] Specifically it is seen that the Article 50 (1) immunity is enacted "*to enable the Bank to fulfil the functions with which it is entrusted…"* I would conclude that "the functions with which the 5th applicant is entrusted" can only be found in the statute and the agreement. The immunity, while absolute, is conferred solely for the purposes of fulfilling these obligations. If the 5th applicant acts outside the scope of its authority enacted by statute or conferred by agreement, the immunity cannot apply.

[56] The similar logic applies with greater force to the other applicants. I will address shortly the respondents' complaint that the 1st applicant does not benefit from the Article 50 immunity. Assuming for the moment that the immunity applies to him as it does to the other applicants, I will say that it can only do so with respect to all of them only in so far as it can be shown that their conduct fell within their "official capacity". What constitutes that capacity can again only be ascertained by looking at the terms of the statute pursuant to which they sought to exercise those functions in respect of PBT and CCIB. If the actions they took are not covered by the powers granted by the statute, then it is difficult to see how they can be permitted to argue that they acted in their official capacity and as such they must benefit from the immunity granted solely for such conduct.

[57] So everything turns on what the Act says can be done once the 5th applicant is satisfied that a situation exists which requires its intervention. Article 5B stipulates the actions that the 5th applicant can take where it is satisfied that it ought to intervene. The permissible actions include employing or engaging the 1st to 4th applicants to exercise various functions in furtherance of the powers conferred by Article 5B. I would for completeness opine that one cannot look to the notices to ascertain the extent of the immunity for the present discussion. Article 5C (1) to (4) enjoins the 5th applicant to issue a notification of its intended actions in respect of a financial institution. The

notices are issued pursuant to Article 5C and cannot extend the powers stated in Article 5B. That is the extent of that remit.

[58] When I examine Articles 5B, 5C, 50(2) and 50 (7) and the notices, the following observations can be made –

(1) Article 5B (1) (i) to (vii) set out above empowers the 5th applicant to take a number of specified actions in relation to financial institutions in Anguilla where it is satisfied that the conditions set out in Article 5B(1) (a) to (c) and 5B(2) subsist;

(2) Where the 5th applicant is satisfied that the conditions set out in Articles 5B(1) (a) to (c) and 5B (2) subsist, it may , inter alia, exercise the powers under Article 5B(1) (ii), that is to say, it can assume the control of and carry on the affairs of a financial institution;

(3) Where the 5th applicant intends to assume the control of and carry on the affairs of a financial institution it must issue a notification pursuant to Article 5C(1) which notice must itemize specified information. In this regard, the notice must state the property and undertaking that the 5th applicant proposes to take over and the powers it intends to exercise in respect of the financial institution;

(4) The 5th applicant issued two notices in which it specifically stated that it intended to assume control of the affairs of NBA and CCB. There was no express notification of the assumption of control of the affairs of PBT and CCIB.

[59] The question then to be asked is whether in addition to the express statement of the assumption of control of NBA and CCB, there was any statutory power allowing the 5th applicant and/or the other applicants to take the steps they took in respect of PBT and CCIB. Before examining that question, a short description of some of the agreed or unchallenged factual landscape is necessary –

(1) NBA and CCB are local banks licensed to operate under the local Banking Act R.S.A Cap B11. For the purposes of the Eastern Caribbean Central Bank (Agreement) Act, it has not been disputed on this application that these 2 banks fall within the definition of

financial institutions within the definition set out in Article 5A. In that regard, the 2 banks fall within the regulatory machinery of the 5th applicant;

(2) PBT and CCIB are institutions licensed to carry on offshore banking business. The licences are granted by the Anguilla Financial Services Commission, the regulatory body which governs and regulates the conduct of offshore banking business under the Anguilla Trust Companies and Offshore Banking Act, R.S.A c. T60. PBT and CCIB are therefore not licensed or regulated by the 5th applicant;

(3) NBA and CCB are the sole shareholders of PBT and CCIB respectively. PBT and CCIB are subsidiary companies of NBA and CCB. PBT and CCIB fall within the definition of affiliated companies started in Article 5A(1)(a) which reads –

> *"affiliated institution", in relation to a financial institution, means a company which is or has at any relevant time been -*
> ***(a) a holding company or a subsidiary of the financial institution**,*
> *(b) a subsidiary of a holding company of the financial institution**,***
> *(c) a holding company of a subsidiary of the financial institution, or*
> *(d) a holding company of a holding company or a subsidiary of a subsidiary of the financial institution.*
> (Bold emphasis mine)

(4) The 5th applicant at various periods after the issuance of the notices in respect of NBA and CCB then appointed the 1st to 4th applicants to the office of conservators of NBA and CCB. The conservatorship continued until the two banks were placed into receivership in April 2016;

(5) The responsibilities of the conservators were set out in various appointment letters which stated the following –

> *To the extent permitted by law, the appointee will –*

(a) Assist in the managing and carrying on the affairs of the banks for and on behalf of the Appointor. In so doing the Appointee shall have oversight of the day to day business and affairs of the Bank;

(b) Establish, maintain or cause to be established or maintained in respect of the banks policies and procedures in keeping with standard banking practices;

(c) Monitor the performance of staff of the banks;

(d) Take any decisions on steps considered to be necessary and within his competence to protect the banks' financial position and the banks' ability to meet their debts and other obligations when they fall due;

(e) Keep and maintain or cause to be kept and maintained all records, books and accounts of the banks;

(f) Keep the Appointer informed in respect of the management of the banks. In that regard the Appointee will provide weekly reports to the Appointor. In addition to such reports the Appointee shall, at the request of the Appointor, produce any ad hoc reports concerning the management of the banks at any time;

(g) Assist with any restructuring, recapitalization or sale of the assets and liabilities of the banks as the Appointor deems necessary;

(h) Act in accordance with such directions and instructions which may be issued in writing by the Appointor from time to time in respect of the management of the banks; and

(i) Efficiently and diligently carry out his responsibilities and directions given by or under the authority of the Appointor in respect of the management of the banks and with a view to protecting the interests of the banks;

The Appointee may, subject to the approval of the Appointor -

i. Engage such officers, servants and/or agents as he deems necessary to assist him in the performance of his functions; and

ii. Employ or terminate any officer or employee of the banks.

(6) During the period of the intervention into NBA And CCB, the 5th applicant, at various times and for varying periods appointed the 1st to 4th applicants as managers

(conservators) of PBT and CCIB which management subsisted until February 22, 2016 when Mr. William Tacon was appointed administrator by the AFSC;

(7) The 1st to 4th applicants, in the exercise of their duties as recited above, among other things, issued correspondence to each of the respondents outlining the terms of the management of PBT and CCIB. These specific actions included restrictions on withdrawals and revisions to interest rates on deposits held at those entities and belonging to the respondents;

(8) In furtherance of the duties above recited, the evidence also shows that the 1st to 4th applicants removed the various directors and/or officers of PBT and CCIB and replaced themselves as the officers and/or directors of the said entities.

[60] There is disagreement on the interpretation of what transpired. For the applicants, it is said that the 5th applicant did no more than appoint managers to maintain the status quo at PBT and CCIB until the appointment of Mr. Tacon as receiver. The affidavit in support of the application to dispute the court's jurisdiction indicates that having regard to the prevailing relationship between PBT and CCIB and their parent companies NBA and CCB, including the comingling of funds and the services agreement, and with deference to the objects of the intervention, the funds of PBT and CCIB continued to be managed as part of NBA and CCB throughout the intervention period. The applicants have not presented the service agreements to the court so no comment can be made on whether the actions of the applicants was a continuation of the management arrangement in place between the NBA and CCB and their subsidiaries, PBT and CCIB. The letters of appointment, however, indicate that the conservators were to "assist with the management of the CCB and NBA on behalf of…" the 5th applicant.

[61] I have formed the view that based on the description of the responsibilities of the conservators set out in the terms and conditions of appointment and the facts as to what was actually done by the conservators in respect of PBT and CCIB, a whole lot more than the continued management of comingled funds was envisaged by the intervention of the applicants into the affairs of PBT and CCIB. I observe, for instance, that the conservators were empowered to employ and terminate officers or employees. This is not a power given expressly to the 5th applicant and by extension its

employees or appointees in respect of affiliated institutions. No such power is stated in Article 5B or elsewhere in the statute. Article 5D authorizes the 5th applicant (by extension its appointee and employees) to terminate or retain the services of directors, officers and employees of a financial institution where the 5th applicant has assumed control of that financial institution. There is no authority in the statute for the 5th applicant or its appointees to hire and fire the officers or employees of an affiliated institution.

[62] Further fortification of my assessment is found in the correspondence sent to each of the respondents by the conservators. The letters spoke of specific acts of control of PBT and CCIB including restrictions on withdrawals and revisions to interest rates on deposits held at those entities and belonging to the respondents. The evidence shows that the consolidation of authority over the affairs of PBT and CCIB was also facilitated by the removal and/or resignation of the various directors and/or officers of PBT and CCIB and their replacement with the conservators throughout the period in question. The totality of these actions indicates the assumption of control of these entities and rebuts the argument propounded by the applicants that their march into the affairs was benign and facilitative of the management of funds.

[63] The applicants, in their submissions expand the argument to suggest that the notices gave the applicants the power to do a whole range of activities outlined in Article 5B(1) including in particular those given to them by Articles 5B(1)(i),(ii) and (iii). In this regard the applicants are empowered not only to investigate the affairs of the affiliated institutions of the banks over which a notice of intervention has been issued but also to take all steps necessary to protect the interest of the depositors and creditors of the intervened financial institutions. The applicants are also empowered to "take over the property and undertaking of the financial institution."

[64] Before commenting on the difficulties emerging from these arguments, it must be recalled that in construing the specific powers of intervention, the only expressed power to take any remedial or other action in respect of affiliated institutions is recited at Article 5B(1)(i) as the 5th applicant's authority to "*investigate the affairs of the financial institution concerned and any of its affiliated institutions and to appoint a person or persons for that purpose".* The notices recite this authority as the power to *further investigate the affairs of the Bank concerned and any of its affiliated institutions.* Accordingly, I cannot accept the applicant's contention that the 5th applicant together

with its appointees and/or employees, the 1st to 4th applicants possessed any expressed authority beyond investigating the affairs of PBT and CCIB.

[65] The applicants' argue that Article 5B(1) permit them to take all steps considered necessary to protect the interests, and preserve the rights of depositors and creditors of the financial institution which steps include taking over the property of the financial institutions. PBT and CCIB are said to be the property of NBA and CCB. The respondents' interpretation ignores the clear provisions of the statute and indeed the powers advertised in the notices. The approach to interpreting immunity powers of this sort eschews any other than a strict construction of the unambiguous statutory provisions. For one thing the statute is unequivocal in its expression of what can be done in respect of affiliated institutions. Secondly, the authority to take all steps necessary to preserve the rights of depositors and creditors and the right to take over the property are general powers and cannot give the applicants a mandate to do any more with respect to affiliated institutions than what the statute in lucid language says can be done.

[66] My understanding is that the general words can only be strictly interpreted to give the applicants the authority to do with respect to affiliated institutions all that is necessary to investigate the affairs of the same. Some logic for this limited right of interference into the affairs of affiliated institutions may be garnered for instance, when one examines the separate legal structures governing the licensing and regulation of NBA and CCB on the one hand and PBT and CCIB on the other.

[67] For all these reasons, it is my conclusion that the immunity set out in Article 50 does not apply to the applicants in this case since they did not possess the authority to take the steps which they took in respect of PBT and CCIB. Specifically, the 5th applicant did not possess the authority pursuant to Article 5B or the notices to intervene in the affairs of PBT and CCIB in the manner and to the extent that it did. The other applicants could only say that they acted within their official capacity when they were clothed with the statutory and other powers to perform the several acts which they did in respect of PBT and CCIB. There was no authority for them to do so and as such the immunity does not aid them in their defence of the claim against them.

[68] Before concluding I must comment on the argument that Article 50 does not apply in any event to the 1st applicant. I can only say shortly that the language of Article 5B(1)(vii) could not be more

pellucid. The section gives the 5th applicant the authority to appoint such persons or corporations to assist in the exercise of the several powers enacted at Article 5B (1)(i) to (vi). Those persons or corporations are then clothed by the section with the same immunities as the persons protected under Article 50. The respondents argue that Article 5F clothes all the applicants including the persons or corporations appointed under Article 5B(1)(vii) with immunity from suit and it is to that Article they must have recourse in the circumstances. Article 5F reads –

> *The Council, the Minister or the Bank, its directors and officers and any persons appointed by the Bank under Article 5B are not subject to any action, claim or demand by, or any liability to, any person in respect of anything done or omitted to be done in good faith and without negligence in the performance, or in connection with the performance of functions conferred on the Bank under this Part*

[69] The short answer to the respondents' argument lies in the acceptance in the submission of both sides that Article 5F can only be invoked after an examination of all the facts at trial. These are early days and a discourse on whether the applicants acted negligently and/or in breach of trust is not open for elaboration or comment at this juncture. The statutory protection enacted at Article 5F can only be invoked after a full ventilation of the facts of the case. On the converse, the conditions recited in Articles 5B (1)(vii) are not thus limited. There appears to be no justification to relegate the applicants to redress solely under Article 5F. To do so will require that the court ignores and renders inoperative the clear provisions of Articles 5B (1)(vii) and Article 50.

[70] In all the circumstances and for the reasons stated above the application to dispute the court's jurisdiction is refused. The applicants are to file and serve a defence within 28 days of today's date. The court office is to list the matter for a case management conference within 6 weeks of the last day for the defence to be filed (CPR 9.7 (7) (a) (i) and (b)). The respondents are the successful parties on this application and as such are awarded costs of US $1500.00. I thank both sides for their comprehensive submissions and assistance.

……..
RAULSTON GLASGOW
MASTER