IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Antigua and Barbuda

Claim No: ANUHCV2017/0266

BETWEEN:

MASSIMO ALLEMAGNE

By his Attorney Alessandra Allemagne

Claimant

and

MCALLISTER ABBOTT

1st Defendant

EUGENE ABBOTT

2nd Defendant

SIR EUSTACE FRANCIS

3rd Defendant

MICHAEL PIGGOTT

4th Defendant

Before:

Master Jan Drysdale

Appearances:

Kendrickson Kentish and Cherise Archibald of counsel for the claimant

Hugh Marshall of counsel for the first and second defendants

Jacqueline Walwyn of counsel for the fourth defendant

2018: June 18th

August 24th

DECISION

[1] **Drysdale, M.**: For consideration are two applications for summary judgment filed on 10th and 11th October 2017 respectively by the fourth defendant and subsequently by the first and second defendants.

Background

[2] In these proceedings which were filed on 23rd May 2017 and subsequently amended on 25th May 2017 the claimant claims damages for the alleged negligent management of an offshore bank by the defendants all of whom were directors. The claimant contends that as a result the bank became insolvent and now is in winding up proceedings.

[3] The claimant also founds his claim on breach of fiduciary duty which the claimant claims the directors owed to depositors like himself of the bank. Finally the claimant avers that the defendants were fiduciaries of his assets which were in the control of the bank at the material time.

[4] The defendants each filed defences in the instant matter. Thereafter the various applications for summary judgments were filed. The substance of the defences are repeated in the applications and as such a summary of each application will be undertaken hereunder.

The first application

[5] By notice of application the fourth defendant sought an order that judgment be entered in its favour pursuant to CPR15. The fourth defendant submits that the claimant's claim filed herein had no realistic prospect of success. A summary of the grounds of the application is contained hereunder:

[i] That the amended statement of claim discloses no cause of action in negligence.

[ii] That the amended statement of claim pleads damage which the claimant is yet to suffer.

[iii] The amended statement of claim does not disclose any facts as it relates to the alleged wrongful conduct of the fourth defendant.

[iv] The amended statement of claim is an abuse of the process of the court and is likely to obstruct the just disposal of proceedings.

[6] The fourth defendant filed an affidavit in support which amplified and explained the grounds advanced for the application. In it the fourth defendant deposes that he resigned as on the director 25th July 2011 which became effective 5th September 2011. This was at least six

months prior to the bank going into liquidation on 12th February 2012. Moreover the fourth defendant contends that at no time during his tenure as director did the regulatory authority or any qualified person or body ever allege that he as a director acted negligently or unlawfully in the fulfilment of his functions as a director.

[7] The fourth defendant deposes further that the pleadings of the claimant simply lists conclusions of the receiver-manager without there being any nexus to any negligent or intentional act during his tenure as director. The fourth defendant also argues that the claim against him is statute barred as in accordance with the International Business Corporation Act a claim against a director cannot be sustained after a period of two years from the date of alleged act or omission.

[8] The fourth defendant also submits that the liquidation process is still ongoing. Accordingly the claimant is incapable of demonstrating that he has no chance of the return of his deposit in the circumstances.

The second application

[9] The second application for summary judgment was filed by the first and second defendants. A summary of the grounds of the application are as follows:

[i] That the claimant has no real prospect of succeeding on the claim.

[ii] The defendants are sued in the capacity as directors of the bank.

[iii] The defendants as directors owed a duty of care to the bank only and not to the claimant and or any depositor of the bank.

[iv] The defendants have made no promise or representation to the claimant.

[v] That the law does not impose any duty of care as alleged by the claimant on a director of the bank to its depositors.

[vi] The claimant is seeking to circumvent the liquidation process as provided for under the International Business Corporation Act.

[10] In the evidence of the first and second defendants, they dispute that they owed a duty of care to the claimant and submit that the claim in negligence is misconceived.

[11] The first and second defendants deny the existence of any fiduciary relationship as alleged by the claimant. They depose that there was no obligation to act in the best interests of the depositors of the bank.

[12] They deny that they were ever trustees of the claimant's moneys deposited with the bank. Further they state that at no time did they mishandle, misappropriate, poorly invest or dissipate the claimant's deposits and therefore cannot be deemed to have breached any duty to the claimant.

[13] The first and second defendants more importantly state that they were never in advisory relationship with the claimant and did not make any representations to him concerning his money.

[14] Finally they state that these proceedings are an attempt to circumvent the liquidation process. They assert that this would result in the opening of the floodgates and as a matter of public policy must fail.

The Claimant's response to the applications

[15] The claimant by affidavit filed on 21st November 2017 opposes the applications for summary judgment. The affidavit purports to be a response to the summary judgment applications as well as an affidavit in support of an application for the further amendment of the statement of claim.

[16] The affidavit simply refers to a further amended statement of claim which the claimant avers is an attempt to clarify the case against the defendants. The various reports of the receiver-manager are also exhibited to the affidavit.

ANALYSIS

Summary Judgment Principles

[17] CPR 15.2 provides that the court may give summary judgment on the claim if it considers that the claimant has no real prospect of succeeding on the claim or issue.

[18] A realistic prospect of success is not tantamount to actual success. In the often quoted case of **Swain v Hillman**[1] Lord Woolf expounded:

> 'The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or..... they direct the Court to the need to see whether there is a "realistic" as opposed to "fanciful" prospect of success.'

[19] In order to determine whether this threshold for summary judgment has been met Pereira CJ in the case of **Didier et al v Royal Caribbean Cruises**[2] advised that the court should:

> 'consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim.'

[20] In this regard the court is also mindful of that in reaching a conclusion the court should not conduct a mini trial[3] but should engage in an analysis of the pleadings and the evidence to determine whether the claim should be dispensed with summarily as having no realistic prospect of success.

[21] Having regard to the above the court will identify the legal issues extrapolated from the claim and thereafter make a determination as to whether summary judgment may be entered either against the claim in whole or on a particular issue.

[22] The claimant asserts that the defendants are liable to him under the tort of negligence. The tort of negligence has three component parts comprising of a duty of care owed by the defendant to the claimant, a breach of that duty and loss or damage directly attributed to the breach. All of these must be satisfied in order for the tort to exist.

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[1] [2001] 1 All E.R. 91
[2] [2016] ECSCJ No. 105
[3] Swain v Hillman [2001] 1 All E.R. 91

[23] The claimant claims that the directors of the bank were under a legal obligation to act in the best interests of both the bank and its depositors. He rationalises that the defendants owed a duty of care to depositors, 'the latter being persons whom it would have been reasonable to foresee might suffer harm from any breach of duty by the defendants.'

[24] The test for determining whether a duty of care will be deemed to exist is derived from the case of **Caparo Industries Plc v Dickman and Others**.[4] Here the court set out three principles which must be found in order for the tort of negligence to exist. These principles are as follows:

(1) The relationship between the parties must be one of sufficient proximity.

(2) It must be reasonably foreseeable that the actions of the defendant will cause harm or loss to the claimant.

(3) The court must consider it to be fair just and reasonable to impose a duty of care on the defendant.

[25] Having regard to the above the court must first seek to determine what relationship if any exists between the defendants and the claimant. In the instant matter the claimant has sued the defendants on the basis that they are directors of the bank responsible for the management of the banks affairs. The relationship between the defendants and the bank is therefore contractual.

[26] The bank also has a contractual relationship with the claimant as its customer. The effect of that relationship is such that when a customer deposits money into an account that customer becomes the lender and the bank becomes the debtor of the customer. Once moneys are deposited by the customer, it ceases to belong to the customer and becomes the property of the bank whom can use the same as it sees fit. The customer as creditor becomes entitled to the repayment of any sum deposited upon demand. As far back as 1948

[4] 11 LDAB 563

the House of Lords in the case of **Foley v Hill and others**[5] endorsed this view and stated:

> 'Money, when paid into a bank, ceases altogether to be the money of the principal; it is by then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into a banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.
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> That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor.'

[27] Having regard to the above it is pellucid that there exists two contractual relationships, one with the bank and the defendants as directors on the one hand and the bank and the claimant as customer on the other. These two contractual relationships are separate and distinct from each other. There is no privity of contract between the

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[5] [1848] 9 ER 1002

directors of the bank and the customer of the bank in any of the contractual agreements.

[28] In addition to there being no contractual relationship between the claimant and the defendants, there also appears to be no agency relationship between or concerning the parties and none has been pleaded.

[29] It is a well-known principle that a company is a separate and distinct entity to its directors. The exception to this sacrosanct principle is where the company is a sham or is being used for an unlawful purpose. In such circumstances an application will be made to pierce the corporate veil to establish that the directors and the company are in effect one and the same and thereby at least on the face of it create a nexus between the parties. The claimant has however not made any such submission and in fact the bank has not been joined as a party.

[30] Further the fact that the defendants worked for the bank does not automatically translate into there being a relationship of proximity between themselves and the claimant as customer of the bank, with whom they have no direct dealings, agreement and or involvement.

[31] Accordingly in light of the above the claimant has failed to establish the proximity of relationship required for the duty of care to arise.

[32] In addition to the above, the claimant has also failed the third limb of the Caparo test, that is whether it is fair just and reasonable to impose a duty of care on the defendants. The claimant has acknowledged that the bank is currently in liquidation proceedings. Based on the contractual relationship with the bank the claimant would be entitled to recover any sums due as payable to him if any upon the conclusion of the same. Parliament intentionally created a detailed statutory regime to deal with creditor entitlements upon the insolvency of an entity. The attempt to recover all moneys deposited with the now insolvent bank by virtue of these proceedings is tantamount to an attempt to circumvent the statutory process. Moreover I accept that the claimant as one of many depositors of the bank would by virtue of these proceedings attempt to open the floodgates by these

proceedings. Public policy will thereby preclude the tort of negligence from being extended in these circumstances.

[33] The claimant also claimed an action against the defendants as directors for breach of fiduciary duty. A director as a fiduciary owes a duty to act honestly, in good faith and with regard to the best interest of the company. This common law duty has also been encapsulated in both the Company Act of Antigua section 97 as well as section 95[1][b] of the International Business Corporations Act Cap. 222 of the Laws of Antigua and Barbuda. As it relates to the statute the court must give effect to its clear and unambiguous words. In the absence of anything further the court cannot import any additional persons or entities to extend this duty to the claimant.

[34] With respect to the common law duty of care, the interest of a director being only to the company has been explored in a multiplicity of cases including the case of **Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Service Ltd.**[6] In that case Dillon LJ expressed that the fiduciary duty was owed to the company and not to a shareholder or creditor. He stated:

> 'The directors indeed stand in a fiduciary relationship to the company as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future or to individual shareholders.'

[35] In light of the above the claimant is unable to prove that he is a proper party to whom a statutory and or common law fiduciary duty owed.

[36] The final cause of action of the claimant concerns the assertion of breach of trust. In support of this contention the claimant relies on the report of the receiver-manager which details the financial position of the bank. Once again the claimant relies on his status as a depositor and customer of the bank to seek to establish this relationship. However as previously indicated the deposit of money gives rise to the relationship of debtor and creditor. Halsbury's Laws of

[6] [1983] Ch 258

England/Trusts and Powers (Volume 98 (2013))/1 affirms this and debunks the idea that a trust relationship is created. It states:

> 'The deposit of money with a bank normally gives rise to a loan (a debtor-creditor relationship) and not to a trust. This remains the case where a bank that is a trustee holding trust money banks the money with itself pursuant to an authority in that behalf in the trust instrument, so that the money can be used as normal in the bank's business (for example lending money). If the bank becomes insolvent the beneficiaries, merely having a thing in action against the bank, rank only as unsecured creditors.'

[37] I adopt this posture and find that the relationship of the claimant and the bank does not create a trust. Further there is no trust agreement which was entered into by the claimant and the defendants, neither did the defendants purport to act for the claimant in any advisory or any capacity concerning the funds deposited with the bank. The claimant therefore also fails on the issue of there being a breach of trust.

ORDER

[38] Based on the foregoing I make the following order:

1. That the applications for summary judgment are both granted. Judgment is entered for the first, second and fourth defendants against the claimant.
2. The claimant shall pay the first and second defendants cost in the sum of $1,500.00.
3. The claimant shall pay the fourth defendant costs in the sum of $1,500.00.

Jan Drysdale

Master

By The Court

Registrar