THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. NEVHCV2017/0124

BETWEEN:

Kevin Huggins
Applicant

and

Eastern Caribbean Central Bank
Respondent

Appearances:-
Mr. John Carrington Q.C. with Ms. Midge Morton and Ms. Maurisha Robinson for the Applicant.
Mr. Emile Ferdinand Q.C. with Mr. Garth Wilkin and Ms. Danni Maynard for the Respondent.

2017: November 10

2018: October 24

DECISION

[1] WILLIAMS, J.: **The Applicant Kevin Huggins of Prospect Palms, St. John's Parish,** has applied to the Court for leave to apply for Judicial review for an order of certiorari to quash the following decisions of the Respondent the Eastern Caribbean Central Bank of Basseterre, St. Kitts.

a) The decision contained in its letter dated 15th December 2016 restraining the Applicant from exercising the voting right on his shares and from acting as a proxy at the general meeting of Bank of Nevis Ltd.

b) The decision contained in its letter dated 17th July 2017 that the Applicant fails to satisfy the fit and proper criteria under the Banking Act 2015 Section 97(2).

[2] The grounds of the application are that:

1) The Respondent by letter dated 15th December 2016 purported to suspend the Applicant's authority to exercise voting rights on his shares and from acting as a proxy at the Annual General Meeting of the Bank of Nevis in December 2016 until the completion of its investigations against the Applicant on allegations of extortion.
2) The Respondent acted illegally as it wrongfully deprived the Applicant of the exercise of his rights to property in his shares, interfered wrongfully in his contractual relations with others, and acted beyond the scope of its powers. The Respondent also abused its powers and acted unfairly towards the Applicant as it failed to afford him any opportunity to respond to allegations made against him prior to purporting to institute remedial action under the Banking Act under circumstances where the Applicant would be adversely affected by the decision.
3) By virtue of Section 97 of the Banking Act 2015 every director of a Bank must be a fit and proper person to hold the position of Director. The determination whether a person is fit and proper can be made by the Respondent in respect of a bank that is regulated by it the Respondent.
4) The Respondent, by letter dated 17th July 2017 informed the Applicant of its determination, that the Applicant fails to satisfy the fit and proper criteria under the Banking Act, and that it would advise the Directors of the Bank of Nevis of its opinion. This determination was allegedly made "having regard to the totality of the circumstances and the information surrounding the underlying allegation made against the Applicant, including the Applicant's utterances which is tantamount to threats."
5) The Respondent wrote to the Directors of Bank of Nevis on the 17th July 2017 informing them of this determination and stating "our opinion has been informed by the tone and veiled threats contained in the emails to date."

6) The determination made by the Respondent was unfair as the Respondent failed to give the Applicant access to the evidence on which the case against him was based or a proper opportunity to meet such a case and failed to state the reasons for which it arrived at its decision in sufficient detail so as to enable the Applicant to understand why the decision was made. The Respondent also in communicating its decisions to the Board of Directors of the Bank of Nevis stated reasons that were different from those communicated to the Applicant.
7) In arriving at the determination, the Respondent acted unreasonably as it took into consideration irrelevant matters such as the complaints by the Applicant concerning other transactions and the activities of certain staff members at the Bank of Nevis and failed to consider or give proper weight to material considerations such as the lack of evidence of wrongdoing by the Applicant or the Applicant's overall history as Director of Bank of Nevis.
8) The determination made by the Respondent that the Applicant is not fit and proper to hold the position of Director of Bank of Nevis is irrational in that no public body applying its mind to the criteria under the Banking Act and the allegations made against the Applicant could have reasonably come to the conclusion that the Applicant does not meet the criteria of being fit and proper to hold the position of Director of Bank of Nevis.

The Issue

[3] Whether the Applicant satisfies the criteria to be granted leave to bring Judicial review proceedings against the Respondent?

The Respondent's Submissions

[4] The Respondents submit that the matters arising from the Eastern Caribbean Central Bank's (ECCB) letter dated 17th July 2017 was not a decision and not a matter which is amendable to Judicial review since the ECCB did not take action pursuant to Section 103 (4) of the Banking Act 2015.

[5] The Respondent submits that the said opinion of the ECCB as the principal regulator of the domestic Commercial Banking Sector within the Eastern Caribbean Currency Union would be covered by the ECCB's statutory immunities under the ECCB Act.

[6] The Respondent's also contend that the removal of the Applicant from his position as a Director was a decision of the Board of Bank of Nevis.

As such different legal considerations would have arisen if the Respondent had taken a decision and issued a directive under Section 103 (4) of the Banking Act 2015.

[7] The Respondents further submit that their letters dated 17th July 2017 merely communicated to the Applicant and to the Board of the Bank of Nevis, their opinion as to the Applicant's failure to meet the minimum statutory criteria in Section 97 of the Banking Act. The Respondent also submits that there is no merit whatsoever in the Applicant's allegation that the Respondent was unfair to the Applicant.

[8] The Respondents contend that the Applicant was invited to provide written responses to the Respondents Deputy Governor by letter dated 1st March 2017.

The Respondents submit that the Applicant made written representations to the ECCB and attended a meeting with the ECCB representatives; where upon the Applicant expressed satisfaction with the opportunities to be heard that were afforded him by the Respondent.

[9] The Respondents argue that the Applicant should seek redress in private law against the Board's decision if he believes that his complaint has merit and that he is a fit and proper person to be a Director of the Bank.

[10] Further, the Respondents contend that the Applicant is reluctant to pursue any redress to which he may be entitled to against the Board of the Bank of Nevis and this provides another reason why the Court should <u>not</u> grant leave for Judicial review.

[11] The Respondents submit that the "Suspension Decision" contained in their letter ought not to be subject to Judicial review for the following reasons;

1) That the issue was not a live issue and that the "Suspension Decision" had already been lifted by the Respondent and therefore there was no decision to quash.

2) That a suspension pending an inquiry is imposed solely as a matter of good administration and did not require compliance with the rules of Natural Justice, and that the Respondent's letter dated 15th December 2016 stated that the prohibition and suspension that were imposed were pending the completion of investigations.

   Therefore the principles of Natural Justice were not breached in relation to the Suspension Decision and there is no possibility that Judicial review will succeed on that ground.

[12] The Respondents submit that a delay of nine months in seeking leave for Judicial review amounts to undue delay in light of the fact that the suspension was already lifted by the Respondent's letter of the 17th July 2017.

[13] The Respondents further argue that it is not enough that a case is potentially arguable, and that an Applicant cannot plead potential arguability to justify a grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen.

[14] The Respondents therefore contend that the Applicant has failed to establish that this is an appropriate case in which to grant leave to seek Judicial review.

The Applicant's Submissions

[15] Counsel for the Applicant Mr. John Carrington Q.C. submits that in the instant case, the Applicant wishes to challenge two decisions of the Respondent.

The first is the decision to suspend his voting rights and proxy in a letter to the Applicant date 15th December 2017, and the second decision is that of the 17th July 2017 where the Respondent lifted its suspension of the Applicant's voting rights and proxy.

According to Mr. Carrington Q.C. the Bank of Nevis Board of Directors by its letter dated 27th July 2017 purported to resolve that the Applicant was removed as Director and therefore it could not be argued that the Applicant acted with any delay in presenting the application for leave for Judicial review.

[16] Mr. Carrington Q.C. further argues that there should also be no question as to an alternate remedy as against the Respondent, since the Applicant and the

Respondent did not enjoy a relationship based on contract or any other area of the law and as a such any argument of a discretionary bar as pertains to an alternate remedy would fail.

[17] Counsel for the Applicant Mr. Carrington Q.C. also submitted that both decisions made by the Respondent were unfair as they failed to give reasons for arriving at its decision so as to enable the Applicant to understand why the decision was made. **The Respondent also stated reasons in communicating it's 2nd** decision that were different from those communicated to the Applicant.

[18] In relation to this issue, Counsel for the Respondent Mr. Emile Ferdinand Q.C. submits that leave ought not to be granted since;

1) The opinion of the ECCB contained in its letter dated 17rh July 2017 was not a decision and therefore not amenable to Judicial review.
2) The ECCB did not take action pursuant to Section 103(4) of the Banking Act 2015.

[19] Mr. Ferdinand Q.C. opines in his written submissions that the ECCB as the principal regulator of the domestic commercial banking sector within the Eastern Caribbean Currency Union would be covered by the Statutory Immunities under the ECCB Act.

[20] Mr. Ferdinand Q.C. further contends and reiterates that the removal of the Applicant from his position as a Director was a decision of the Board of the Bank of Nevis and not a directive.

[21] Counsel also contends that the ECCB letters dated 17th July 2017 are in substance reports to the Applicant and to the Board of Directors of the Bank of Nevis containing the opinion that the ECCB had come to following its investigations.

The Law and Legal analysis

[22] The application is brought under CPR part 56 which stipulates that an application under this part must be made inter alia by a person who has been adversely affected by a decision of a Judicial or quasi-judicial body.

[23] Under CPR 2000, Applications for Judicial review are subject to a two stage process.

The first stage namely the determination whether leave should be granted to the Applicant to bring Judicial review proceedings is dealt with by the Court on application by the prospective Claimant and the Judge hearing the application must be satisfied that leave should be granted to the applicant to make the substantive claim for relief by Fixed Date Claim Form.

[24] The leave stage is a filtering process and the dicta of Mitchell JA in Treasure Bay (St. Lucia) Limited vs Cage (St. Lucia) Limited et al[1] is instructive;

"So without deciding the issue, it appears that applications for leave to appeal are intended by the Rules to be a "weeding out" process to ensure that unmeritorious claims are not filed" They should not normally be intended to be contested at such at an early stage.

[25] This therefore suggests that even where the Court directs an oral hearing to take place on notice, it is not expected that a mini-trial of the issue whether leave should be granted should take place and the filing of evidence by Respondents that does not address the relatively narrow issues with which the Court is concerned at this stage should be actively discouraged. See: R vs Aylesbury Vale DC[2]

[26] The threshold requirement which the Applicant should meet is now well established by the Privy Council decision in Sharma vs Browne-Antoine [3] where the Board stated that;

"The Court will refuse leave to claim Judicial review unless satisfied that there is an arguable ground for Judicial review having a realistic prospect of success, and not **subject to a discretionary bar such as delay or an alternative remedy."**

See also: Rawlings vs Attorney General of St. Kitts and Nevis[4]

[27] The filtering process also requires that even where the threshold has been satisfied, the Court then needs to consider whether leave should nevertheless be refused because of the availability of an alternative remedy or delay by the applicant in seeking leave. See: CPR 56.5(2)

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[1] SLUHCVAP2011/45
[2] [2007] EWCA Civil 1166
[3] [2006] UKPC 57
[4] SKBHCV2016/0344

Natural Justice

[28] Mr. Ferdinand Q.C. also submits that there is no merit in the Applicant's allegations that the Respondent was unfair to the Applicant since the Applicant was notified of the contents of the "Fit and proper" letter and invited to provide written responses to the information and allegations.

[29] Learned counsel Mr. Ferdinand Q.C. submits that by the Applicant's emails dated 14th March 2017 and 21st March 2017 he admitted that he had made written representations to the ECCB and had attended an in-person meeting with representatives of the ECCB.

Alternate Redress

[30] Learned Queen's Counsel Mr. Ferdinand submits that the Applicant's complaint in his Counsel's letter dated 31st July 2017 is the alleged breach of the Bank of Nevis's by laws and the Board's "authority to remove".

However according to Mr. Ferdinand Q.C. in that said letter, Counsel for the Applicant strongly asserts that relief from the Court is available to the Applicant; thereby evidencing a breach of the alternative redress principle.

[31] Mr. Ferdinand Q.C. contends that there are no live issues for the Court to further consider since the "Suspension Decision" had been lifted by the Respondent's in a letter dated 17th July 2017 and therefore the Court should not issue orders that cannot possibly be implemented.

[32] In relation to the issue of delay learned Queen's Counsel Mr. Ferdinand contends that the Applicant's delay of nine months in seeking leave for Judicial review was a further ground for not granting leave to apply for Judicial review.

[33] Further learned Counsel submits that it is not enough that a case is potentially arguable for a grant of leave to issue proceedings, but that the Court will refuse leave to claim Judicial review unless satisfied that there is an arguable ground for Judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.

[34] CPR 56(2) stipulates that an application under this part is limited to inter alia any person who has been adversely affected by the decision which is the subject of the

application; and that the Applicant has sufficient interest in the subject matter of the Application.

The Applicant must demonstrate that he has an arguable case that a ground of Judicial review exists that warrants thorough examination at a substantive hearing and that there are no debarring factors.

[35] At this stage I am not concerned with the merits of the decision in question nor am I required to conduct a mini-trial. I have to concern myself with the legality of the decision, with the jurisdiction of the decision maker and with the fairness of the decision making process.

See: Rawlings vs The Attorney General of SKN et al[5]

[36] The Respondents contend that the opinion of the ECCB by letter dated 17th July 2017 was merely an opinion and not a decision and as such not amenable to Judicial review.

[37] In examining the language of the ECCB letter dated 17th July 2017, I find great difficulty in concluding that this was merely an opinion of the ECCB.

While the letter contains the words "opinion" at paragraphs 3 and 4 of the said letter, the finality and tone of the language to wit:

"The Eastern Caribbean Central Bank having had regard to the totality of the circumstances and information surrounding the allegation made against **you…. has formed the opinion that you fail to satisfy the fit and proper criteria.** As a consequence, we are to advise the Board of Directors of the Bank of **Nevis of our opinion."**

This language has persuaded me to arrive at the conclusion that this was a decision of the ECCB by which the Applicant was plainly affected and which was acted upon by the Board of Directors of the Bank of Nevis at their meeting of the 26th July 2017 when Kevin Huggins the Applicant was removed as a Director of the Board of Directors of the Bank of Nevis.

[38] Counsel for the Defendants Mr. Emile Ferdinand Q.C. in his written submissions at page 2 states that the opinion of the ECCB was the result of its exercise of its

[5] SKBHCV2016/0344

"investigative and reporting activities and as such is covered by the statutory immunity under **the ECCB Act" in particular Article** 50.

I am of the considered opinion that the ECCB has in its letter of the 17th July 2017 **has gone beyond it's "investigative and reporting activities" and conveyed**
its decision to the Board of the Bank of Nevis.

Further I am not convinced on all of the evidence adduced that the Applicant was given an opportunity to be heard before a decision was reached by the ECCB in its letter of the 17th July 2017. The fact that the Applicant has not joined the Bank of Nevis as a party to the Judicial review proceedings does not warrant the attention of the Court at this time and is a matter for the Applicant and his Counsel to determine.

[39] However I am further buttressed in my opinion at paragraph 38 by the dicta of Byron C.J. in the case of Capital Bank Int. Limited vs 1) Eastern Caribbean Central Bank 2) Sir K. Dwight Venner [6] at paragraph 35;

"The Court however found it necessary to remind that it would not be consistent with the rule of Law in a Democratic society or with the Basic principle underlying Article 6 (1) if a state could without restraint remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.

A fair balance had to be struck between the demands of the general interest of the community, and the requirements of the protect**ion of the individual's fundamental rights."**

[40] **The Court's jurisdiction cannot be ousted by a plea of imm**unity from the ECCB **when an individual's fundamental rights are adversely affected by the actions of the** ECCB and others.

Delay

[41] CPR 2000 part 56.5 (1) (2) sets out the factors the Court looks at when considering whether to grant or refuse leave on the grounds of unreasonable delay by the Applicant.

[6] Grenada Civil Appeal Nos. 13 & 14 of 2002

[42] The Court of Appeal has also ruled that Section (21) (1) (a) of the Public Authorities Protection Act did not apply to Judicial review proceedings.

See: Ann Hendrickson Bass vs Nevis Island Administration and Director of Physical Planning et al[7]

[43] In my respectful opinion, there is no fixed statutory time limit imposed on this Applicant for leave to apply for Judicial review. CPR 56.5 gives the Court a discretion to refuse to grant leave where there has been unreasonable delay. It is accepted that mere delay is not enough to trigger this discretion it must be delay which is first unreasonable.

The authorities show that such an application should normally be brought within a three month-period. See: Fishermen and Friends of the Sea vs The Environment Management [8]

[44] However there are authorities in which delays over a year or more has not barred an application for leave for Judicial review

See: The Hon. Patrick Manning et al vs Chaindresh Sharma[9].

Roland Browne vs The Public Service Commission

Urban Dolor vs The Board of Governors Sir Arthur Lewis Community College[10]

[45] As a matter of principle, whether an applicant has employed unreasonable delay will depend on the circumstances of the particular case.

[46] In his affidavit evidence, the Applicant states the chronology of events starting in November 2016 (Exhibit KH1 to KH5).

[47] At KH6 there is a letter from the ECCB dated 15th December 2016 where directives were issued with immediate effect against the Applicant.

[48] Another letter followed from the ECCB dated 1st March 2017 where allegations of extortion were being investigated by the ECCB against the Applicant (KH9).

[7] NEVHCV2016/0014
[8] [2006] 2LRC 384
[9] Privy Council No. 22 of 2008
[10] No. 30 of 2009 (unreported)

[49] At (KH22) the ECCB letter dated 17th July 2017 refers to multiple issues regarding the **"Suspension of position and prohibition of voting rights and investigation into allegations of extortion."**

[50] From the evidence adduced, I am troubled that there is a total lack of specificity of the issues under investigation and the findings arrived at by the ECCB.

[51] In my respectful opinion, the immunities contained in Article 50 despite their language are not absolute because of the constitutionally guaranteed right to the protection of law prescribed in Section 10 (8) of the constitution of St. Kitts and Nevis.

[52] Consequently since the ECCB has not provided any reasons in sufficient detail in arriving at both decisions of the 7th July 2017 and the 17th July 2017 which are adverse to the Applicant, then the Applicant cannot be said to have acted with any delay in filing proceedings against the Respondent ECCB.

Failure to give reasons

[53] I accept the Applicant's submission that the failure of the Respondent in giving reasons or adequate reasons for its decision, amount to an error of law or an illegality sufficient to give rise to Judicial review proceedings. I refer to Section 97 (2) and (3) of the Banking Act 2015.

[54] I am fortified in my opinion by the decision of Virgin Islands Environmental Council vs The AG per Hariprashad-Charles J where Her Ladyship opined as follows;

"A failure to give reasons for a decision may be a ground for Judicial review; where reasons should be given, they need to be stated in sufficient detail to enable the Claimant to know what conclusion the decision maker has reached on important controversial issues."

The ECCB in my opinion has also not given consideration to Section 103 (1) (a) (ii) of the Banking Act in that the prudential standards to be issued by the Central Bank has not been adduced in the evidence provided and has not been cited in the decision of July 17th 2017.

See: Also Peter Thomas vs Desireen Douglas[11] per Perriera C.J. at paragraph 16.

Fairness

[55] The dicta of Blenman J.A in the case of Sylvester Solomon vs His Honour Senior Magistrate Robert Shustera [12] is instructive where Her Ladyship opined;

"It is the law that the right to a fair hearing entails giving each party an opportunity to put its side of its case before a decision is reached."

[56] Again in the case of Regina vs Secretary of State for the Home Department Ex parte Doody[13] per Lord Mustill where he expressed the requirements of fairness as follows;

"Fairness will very often require that a person who may be adversely affected by a decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to procuring its modification or producing a favorable result or both.

Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require **that he is informed of the gist of the case with which he has to answer."**

[57] I will now consider whether the Applicant has an arguable case with a realistic prospect of success. In conducting this assessment, I have in mind the relevant learning as enunciated in the case of Sharma vs. Browne-Antoine;

"The ordinary rule now is that the Court will refuse leave to claim Judicial review unless satisfied that there is an arguable ground for Judicial review having a realistic prospect of success, and not subject to a discretionary bar such as delay or an **alternative remedy… The more serious the allegation or the more serious the** consequences if the allegation is proved, the stronger must be the evidence before **a court will find the allegation proved on the balance of probabilities."**

[11] GDAHCVAP2015/0036
[12] MNIHCVAP
[13] [1994] 1 AC 531

[58] In the case at Bar, Counsel for the Applicant submits that the Applicant wishes to challenge two decisions of the Respondent. The first is contained in the letter of the 15th December 2016 where the Respondent purported to suspend the voting rights **attached to the Applicant's shares in the Bank of Nevis as well as the suspension from the Applicant's position as** Director with the Bank of Nevis.

[59] The second decision of the decision-maker/Respondents is contained in a letter dated 17th July 2017 wherein the Respondents declared that the Applicant failed to satisfy the fit and proper criteria of a Director of the Bank of Nevis. However the Respondent lifted the prohibition on voting rights that it had imposed on the Applicant.

As a result of the letter of the ECCB dated the 17th July 2017, the Board of the Bank of Nevis by letter dated 27th July 2017 removed the Applicant from its Board effective 1st August 2015 without giving reasons or sufficient reasons for such removal pursuant to Section 97 (2) of the Banking Act.

[60] Accordingly I hold that the Applicant has established an arguable case with a realistic prospect of success that the decision was unreasonable, irrational and illegal and that he acted without delay in bringing proceedings against the Respondent.

[61] In the circumstances, I am driven to conclude that the application for leave to bring Judicial review proceedings must be granted against the Action of the ECCB in its **decision to declare that the Applicant failed to satisfy the fit and "proper criteria" of** a Director. The prohibition on voting rights has been lifted by the ECCB and therefore leave to file Judicial review proceedings against that particular decision would be denied.

Conclusion

[62] It is hereby ordered that:

1) Leave is granted to the Applicant to seek Judicial review;

    a) Against the decision of the ECCB to declare **him an "unfit and improper" person to be a Director of the Bank of Nevis.**

b) Against the decision of the ECCB to suspend him from his position as Director with the Bank of Nevis.

2) The first hearing of this matter shall be on a date to be fixed by the Registrar.
3) The Application for Judicial review must be filed and served by the Applicant within 14 days of the date of this order.
4) Costs will be costs in the cause.

Lorraine Williams

High Court Judge

By the Court

Registrar