

GRENADA

IN THE COURT OF APPEAL

HCVAP 2009/007

BETWEEN:

CAPITAL BANK INTERNATIONAL LIMITED

Appellant

and

[1] DAVID HOLUKOFF (Receiver of Capital Bank International Limited)

[2] V. NAZIM BURKE (Minister of Finance in the Government of Grenada)

[3] THE ATTORNEY GENERAL OF GRENADA

Respondents

Before:

The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Cajeton A. K. Hood for the Appellant

Mr. Rohan A. Phillip, Solicitor General for the 2nd and 3rd Respondents

2010: June 16

Civil Appeal – Civil Procedure – Procedural Appeal – revocation of appointment of receiver – whether interlocutory or final – whether correct procedure employed for instituting proceedings under the Banking Act No. 19 of 2005 – Parts 8 and 17 of the Civil Procedure Rules 2000 – section 33(2)(g) of the West Indies Associated States Supreme Court (Grenada) Act Cap. 336

The second respondent (“the Minister”) appointed a receiver over the appellant bank (“the Bank”) pursuant to powers conferred by section 43 of the Banking Act No. 19 of 2005 (“the Act”). Section 45 of the Act provides that the financial institution, may, within ten days of the appointment, institute proceedings in the High Court to have the appointment revoked. The Bank sought to institute proceedings to challenge the appointment of the receiver by filing and serving a claim form with a notice of application and an affidavit in support pursuant to Part 17 of the Civil Procedure Rules 2000 (“CPR 2000”). The second and third respondents opposed the application on the ground that there was no claim before the court as the Bank had failed to file a statement of claim as required by CPR 8.1(1) and CPR 8.2 did not apply.

The learned judge held that as no regulations had been enacted under the Act to deal with procedures for instituting proceedings, the jurisdiction of the High Court was to be exercised in accordance with rules of court, to wit, CPR 2000. The learned judge noted that whereas CPR 8.1(1) requires proceedings to be commenced by the filing of the claim form and statement of claim (or affidavit, if any rule or practice direction so requires), CPR 8.2 sets out circumstances under which a claimant may serve a claim form without a statement of claim or affidavit. It was however found that the Bank had neither complied with the procedures nor met the required conditions under CPR 8.2.

The learned judge found further that the filing of an application was not sufficient to “institute proceedings” in accordance with the Act and that the application, which sought final and not interim relief, was a means of obtaining by application what the rules require to be done by claim form and statement of claim. It was accordingly held that there were no proceedings over which the court could properly exercise its jurisdiction, which fundamental defect could not be cured by recourse to the overriding objective. The Bank appealed against these findings.

Held: allowing the appeal, setting aside the decision of the learned judge and remitting the matter to the court below with costs to the appellant to be assessed, if not agreed:

1. An application is a proceeding and the proceeding is commenced when the application is filed. The learned judge accordingly erred in holding that the filing of an application was not sufficient to institute proceedings in accordance with the Act.

Quorum Island (BVI) Limited and the Attorney General v Virgin Islands Environmental Council British Virgin Islands HCVAP 2008/004, followed.

2. The application for the revocation of the appointment of a receiver is interlocutory in nature as the decision on the application would not have finally determined the matter in litigation for whichever side the decision is given. Stated alternatively, the proceedings would not have ended if the Bank, as opposed to the respondents, had won.

Oliver McDonna v Benjamin Wilson Richardson Anguilla Civil Appeal No. 3 of 2005, followed.

3. Having regard to the requirements of CPR 8.1(1), proceedings had not been commenced. CPR 8.1(6) however provides that a person who seeks a remedy before proceedings have been started must seek that remedy by application under Part 11 of CPR 2000, which the Bank purported to do. It would appear that the Bank’s application comports with the requirements of Part 11. However, being also an application for interim relief, the requirements of Part 17 need also have been satisfied. The learned judge, having erred in holding that the application was final and not interlocutory, failed to address her mind to CPR 17.2, by virtue of which the Bank’s application was prejudiced.

JUDGMENT

- [1] GORDON, J.A. [AG.]: The issue raised on this appeal is a novel one and concerns the procedure to be employed for the commencement of proceedings to challenge the appointment of a receiver under the **Banking Act**¹ (the Act).

Procedural Background

- [2] Pursuant to powers conferred by section 43 of the Act, the second respondent (“the Minister”) appointed a receiver over the appellant bank (“the Bank”) on 18th September 2008.
- [3] On 29th September 2008, the Bank sought to challenge the appointment of the receiver by serving a claim form seeking certain declarations and other relief. The Bank also served with the claim form, a notice of application pursuant to Part 17 of the Civil Procedure Rules 2000 (“CPR 2000”) and an affidavit in support.
- [4] The second and third respondents applied for a declaration that the court had no jurisdiction to try the claim or alternatively should not exercise its jurisdiction to try the claim. The second and third respondents contended that there was no claim before the court as the Bank had failed to file in the court office a statement of claim as required by CPR 8.1(1). It was further argued that CPR 8.2 did not apply.

The decision appealed

- [5] The learned judge summarised the issues thus²:
- “...(1) have proceedings pursuant to section 45 of the Banking Act been properly instituted herein; (2) if not, what are the consequences.”
- [6] Section 45 of the Act provides that where a receiver has been appointed under the Act, the financial institution may, within ten days of the appointment, institute proceedings in the High Court to have the appointment revoked.

¹ No. 19 of 2005

² Grenada Claim No. GDAHCV 2008/0484 delivered 20 February 2009

- [7] The learned judge observed that whereas the High Court is identified as the court in which proceedings are to be instituted, no regulations had been enacted under the Act to deal with procedures for instituting proceedings. The learned judge noted that section 11 of the West Indies Associated States Supreme Court (Grenada) Act (“the Supreme Court Act”)³ provides that the jurisdiction of the High Court in civil proceedings is to be exercised in accordance with rules of court, to wit, the Civil Procedure Rules 2000 (“CPR 2000”).
- [8] Part 2.2 of the CPR 2000 provides that CPR applies to all civil proceedings except those specifically exempted under subsection 3, which latter include, insolvency proceedings and proceedings in the Supreme Court instituted under any enactment insofar as rules made under that enactment regulate those proceedings. There being no such rules enacted under the (Banking) Act, the learned judge concluded that CPR 2000 was applicable to proceedings under the Act.
- [9] The learned judge observed that Part 8 of CPR 2000 deals with how to start proceedings:
- “8.1 A claimant starts proceedings by filing in the court office
- (a) the claim form and (subject to rule 8.2)
- (b) the statement of claim; or
- (c) if any rule or practice direction so requires – an affidavit or other document.”
- [10] CPR 8.2 provides that a claim form may be served without a statement of claim or affidavit if the claim form contains all the information required by rules 8.6, 8.7, 8.8 and 8.9 or the court gives permission. The learned judge opined that the claim form filed and served by the Bank did not contain all the information required and the court's permission had not been sought. It was further opined that the application did not meet the conditions for the service of a claim in urgent cases. The learned judge held therefore that the proceedings were not properly instituted

³ Cap. 336

which fundamental defect could not be cured by recourse to the overriding objective.⁴

- [11] The learned judge also had regard to the Bank's argument that the revocation of a receiver can equally be done by application. The learned judge observed that section 45 of the Act made no reference to an application but to the institution of "proceedings" in the High Court. It was noted that "instituting proceedings" in the Act had the same meaning as starting proceedings in Part 8 of CPR 2000. The learned judge held that the application was not one for interim relief but a means of obtaining by application what the rules require to be done by claim form and statement of claim. It was accordingly declared that the service of the claim form without observing the requirements of Part 8 of CPR 2000 was not effective to institute proceedings so that there were no proceedings over which the court could properly exercise jurisdiction.

The notice of appeal

- [12] The Bank appealed by notice of appeal filed 13th July 2009, on the grounds that the learned judge erred:
- (i) in finding that there was no proceeding over which the court could properly exercise jurisdiction;
 - (ii) in failing to use the court's case management powers to cure the perceived defect in procedure; and
 - (iii) in finding that the application could not be heard pursuant to CPR Part 17.

The appeal

- [13] I am of the view that the central issue for determination is whether the relief sought, that is, the order for the revocation of the appointment of a receiver, is

⁴ The learned judge applied the learning espoused in *Gordon Brathwaite v Anthony Potter* Civil Appeal No. 18 of 2002 applying *Vinos v Marks & Spencer plc* [2001] 3 All ER 784; *In Re Pritchard* [1963] 1 Ch 502 and *Strachan v The Gleaner Company Ltd. & Another (Jamaica)* [2005] UKPC 33

interim/interlocutory or final. It is now well established that the application test is to be employed to determine whether an order sought is interlocutory or final:

“The application test says that the court considering whether an order was interlocutory or final must look at the application pursuant to which the order was made. If, whichever way the application was decided that decision would have brought an end to the issue in litigation, the decision given on that application is a final order. If, on the other hand, the proceedings would not have ended if one side as opposed to the other side won, the order is not final but is an interlocutory order.”⁵

[14] The application for the revocation of the appointment of a receiver is interlocutory in nature as the decision on the application would not have finally determined the matter in litigation for whichever side the decision is given. Stated alternatively, the proceedings would not have ended if the Bank, as opposed to the respondents, had won.

[15] It is clear too, as asserted by counsel for the appellant, that the appointment of a receiver under the Act is a temporary measure instituted by the minister which must be justified to the High Court and is only a first step in an entire process that could lead to a complete liquidation of the Bank.

[16] Having so found, it must be determined whether the Bank properly instituted proceedings for the grant of such interim/interlocutory relief. Applying the dicta of Barrow J.A. in *Quorum Island (BVI) Limited and the Attorney General v Virgin Islands Environmental Council*⁶ that “[a]n application is a proceeding”⁷ and “the proceeding is commenced when the application is filed”⁸, the learned judge clearly erred in holding that the filing of an application was not sufficient to “institute proceedings” in accordance with the Act. I do not agree with the submissions of counsel for the second and third respondents that the case may be distinguished on its peculiar facts.

⁵ *Oliver McDonna v Benjamin Wilson Richardson Anguilla Civil Appeal No. 3 of 2005*

⁶ *British Virgin Islands HCVAP 2008/004*

⁷ *Id.*, para. 9

⁸ *Id.*

- [17] As stated at paragraph 9 above, CPR 8.1 requires proceedings to be commenced by filing a claim form and statement of claim or affidavit if any rule so requires (for example, applications for administrative orders under CPR 56.7(3)). The Bank did not file a statement of claim with the claim form and CPR 8.1(c) does not apply. Proceedings accordingly had not been commenced. CPR 8.1(6) however provides that a person who seeks a remedy before proceedings have been started must seek that remedy by an application under Part 11, which the Bank purported to do. It would appear that the application comports with the requirements of Part 11. However, being also an application for interim relief, the requirements of Part 17 must also be satisfied.
- [18] CPR 17.2(3) provides that a court may grant an interim remedy before a claim has been made **only if** the matter is urgent or it is otherwise necessary to do so in the interests of justice. Where an interim remedy is sought before a claim is made, an affidavit in support of an application for interim relief should generally address the tests of urgency or the interests of justice. However, an applicant's failure to so state would not preclude the court from granting the relief sought where satisfied that the application is urgent or it is otherwise necessary in the interests of justice. CPR 17.2(5) provides further that if the court grants an interim remedy before a claim has been issued, it must require an undertaking that the claim form be issued and served by a specified date. Notably, the claim form in respect of which an undertaking would have been required under CPR 17.2(5) had already been filed and served.
- [19] The learned judge, having erred in holding that the application was final and not interlocutory, failed to address her mind to CPR 17.2, by virtue of which the Bank's application was prejudiced.

[20] Having so found, it would be not be necessary to determine the second stated ground of appeal and without more, the appeal is allowed, the decision of the learned judge set aside and the matter remitted to the court below for consideration of the test under CPR 17.2(3). Costs are awarded to the appellant to be assessed, if not agreed.

Michael Gordon, QC
Justice of Appeal [Ag.]