EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2016/0008

BETWEEN:

[1] NATIONAL BANK OF ANGUILLA (PRIVATE BANKING AND TRUST) LIMITED (in administration)
[2] CARIBBEAN COMMERCIAL INVESTMENT BANK LIMITED (in administration)

Appellants

and

[1] NATIONAL BANK OF ANGUILLA LIMITED (in receivership)
[2] CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED (in receivership)

Respondents

[3] NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Ronald Scipio, QC with him Ms. Eustella Fontaine and Ms. Keisha Hiles for the Appellants
Ms. Keesha Carty and Ms. Navine Fleming for the first and second Respondents
Mr. Alex Richardson holding a watching brief on behalf of National Commercial Bank Anguilla Limited

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2018: April 30;
July 11.

Interlocutory appeal — Proprietary claim — Application to lift statutory stay imposed by section 143(c) of the Banking Act, 2015 — Exercise of discretion by the learned master — Whether the learned master erred in the exercise of her discretion by refusing to lift the stay on the sole basis of the non-joinder of the conservator directors

The appellants, National Bank of Anguilla (Private Banking and Trust) (in administration) ("PBT") and Caribbean Commercial Investment Bank Limited (in administration) ("CCIB") are companies incorporated under the laws of Anguilla and licensees of the Financial Services Commission of Anguilla ("FSC") to carry on offshore banking business. The respondents, National Bank of Anguilla Limited (in receivership) ("NBA") and Caribbean Commercial Bank (Anguilla) Limited (in receivership) ("CCCB") are the parent companies of PBT and CCIB, respectively and were involved in onshore banking pursuant to the Banking Act.

From 12th August 2013 to 22nd April 2016, NBA and CCCB were placed under conservatorship. Conservator directors were appointed who summarily dismissed the directors of PBT and CCIB, and it is alleged that the day-to-day banking business of PBT and CCIB were conducted under the management and control of the conservator directors.

Subsequently, PBT and CCIB were placed into liquidation and Mr. William Tacon was appointed as the administrator. He contends that he discovered the misuse of monies belonging to PBT, and CCIB and that these monies were improperly given by the conservator directors, to NBA and CCCB in breach of their fiduciary duties. As a consequence of these alleged breaches, PBT and CCIB filed a proprietary claim against NBA and CCCB on the basis that they are in possession of monies that belong to PBT and CCIB. PBT and CCIB sought to recoup monies which they alleged belong to them and are in the possession of NBA and CCCB. However, as NBA and CCCB are both in receivership, the claim was automatically stayed by operation of section 143(c) of the Banking Act.

PBT and CCIB applied for the statutory stay to be lifted to permit their proprietary claim to proceed against NBA and CCCB. The learned master concluded that PBT and CCIB's proprietary claim could not have been dealt with in the winding up process and being disposed to lift the stay, refused to do so on the sole basis of the non-joinder of the conservator directors to the claim. She also found that PBT and CCIB could not seek a declaration for breach of fiduciary duties without naming the conservator directors as parties and as such their claim had a very poor prospect of success.

Dissatisfied with the decision of the learned master, PBT and CCIB appealed to this Court. The thrust of PBT and CCIB's arguments is that the master erred in refusing to lift the stay by taking into account irrelevant considerations, namely, the failure to name the conservator directors as parties to the claim. In response, NBA and CCCB contended that the master was correct in holding that PBT and CCIB's claim had a poor prospect of success as their claim for breach of fiduciary duties could not be granted or pursued against NBA and CCCB without joining the conservator directors.

Accordingly, the critical issue for this Court's determination is whether the learned master, having concluded that PBT and CCIB's proprietary claim could not have been dealt with in the winding up process, and being disposed to lifting the stay, erred in law by refusing to do so on the sole basis of the non-joinder of the conservator directors.

Held: allowing the appeal; setting aside the judgment and costs order of the learned master; lifting the statutory stay; and awarding costs on the appeal and in the court below to the appellants, to be assessed if not agreed within 21 days, that:

1. The Banking Act does not provide the procedure for the lifting of a stay arising by operation of section 143(c) and neither does it assist the court with the factors that should be considered in its determination of whether a stay should be lifted in order to enable a claim to proceed. However, authorities indicate that the court should consider: the purpose of the receivership; whether the nature of the claim can be dealt with in the winding up process; the effect which lifting the stay would have on the parties; the public interest and; the merits of the claim.

   Gerard Cassegrain & Co Pty Limited v Felicity Cassegrain [2013] NSWCA 453 applied; Re Bigdeal Artist Management Pty Ltd. (in liquidation) [2015] NSWSC 936 applied.

2. An appellate court will not interfere with the exercise of a judicial discretion unless it is satisfied that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations, and that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

   Michel Dufour et al v Helenair Corporation Ltd et al (1996) 52 WIR 188 followed.

3. Once the learned master had accepted that the claim was a proprietary claim that could not have been dealt with in the winding up process and there were no countervailing factors that militated against her lifting the statutory stay, she ought to have done so in the exercise of her discretion. Accordingly, her judgment can be properly impugned and PBT and CCIB's complaints are quite compelling since there is an error of principle in the exercise of her discretion.

4. The learned master having erred in refusing to lift the stay by taking into account the irrelevant consideration of the non-joinder of the conservator directors, it therefore falls to this Court to exercise its discretion afresh. In the exercise of our discretion afresh, in circumstances where the learned master was satisfied that the stay ought to have been lifted (but for the point on the parties), it is clear that that is the convenient and appropriate course that this Court should adopt.

   Michel Dufour et al v Helenair Corporation Ltd et al (1996) 52 WIR 188 followed.

JUDGMENT

Introduction

[1] BLENMAN JA: The principal issue that arises to be resolved in this appeal is whether the learned master erred in refusing to lift the statutory stay that was imposed by section 143(c) of the Banking Act, 2015 ("Banking Act"),[1] in order to permit National Bank of Anguilla (Private Banking and Trust Limited) (in administration) ("PBT") and Caribbean Commercial Investment Bank Limited (in administration), ("CCIB") to proceed with their claim for breaches of fiduciary duties against National Bank of Anguilla Limited (in receivership) ("NBA") and Caribbean Commercial Bank (Anguilla) Limited (in receivership) ("CCCB").

[2] It is necessary to state the history of this appeal in order to provide some context.

History

[3] PBT is a company incorporated under the laws of Anguilla and was at all times a licensee of the Financial Services Commission of Anguilla ("FSC") to carry on offshore banking business. The parent company of PBT is NBA which was incorporated in Anguilla and involved in onshore banking, pursuant to the Banking Act.

[4] CCIB is a company incorporated under the laws of Anguilla and was at all times a licensee of the FSC. It was concerned with offshore banking. CCCB is the parent company of CCIB and the former was incorporated under the banking laws of Anguilla.

[5] From 12th August 2013 to 22nd April 2016, the affairs of NBA and CCCB were placed under conservatorship. CCCB, having been placed under conservatorship, was controlled by the Eastern Caribbean Central Bank ("ECCB") and conservator directors were appointed. During the relevant period, from 12th August 2013 to 24th March 2016, the conservator directors summarily dismissed the directors of

[1] Act No. 6 of 2015, Statutes of Anguilla.

PBT and CCIB and it is alleged that the day-to-day banking business of PBT and CCIB were conducted under the management and control of the conservator directors, who were appointed from time to time.

[6] Subsequently, PBT and CCIB were placed into liquidation and Mr. William Tacon ("Mr. Tacon") was appointed as the administrator.

[7] Mr. Tacon contends that he discovered the misuse of monies belonging to PBT and CCIB, and that these monies were improperly given, by the conservator directors, to NBA and CCCB, in breach of trust. As a consequence of these alleged discoveries, PBT and CCIB filed a claim against NBA and CCCB on the basis that they are in possession of monies that belong to PBT and CCIB. PBT and CCIB sought to recoup monies which they alleged belong to them and are in the possession of NBA and CCCB.

[8] PBT and CCIB say that the purpose of the conservator directors' appointment over NBA and CCCB, was to enable steps to be taken to ensure that the interests of the creditors of the offshore subsidiaries (PBT and CCIB) were being adequately protected, following NBA and CCCB being placed under conservatorship by the ECCB. To the contrary, it is alleged that during the relevant period Mr. Tacon was concerned that the conservator directors of NBA and CCCB continued to carry on the offshore banking business in the name of PBT and CCIB, in a manner to assist and provide liquidity to NBA and CCCB, rather than in a way that would have benefitted PBT and CCIB, or their depositors. In so doing, the conservator directors were aware that NBA and CCCB were insolvent and unable to pay their debts, yet the conservator directors continued to conduct the offshore banking business of PBT and CCIB and placed the monies in the insolvent NBA and CCCB, in clear breach of the fiduciary duties which were owed by the conservator directors to PBT and CCIB. The conservator directors should have placed the monies received by them in solvent entities. Further, PBT and CCIB complain that the conservator directors failed to put in place any, or any sufficient arrangements

to ensure part of the deposits as represented by monies collected from depositors were ring-fenced for the benefit of the depositors or PBT and CCIB. PBT and CCIB further complain that during the above period, new deposits with their entities were not protected or safeguarded. Instead, their monies were used by NBA and CCCB to provide liquidity to themselves rather than being retained for the benefit of PBT and CCIB.

[9] PBT and CCIB say that the administrator, Mr. Tacon concluded that there are assets which belong to them and which are wrongly in the possession of NBA and CCCB. This is based on the fact that he was given the power to identify, locate, value, trace and recover the assets that belong to them and on the basis of his enquiries. They also state that they have a proprietary claim against NBA and CCCB for the return of their monies paid to NBA and CCCB by the conservator directors in breach of their fiduciary duties.

[10] PBT and CCIB state that despite their requests to be provided with the necessary information, NBA and CCCB have refused to provide them with any information regarding the transfer of monies from their (PBT and CCIB's) accounts and details as to how those monies were used. They further contend that NBA and CCCB, having received monies which belong to them or their depositors, have an obligation to make good the loss which they have suffered.

[11] As a consequence, and as indicated above, both PBT and CCIB have filed a proprietary claim, in the court below, against NBA and CCCB for the return of their monies. However, due to the fact that NBA and CCCB are both in receivership, the claim was immediately impacted upon its filing by operation of section 143(c) of the Banking Act which has resulted in a statutory stay being imposed and, as a consequence, they have been unable to proceed with their claim.

[12] Consequently, PBT and CCIB filed an application with the court below for the statutory stay to be lifted in order to be able to proceed with their proprietary claim

against NBA and CCCB.

[13] In the claim PBT and CCIB sought, among other things, a declaration that in procuring or permitting monies belonging to them to be paid to NBA and CCCB, the conservator directors acted in breach of their fiduciary duties, which they owed to PBT and CCIB. They also sought a declaration that such part of the monies or their traceable proceeds are held by the NBA and CCCB on trust for them.

[14] I will now look at the application in the court below.

The Application in the Court Below

[15] The claim was not served on NBA nor CCCB. It came up for hearing before the learned master, and on the same day PBT and CCIB filed an application in the court below, pursuant to section 143(c) of the Banking Act for leave to be granted to bring proceedings against NBA and CCCB. The statement of claim was exhibited to the affidavit of Mr. William Tacon. A number of matters intervened but they are not relevant to the appeal and will not be stated in this judgment. As events unfolded, the application was adjourned, since the learned master was concerned as to whether the court's permission ought to have preceded the filing of the claim. The master granted leave to NBA and CCCB to file an application on the issue of whether the claim should be struck out, on the ground that leave was required to be obtained prior to the commencement of the claim.

[16] Both NBA and CCCB filed an application to strike out the claim on the ground that it amounted to an abuse of process, since PBT and CCIB had not obtained the leave of the court prior to commencing the claim. In addition, they sought to have the claim struck out on grounds for which they did not obtain the master's leave. These additional grounds would be addressed in detail shortly since, in my view, they have contributed significantly to the criticisms that are levelled against the judgment in the court below.

[17] It is important to state the issues that were raised in the court below.

Issues before the Court Below

[18] The following issues were identified by the learned master to be resolved:

(a) Whether the claimants required leave of the court to commence the claim.

(b) If yes, what is the effect of the failure to obtain leave?

(c) If no, whether the court should have left the stay imposed by section 143(c) of the Banking Act and grant the claimants leave to proceed with the claim.

[19] It is noteworthy that at the hearing of the application, the learned master expressed the view that NBA and CCCB have filed application that went outside of the ambit of the order which granted them leave. The master indicated in her judgment that she would not have considered the aspects of the application that exceeded the terms of the order. Leaving this aside for the moment, it is noteworthy that the application to lift the stay was opposed.

[20] As indicated earlier, the learned master having heard the application, refused to lift the stay in order to enable PBT and CCIB to be able to proceed with their claim against NBA and CCCB. As a consequence of the master's refusal, PBT and CCIB have appealed against the decision. However, in her refusal, the master in the judgment made critical findings and these, in my view, also form the basis of this appeal. Accordingly, I would set out the salient aspects of the judgment in the court below.

[21] The Judgment in the Court Below

At paragraph 11-13 of the judgment the learned master expressed herself thus:

"11. I therefore granted the 1st and 2nd defendants time to file an

application limited to the sole issue raised by the court *i.e.* whether the claim against the 1st and 2nd defendants should be struck out on the ground that the claimants were required to obtain leave prior to commencing the claim. The matter was adjourned to 12th August 2016 for hearing.

12. The 1st and 2nd defendants filed the application within the time fixed by the court. The claimants filed a short affidavit in answer in which it was asserted that the application went beyond the ambit of the order made on 10th August 2016.

13. In my view the application goes outside the terms of the order in that it is asking the court to strike out the claim on the ground that it is an abuse of process not only because leave was not obtained to commence the claim but also on the ground that the proper parties have not been named. I informed the parties that I will not address any part of the 1st and 2nd defendants' application to strike out the claim which goes outside the scope of the order of 10th August 2016 (emphasis mine). This is of course without prejudice to the 1st and 2nd defendants' right to raise those issues subsequently."

[22] The learned master having heard the application to lift the stay and the application to strike out the claim on the basis that leave was required to file the claim, at paragraphs 93-94 of the judgment stated:

"93. The claim in my view raises serious questions about the source of the powers under which the conservators of the defendants (appointed by the ECCB) sought to exercise the powers they are alleged to have exercised over the claimants who are offshore banks regulated by the Anguilla Financial Services Commission rather than the ECCB. I note that the affidavit of Mr. Moving is notably silent in response to these matters which were raised by the affidavit of Mr.Mr [sic] Tacon by way of reference to the statement of claim.

94. The claimants assert that the conservators, in acting as the *de facto* or *de jure* directors of the claimants, owed a fiduciary duty to the claimants. They assert that this duty was breached when the conservators, inter alia, procured or permitted the payment to the 1st and 2nd defendants of funds received by the claimants from depositors and the proceeds of all assets of the claimants realized or collected during the relevant period."

[23] Importantly, at paragraph 99 (subparagraphs 1-6) of the judgment the learned master opined as follows:

"(1) Queen's Counsel for the claimants submitted that it is necessary to

name a party if a remedy is sought against that party. A declaration is a remedy. The claimants have sought a declaration against the conservators and they should therefore be named as parties.

(2) The Claimants are seeking a remedy against the conservators. Unless named as parties, how are the conservators to respond to the allegations made against them in the claim? Queen's Counsel for the claimants submitted that the conservators can respond by being summoned to give evidence. There is no doubt that the court has the power to compel a person to attend court and give evidence or produce documents but surely this process is not a substitute for naming the persons against whom specific allegations are made and a specific remedy sought as parties.

(3) In my view, the proper place to respond to allegations raised in pleadings is by way of pleadings. Witness statements provide evidence of the matters contained in pleadings and cannot raise matters not set out or foreshadowed in pleadings. I am therefore unable to agree that the conservators' right to respond to the allegations made against them in the statement of claim can be addressed solely by leaving it open for some party to summon them as witnesses.

(4) More importantly, the claimants assert that they have a proprietary claim. They assert that the conservators, in acting as *de facto* or *de jure* directors of the claimants, owed and breached their fiduciary duty to the claimants. A breach of a fiduciary duty is treated as a breach of trust. A third party recipient of property paid in breach of a fiduciary duty who is not a bona fide purchaser for value will hold that property on trust for the company.

(5) Based on the pleaded case, the claimants must first establish the existence and breach of a fiduciary duty (breach of trust) by the conservators before seeking to pursue property allegedly transferred and held by the defendants in breach of this alleged trust. In the absence of the conservators being named as parties it does not appear to me that the claimants can rightfully seek or obtain a declaration against them that they acted in breach of the fiduciary duty allegedly owed to the claimants.

(6) In the circumstance, I find that without the conservators being made parties the claim has very poor prospects of success. In fact I would venture further to say that I cannot see how the claim against the defendants can succeed without it being initially established that there was a fiduciary duty and a breach of same by the conservators. In my view such a finding cannot be properly made unless the parties against whom the allegations are made and relief sought are made parties and given an opportunity to respond (emphasis mine)".

[24] As is evident from the above paragraphs of the judgment, the learned master discussed many other matters and having done so, recorded her conclusions. These are also at the heart of this appeal. Also, of significance is the master's conclusion which followed her analyses recorded above. At paragraph 107 of the judgment she concluded as follows:

> "(1) The claim is alleged to be a proprietary claim. On the premise that it is such a claim it is not one which can properly be dealt with in the winding up process since the proof of debt procedure does not permit proprietary claims to be adequately advanced or adjudicated.
>
> (2) Generally, a claim of this nature, (a proprietary claim) should be adjudicated upon in a timely manner in the interests of all parties since it would determine whether the funds in issue form part of the defendants' insolvency estate and would also provide clarity to the Administrator of the claimants with respect to the status of the funds and aid in the proper discharge of his functions.
>
> (3) There is no evidence of how the lifting of the stay would have any impact, if any, on the winding up process. Specifically there is no evidence that lifting the stay would adversely affect the winding up process.
>
> (4) There is no evidence of how the lifting of the stay would affect financial stability or the discharge of the functions of the Central Bank. Specifically, there is no evidence that the lifting of the stay would adversely affect financial stability or prevent the Central Bank from discharging its functions in an expeditious and efficient manner.
>
> (5) The claim, in substance, raises serious issues regarding the source of the power exercised by the conservators over the claimants and the manner in which the power was exercised. However, the claim as formulated has no real prospect of success since the claim against the conservators for breach of trust must be established before liability can be established against the defendants for the return of funds allegedly held on trust as a result of the alleged breach of the trust (emphasis mine). To put it another way, the conservators, against whom primary liability must first be established before secondary liability against the defendants can be established, must be but are not named as parties to the claim.
>
> (6) Thus while a claim of this nature might otherwise merit the lifting of the stay in the absence of evidence that the lifting of the stay is likely to impede the purpose of the receivership and negatively impact the winding up process or the matters set out in Section 184 of the Act, I am not satisfied that the court should exercise its discretion in favour of lifting the

> stay to allow a claim that has no real prospect of success in its present formulation to proceed. To do so would in my view cause valuable resources (time and money) of both the claimants and the defendants to be put to prosecuting and defending such a claim. It would also not be an efficient use of the court's limited resources (emphasis mine)."

[25] As a consequence of the learned master's refusal to lift the statutory stay, PBT and CCIB have filed several grounds of appeal. However, in their skeleton arguments they have quite helpfully crystallized the several grounds of appeal into two issues.

[26] Issues before this Court

The issues before this Court are as follows:

(a) Whether the learned master, having determined that the proposed claim was a proprietary claim which could not be dealt with in the winding up process, erred in determining that the conservator director should have been joined.

(b) Whether, on the assumption that she was correct in relation to the non-joinder of the conservator directors as parties, the learned master erred in concluding that as a consequence the proposed claim had no real prospect of success, on the basis of the non-joinder of the conservator directors and whether the learned master erred in relying on the non-joinder of the conservators as the sole reason in refusing to lift the statutory stay.

[27] As it often happens in litigation, during the oral arguments before this Court, it became apparent that the two issues that were helpfully identified above can be conflated into one issue, namely: whether the learned master, having concluded that PBT and CCIB's proprietary claim could not have been dealt with in the winding-up process and being disposed to lifting the stay, erred in law by refusing to do so on the sole basis of the non-joinder of the conservator directors. In my view, that is the sole issue that lies at the centre of this appeal which, at first

glance, appeared more complicated than it really is. I will therefore examine the submissions that were made by all counsel against the backdrop of this issue.

Submissions

[28] Learned Queen's Counsel, Mr. Scipio, by way of general observation reminded this Court that in Anguilla, offshore banking is subject to an entirely different legislative scheme from that of onshore banking. The former is governed by the Financial Services Commission Act,[2] whereas the latter is regulated by the Banking Act.

[29] Mr. Scipio, QC accepted that the principal issue that this Court should resolve is the one that has been identified above in paragraph 27. He highlighted the fact that PBT and CCIB have not appealed against the learned master's findings. He said that the gravamen of their complaint is that the master, having correctly accepted that PBT and CCIB's proprietary claim could not have been entertained in the winding up process and having concluded that lifting the stay would not have impacted the winding up process, ought to have lifted it. He submitted that the master erred by going on to consider whether the conservator directors ought to have been joined as parties to the claim. Accordingly, he argued that the master erred in refusing to lift the stay on the sole basis that there was a non-joinder of the conservator directors. He complained that the tangential issue of whether the conservator directors ought to have been joined in the claim was not a matter that should have engaged the master's attention, since she had already concluded that the stay should have been lifted.

[30] Mr. Scipio, QC further submitted that NBA and CCCB are the proper parties to the proprietary claim. He takes issue with the learned master's conclusion that the claim has no real prospect of success because the conservator directors have not been joined to the claim. He said that the master misdirected herself by taking into account irrelevant matters in her consideration of whether the stay should have

[2] Cap .F28, Revised Statutes of Anguilla.

been lifted. He further said that since the master concluded that the stay should have been lifted, it was not open to her to consider other matters, for example, whether the conservator directors should have been joined and refuse to lift the stay due to her assessment that there was non-joinder of the relevant parties, the conservator directors. He was adamant that it was unnecessary for PBT and CCIB to add the conservator directors to the claim since they were the agents of NBA and CCCB. He maintained that PBT and CCIB's claim was against the principals, namely, NBA and CCCB for breaches committed by their agents who are the conservator directors.

[31] Mr. Scipio, QC reiterated that PBT and CCIB have not appealed against the findings that were made by the learned master, but only against the exercise of her discretion not to lift the statutory stay, which was based solely on the non-joinder of persons whom the master thought should have been joined. He maintained before this Court, that there is absolutely no need to join the agents since the principals have been sued.

[32] Further, Mr. Scipio, QC complained that the claim had not even been served on NBA and CCCB, and in any event, it would have been open to PBT and CCIB to apply to the court for leave to join the conservator directors, if there was any need to have them joined to the claim. He was adamant, however, that it was unnecessary to join the conservator directors since they were agents of NBA and CCCB and that the latter are properly joined in the claim. He reiterated that the learned master took into account irrelevant factors after she had decided to lift the stay, by going on to consider whether the conservator directors should have been joined and utilizing, quite wrongly, this latter basis of the non-joinder of the conservator directors as a reason not to lift the stay.

[33] Elaborating further, Mr. Scipio, QC said that the declarations that are being sought are based on the fiduciary breaches of the conservator directors who are agents of NBA and CCCB. He says that it is unnecessary for PBT and CCIB to join the

conservator directors since the remedy that is being sought is against their principals – NBA and CCCB. It is a remedy through which they aim ultimately to recoup their monies from NBA and CCCB.

[34] In opposition and on behalf of NBA and CCCB, learned Counsel Ms. Carty stated that section 123(1) of the Banking Act provides for the appointment by the ECCB of certain officials otherwise called conservator directors, who shall be vested with all powers, functions and responsibilities of the licensed financial institution's or licensed financial holding company's shareholders, directors and officers. She pointed out that section 123(2) prescribes the powers of the conservator directors who:

> "...shall have full and exclusive powers to manage and operate the licensed financial institution or licensed financial holding company, including taking any action –
>
> (a) necessary or appropriate to carry on the business of the licensed financial institution or licensed financial holding company in accordance with this Act, Regulations made under section 182, Orders or prudential standards issued by the Central Bank;
>
> (b) to preserve and safeguard its assets and property; or
>
> (c) to implement a plan of action with respect to the licensed financial institution or licensed financial holding company approved by the Central Bank."

[35] Learned Counsel Ms. Carty articulated that section 136 of the Banking Act provides for the official administration to be terminated before the expiration of the term in two instances, namely, section 136(2)(a) where it is no longer needed because the grounds for appointment have been remedied; or section 136(2)(b) where:

> "the licensed financial institution or licensed financial holding company cannot be rehabilitated and the Central Bank issues a decision to revoke the licensed financial institution's or licensed financial holding company's license under section 13 and to commence liquidation proceedings under Part 10."

She said that the ECCB proceeded to appoint a receiver over the NBA and CCCB. Part 10 of the Banking Act allows for this and further, does not provide the financial institutions any say or part to play in the appointment.

[36] Learned Counsel, Ms. Carty, accepted that section 143(c) of the Banking Act provides that upon the appointment of a receiver:

> "all legal proceedings against the licensed financial institution or licensed financial holding company are stayed and a third party shall not exercise any right against the licensed financial institution's of licensed financial holding company's assets without the prior leave of the court unless the court directs otherwise."

She submitted that the learned master was correct in holding that PBT and CCIB's claim had a poor prospect of success as the relief sought, chief among which was the claim for breach of fiduciary duties, could not have been granted or even pursued against NBA and CCCB without joining the conservator directors.

[37] Learned Counsel, Ms. Carty, argued that section 143(c) of the Banking Act must also aim to allow the court to ensure that the resources at the disposal of the receiver are used wisely. She therefore submitted that it could not be a good use of the receiver's or the court's resources to lift a stay of proceedings which, as drafted, cannot succeed as the proper parties are not before the court. She said that while PBT and CCIB could amend their statement of claim before the case management conference, it is not a wise use of the resources available to the receiver to defend a claim which requires amendment in order for the claim to have any prospect of success.

[38] Learned Counsel, Ms. Carty, stated that no declaration of breach of fiduciary duties could be granted against NBA and CCCB since they never collected, managed or otherwise handled the monies of the depositors of PBT and CCIB. She therefore emphasised that no portion of the claim in its current form, could affect the rights and interests of the persons who "are parties" and therefore no issues are relevant to be determined in relation to them at this time. She further

stated that NBA and CCCB are not necessary or proper parties to the claim. In all the circumstances, she submitted that this Court ought to dismiss the appeal and award costs to NBA and CCCB.

Discussion

[39] In my view, the scope of this appeal requires this Court to interrogate the exercise of the learned master's discretion in refusing to lift the statutory stay on the sole basis that the conservator directors ought to have been joined to the claim in order to enable PBT and CCIB to proceed with their proprietary claim against NBA and CCCB.

[40] In order to be able to assess PBT and CCIB's complaint, it is necessary to fully recite the section of the Banking Act which is engaged. Section 143(c) of the Banking Act provides as follows:

> "143. Upon and after the appointment of a receiver –
>
> (c) all legal proceedings against the licensed financial institution or licensed financial holding company are stayed and a third party shall not exercise any right against the licensed financial institution's or licensed financial holding company's assets without the prior leave of the court unless the court directs otherwise.

Based on the above statutory provision, it is common ground and evident in the present case that upon the appointment of a receiver over NBA and CCCB by virtue of section 143(c) of the Banking Act, the statutory stay came into effect automatically.

[41] This case required, as the learned master did, an examination of the above section with a view to ascertaining its application, boundaries and limitations. I am aware, like the learned master was, that the above statutory provision is relatively new and there does not seem to be very much jurisprudence which addresses that section. The master undertook to examine the issue of whether leave should have been obtained before the claim was filed to lift the stay. The judgment provides a

record of what transpired at the hearing of the application. Based on a close reading of paragraphs 3-11 of the judgment, it is clear that the issue that engaged the master's attention was whether leave was required before the filing of the claim. In this regard, at paragraph 11 the master stated:

> "I therefore granted the 1st and 2nd defendants time to file an application limited to the sole issue raised by the court *i.e* whether the claim against the 1st and 2nd defendants should be struck out on the ground that the claimants were required to obtain leave prior to commencing the claim..."

[42] As I have stated earlier, at paragraph 12 of the judgment the master noted that:

> "The 1st and 2nd defendants filed the application within the time fixed by the court. The claimants filed a short affidavit in answer in which it was asserted that the application went beyond the ambit of the master's order on 10th August 2016."

[43] In my view, it is of significance that even though the master granted NBA and CCCB leave to file an application to strike out PBT and CCIB's claim <u>on the basis that they had failed to obtain permission</u> to institute the legal proceedings, both of them filed the application to strike out the claim on the basis of the following grounds:

(a) The claim was filed without first obtaining leave from the court

(b) PBT and CCIB have alleged breaches of fiduciary duties by the conservator directors while NBA and CCCB were under conservatorship but they have failed to name the conservator directors as parties to the claim.

(c) Even if PBT and CCIB should seek to add the said conservator directors as parties those persons are protected by immunities granted to them.

[44] It is evident, and as I have already indicated that the master had cause to state that NBA and CCCB's application went outside of the scope of the order. At paragraph 13 of her judgment, the master said:

> "In my view the application goes outside the terms of the order in that it is

> asking the court to strike out the claim on the ground that it is an abuse of process not only because leave was not obtained to commence the claim but also on the ground that the proper parties have not been named. I informed the parties that I will not address any part of the 1st and 2nd **defendants' application to strike out the claim which goes outside** the scope of the order of 10th August 2016. (emphasis mine.)

[45] Importantly at paragraph 14 of the judgment, the master reinforced that:

> "The applications before the court are therefore the claimants' application for leave *"to bring"* proceedings and the application by the 1st and 2nd defendants for the claim to be struck out as an abuse of process on the ground that the claimants failed to obtain leave prior to commencing the claim."

[46] In my view, the learned master quite properly held that the application which NBA and CCCB filed went beyond the terms of the order which granted them leave to file an application on the narrow basis of, whether leave was required to institute the proceedings. Also, the master was correct to indicate that she would not have considered the aspects of the application which NBA and CCCB had filed that went beyond the scope of the order which granted the leave to file the application. The master correctly declared that she would have confined her determination to the issue of whether leave was required to institute the proceedings.

[47] The learned master, in a quite thorough judgment, set about determining for the most part, the ambit of section 143(c) of the Banking Act. As the master found and in my view, there seems to be no authority on the scope of section 143(c) of the Banking Act and against that background she undertook a very comprehensive, careful and extensive analysis of the section. Having reviewed a number of persuasive authorities that were cited, the master quite properly reasoned that leave was not required in order to be able to file a claim. The master correctly held that a claim form is not a legal proceeding until it is filed, and in particular at paragraph 56 of her judgment, the master rejected the defendant's submissions and correctly stated as follows:

> "I am therefore unable to agree with the submissions of the defendants that in the context of Section 143 (c) a claim form is a "legal proceeding" even before it is filed. I find that the literal meaning of the Section 143 (c)

is that all legal proceedings, whether filed before or after the appointment of the receiver, are stayed unless the court directs otherwise."

[48] Based on a close reading of the learned master's judgment, it is clear that much of the reasoning had to be undertaken by her on base principles in the absence of any case on point. Even though this observation does not lie at the heart of the appeal, in my view, the master's finding above is closely reasoned and sound in law – it cannot be assailed. I agree with the master that section 143(c) of the Banking Act is meant to apply both to claims that are filed before or after the appointment of the receiver. The reasons for this are obvious. It is fair to record that the judgment reveals that the master was aware that the Banking Act does not provide the procedure for the lifting of the stay, neither does it assist the court with the factors that should be considered in its determination of whether the stay should be lifted in order to enable the claim to proceed.

[49] As indicated earlier, the Banking Act is relatively new and there seems to be the absence of any judicial guidance to assist the court in the exercise of its discretion. The learned master quite properly acknowledged that the words "unless the court otherwise directs" clothes the court with a discretion. In the absence of any authority on the point, the master quite commendably obtained much needed guidance from Gerard Cassegrain & Co Pty Limited v Felicity Cassegrain[3] and In the matter of Re Bigdeal Artist Management Pty Ltd. (in liquidation).[4] In my view, at paragraphs 72 to 79 of the judgment, the master stated the matters that should be taken into account in the exercise of her discretion. In a nutshell, the master stated that they are namely:

(a) The purpose of the receivership.

(b) Whether the nature of the claim can be dealt with in the winding up process.

(c) The effect which lifting the stay would have on the parties.

[3] [2013] NSWCA 453.
[4] [2015] NSWSC 936.

(d) The public interest.

(e) The merits of the claim.

[50] It is evident that the learned master was well aware of the true balance that needed to be struck in determining whether to lift the stay and faithfully applied those principles. The master scrutinized the claim at paragraphs 80 and 81 of the judgment and quite properly apprehended that PBT and CCIB were seeking to have the stay lifted in order to bring their proprietary claim. The master recognised that the terms of her order, through which she had granted NBA and CCCB leave to file the strike out application, indicated that the basis to strike out the application was to be confined to the narrow issue of whether leave was required to bring the claim.

[51] In my view, quite apart from the fact that NBA and CCCB improperly went outside of the terms of the learned master's order, they also flouted the court's order. In effect, they encouraged the master to err by addressing matters that were entirely outside of her remit. This much is unfortunate since the judgment was otherwise careful and analytical. I agree with learned Queen's Counsel Mr. Scipio that the master erred and took into account the irrelevant matters of the proper parties. Equally, I agree with him that these matters, if at all, should be addressed at the hearing of the substantive claim. I have already set out some of the relevant paragraphs in the judgment at some length, in order to show that even though the master had indicated that she would not have addressed any aspect of their application to strike out that fell outside of the order (such as the non-joinder of the parties), this is precisely what she did. At paragraphs 95-100, the master addressed the rival positions that were submitted orally before her in relation to non-joinder of the conservator directors as parties. Despite her admonitions to herself in the judgment at paragraph 13, the master did exactly what she indicated that she was not going to do; that is, she embarked on the ascertainment of who

were the proper parties to the claim, in addition to NBA and CCCB (the latter two who were joined in the claim).

[52] It is clear that the learned master's careful, and analytical judicial approach was undermined by the approach she took in examining the parties to the claim. The master was ably assisted by NBA and CCCB both of whom took the view that the conservator directors ought to have been joined. In so doing, the master reached the conclusion which was as a result of her having embarked on an impermissible trial of the matter on the merits. The complaints or Mr. Scipio, QC are very compelling and I accept them without reservation. I have no doubt that the master fell into error by examining matters that ought properly to be ventilated at the substantive hearing and concluding at paragraph 99 that the conservator directors are necessary parties to the claim. In my view, once the master had accepted that the claim was a proprietary claim that could not have been dealt with in the winding up process, and there were no countervailing factors that militated against her lifting the statutory stay, the master ought to have done so in the exercise of her discretion.

[53] It is not appropriate for this Court to express any settled view on some of the other matters to which the learned master alluded, since they should be properly ventilated at a substantive hearing of the claim. Suffice it to say, that it is the law that a party can sue the principal for acts or omissions of the agents without specifically naming the agents as parties to the suit.

[54] I hasten to say that this is not an exclusive criticism of the learned master in so far as she was clearly misled by NBA and CCCB in addressing matters that were not part of the section 143(c) application, nor the application to strike out on the basis of lack of leave to bring the claim. It may well be part of the problem and a reason for the confusion was that the master, having indicated in her judgment that she was not going to address the issue of proper parties since it was outside of the scope of the order, did exactly that. I hope it is not unfair to say that the confusion

must have been compounded by the oral arguments that were articulated to the learned master. This however, does not absolve the master from ensuring that the court order is adhered to. It is clear that the master seemed to have been proceeding nicely until she ventured into the examination of the irrelevant issue of whether the conservator directors ought to have also been joined in PBT and CCIB's claim. I will not deal with this aspect in any detail since it may well be the subject of further discussion. However, it is noteworthy that PBT and CCIB's claim is to trace their property and to recoup it from the persons who they allege have it and these persons are stated to be NBA and CCCB.

[55] With respect to the learned master, it is apparent that by embarking on the discussion of proper parties and not the narrow issue that was before her, the result is an internal inconsistency in the judgment. Accordingly, the master's judgment can be properly impugned and PBT and CCIB's complaints are quite compelling since there is an error of principle in the exercise of her discretion. To underscore this point, there is no doubt that the master, having correctly found that PBT's and CCIB's claims were proprietary in nature and could not be dealt with in the winding up process and that section 143(c) of the Banking Act was automatically engaged, the ineluctable conclusion was to lift the stay. This is evident from paragraphs 107(1) and 107(4) of the judgment which I have reproduced earlier in this judgment.

[56] It is evident that the learned master took into account the irrelevant matter of the proper parties to the claim and misapprehended the law in relation to agency and was plainly wrong in the exercise of her discretion in deciding not to lift the stay. As a consequence of the master's error of principle, this Court has no other option but to set aside her order.

[57] I am fortified in the above view by the fact that the sole basis for not lifting the stay is the proper party discussion as stated by the learned master in paragraphs 107 (5) and (6) of her judgment as follows:

> "(5) The claim, in substance, raises serious issues regarding the source of the power exercised by the conservators over the claimants and the manner in which the power was exercised. However, the claim as formulated has no real prospect of success since the claim against the conservators for breach of trust must be established before liability can be established against the defendants for the return of funds allegedly held on trust as a result of the alleged breach of the trust (emphasis mine). To put it another way, the conservators, against whom primary liability must first be established before secondary liability against the defendants can be established, must be but are not named as parties to the claim.
>
> (6) Thus while a claim of this nature might otherwise merit the lifting of the stay in the absence of evidence that the lifting of the stay is likely to impede the purpose of the receivership and negatively impact the winding up process or the matters set out in Section 184 of the Act, I am not satisfied that the court should exercise its discretion in favour of lifting the stay to allow a claim that has no real prospect of success in its present formulation to proceed. To do so would in my view cause valuable resources (time and money) of both the claimants and the defendants to be put to prosecuting and defending such a claim. It would also not be an efficient use of the court's limited resources."

[58] I agree with Mr. Scipio, QC and state I have no doubt that the learned master concluded that the stay would have been lifted but for the fact that the conservator directors were not joined as parties to the claim. The master committed an error of principle by not lifting the stay due to the non-joinder of the parties.

[59] The learned master having committed an error of principle in arriving at her conclusion, it therefore falls for this Court to exercise its discretion afresh. In doing so, I apply the relevant principles above together with the very helpful analysis of the master as distilled in her judgment and summarized at paragraphs 107 (1) – (4), which for convenience I repeat and accept:

> "(1) The claim is alleged to be a proprietary claim. On the premise that it is such a claim it is not one which can properly be dealt with in the winding up process since the proof of debt procedure does not permit proprietary claims to be adequately advanced or adjudicated.
>
> (2) Generally, a claim of this nature, (a proprietary claim) should be adjudicated upon in a timely manner in the interests of all parties since it would determine whether the funds in issue form part of the defendants' insolvency estate and would also provide clarity to the Administrator of the

claimants with respect to the status of the funds and aid in the proper discharge of his functions.

(3) There is no evidence of how the lifting of the stay would have any impact, if any, on the winding up process. Specifically there is no evidence that lifting the stay would adversely affect the winding up process.

(4) There is no evidence of how the lifting of the stay would affect financial stability or the discharge of the functions of the Central Bank. Specifically, there is no evidence that the lifting of the stay would adversely affect financial stability or prevent the Central Bank from discharging its functions in an expeditious and efficient manner."

[60] There is a strong stream of jurisprudence emanating from this Court in relation to the applicable principles on when an appellate court will interfere with the exercise of discretion by the court below. There is no need for extensive reference to the well-known authorities. It is sufficient to refer to what has become the locus classicus on the Court's review of the lower court's exercise of discretion, namely, the pronouncements of Sir Vincent Floissac in Michel Dufour et al v Helenair Corporation Ltd et al:[5]

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[61] Applying the principle in Dufour et al v Helenair Corporation Limited et al, this Court in the exercise of its discretion afresh, in the circumstances where the learned master was satisfied (but for the point on the proper parties) that the stay ought to have been lifted, it is clear that that is the convenient and appropriate course that this Court should adopt. In my judgment and in the exercise of this Court's discretion, the ineluctable conclusion to which I have arrived is the same

[5] (1996) 52 WIR 188, p. 3.

as that of the master, namely that PBT and CCIB have met the prerequisites for the lifting of the stay in order to be able to proceed with their proprietary claim against NBA and CCCB. Accordingly, I would order that the stay be lifted and PBT and CCIB are hereby granted permission to serve and proceed with their claim against NBA and CCCB.

[62] For the above reasons, the appeal against the learned master's judgment is allowed. I will also set aside the costs order below. PBT and CCIB shall have their costs of the appeal and in the court below, to be assessed if not agreed within 21 days of this order.

Conclusion

[63] In view of the totality of circumstances, I would make the following orders:

(a) PBT and CCIB's appeal against the learned master's decision is allowed and the judgment is hereby set aside;

(b) The statutory stay that is imposed pursuant to section 143(c) of the Banking Act is lifted so as to enable PBT and CCIB to proceed with their claim against NBA and CCCB;

(c) The costs that were awarded by the master in the lower court is set aside and PBT and CCIB are to have their costs on this appeal and in the lower court, to be assessed if not agreed within 21 days.

[64] I gratefully acknowledge the assistance of learned counsel.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar