

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2021/0010

BETWEEN:

SYLVIA O'MARD

Appellant

and

[1] ABI BANK LTD
[2] EASTERN CARIBBEAN CENTRAL BANK
[3] THE ATTORNEY GENERAL

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis	Justice of Appeal
The Hon. Mr. Eddy D. Ventose	Justice of Appeal
The Hon. Mde. Esco L. Henry	Justice of Appeal

Appearances:

Dr. David Dorsett for the Appellant
Mr. Justin L. Simon KC with Ms. Nina Joseph for the First Respondent
Mr. Damian Kelsick KC and Ms. E. Ann Henry KC for the Second Respondent
Ms. Carla Brookes-Harris for the Third Respondent

2024: October 3;
December 10.

Civil Appeal – Appeal against decision of the learned trial judge to dismiss application by way of originating motion – Section 3(a) of the Constitution of Antigua and Barbuda, 1981 – Right to protection of the law – Sections 3(c), 9(1) and 9(2) of the Constitution of Antigua and Barbuda – Right to protection from deprivation of property without fair compensation – Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement, 1983 (“ECCB Agreement”) — Whether the learned trial judge erred in not finding a breach of the Constitution before determining whether the alleged breach was justified – Whether Article 5C(5)(a) of the ECCB Agreement breached sections 3(a), 3(c), 9(1) and 9(2) of the

Constitution of Antigua and Barbuda - Whether the learned trial judge erred in finding that the limitation on constitutional rights imposed by Article 5C(5)(a) was no more than is necessary to achieve the objectives of the statutory instrument

On 15th March 2019, the appellant filed an originating motion seeking various declarations and orders, including a declaration that Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement, 1983, is void as it is inconsistent with sections 3(a), 3(c), 9(1) and 9(2) of the Constitution of Antigua and Barbuda (“the Constitution”). In support of the originating motion, the appellant averred that the second respondent, the Eastern Caribbean Central Bank, assumed control of the operations of the first respondent, ABI Bank Limited, pursuant to Article 5B of the Eastern Caribbean Central Bank Agreement and that by virtue of Article 5C(3) of that Agreement, the powers of control and the property of ABI Bank vest in the Eastern Caribbean Central Bank. The appellant also averred that she is a depositor of ABI Bank by virtue of having deposited property, namely money, with ABI Bank and that by being a depositor she has property, namely a chose in action, to bring an action to recover the sums she deposited with ABI Bank. The appellant stated that Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement deprives her of a chose in action, without compensation, and accordingly is contrary to her right against deprivation of property without compensation as guaranteed by section 3(c) of the Constitution.

The appellant stated that since 2012 she has issued lawful demands and instructions for the recovery of certain monies held by ABI Bank, but that ABI Bank has consistently failed to abide by her demands and instructions and in so doing has compulsorily acquired her property, namely money, contrary to her rights guaranteed by section 9 of the Constitution. The appellant claimed that the actions of the respondents were unlawful and unconstitutional entitling the appellant to relief under section 18 of the Constitution and other lawful relief.

In the court below, the learned trial judge considered the issues of whether section 5C(5)(a) of the Eastern Caribbean Central Bank Agreement was: (1) void as it is inconsistent with a person’s right to protection of the law; (2) inconsistent with a person’s right against compulsory acquisition in accordance with the law as provided by section 9(1) of the Constitution; (3) inconsistent with a person’s right against deprivation of property without compensation as guaranteed by section 3(c) of the Constitution; and (4) in violation of a person’s right to access to the court as guaranteed by section 9(2) of the Constitution. Another issue considered by the learned trial judge was whether the appellant has or has had available an adequate means of redress and whether the court ought to decline to exercise its powers by virtue of the proviso of section 18 of the Constitution.

By written judgment dated 16th March 2021, the learned trial judge dismissed the appellant’s application and made no determination as to whether there was a breach of sections 3(a), 3(c) 9(1) and 9(2) of the Constitution. The learned trial judge also did not make any specific finding that a prima facie case had been made out by the appellant in her originating motion. At paragraph [49] of her judgment, the learned trial judge concluded that redress is and was available to the appellant.

By notice of appeal filed 28th April 2021, the appellant appealed against the decision of the learned trial judge with one ground of appeal, namely, the learned judge erred in finding that

the limitation on constitutional rights imposed by Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement was no more than is necessary to achieve the objectives of the statutory instrument.

Held: dismissing the appeal against the decision of the learned trial judge, affirming the order at paragraph [48] of the judgment in the court below dismissing the appellant's application by way of originating motion and making no order as to costs, that:

1. When construing Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement, the court must consider all operative parts. The First Part is linked to the Second Part and the Third Part using the word 'and'. If the drafters intended the construction contended for by the appellant, the First Part would constitute the entire Article 5C(5)(a) and would not be inextricably linked by the use of the word 'and' to the Second Part and the Third Part. The general words in the First Part cannot be used to undermine the limitations of the specific examples given in the Second Part including the proviso contained in the Third Part. The combined effect of the Second and Third Parts is to give an Affected Person the right, among other things, to seek leave of the court to commence any action against the financial institution for the recovery of any claim. The general words in the First Part cannot override the specific words found in the Second and Third Parts. It must yield to them. The Second Part and the Third Part, when read together, make plain that the commencement of any action in respect of the recovery of any claim cannot be done without, *inter alia*, leave of the court or where the court so directs. Giving the entire Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement its plain meaning when read as a whole, there is no contravention of sections 3(a), 3(c), 9(1) and 9(2) of the Constitution of Antigua and Barbuda.

Sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution of Antigua and Barbuda, 1981** Cap 23 of the Laws of Antigua and Barbuda; **Regina (JM (Zimbabwe)) v Secretary of State for the Home Department** [2018] 1 WLR 2329 applied; **Regina (O) v Secretary of State for the Home Department, Regina (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department** [2022] UKSC 3; [2023] AC 255 followed; **R (Quintavalle) v Secretary of State for Health** [2003] UKHL 13 followed; [2003] 2 AC 687 followed; **Sheikha Amena Ahmed H A Al-Thani and another v Sheikha Aisha Mohammed Ali Abdullah Al Thani and 2 others** [2024] UKPC 35 followed

2. The First Part does not seek to regulate access to the court by an Affected Person. It makes plain that the Affected Person has no remedy against the financial institution in respect of any claim. However, it cannot be ignored or doubted that the Second and Third Parts, when read together, confer on an Affected Person the right to seek leave of the court to commence any action against the financial institution for the recovery of any claim. The learned trial judge was correct in stating that when read as a whole Article 5C(5)(a) of the ECCB Agreement is rationally connected to the legislative objective.

de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 applied; **R v Oakes** [1986] 1 SCR 103 applied.

3. Article 5C(5)(a) read as a whole properly balances the interests of society and the proper management of the assets of financial institutions under the control of the Eastern Caribbean Central Bank with those individuals and groups who have claims against the financial institution by providing Affected Persons with the right to seek leave of the court to commence any action against the financial institution for the recovery of any claim. If the learned trial judge was correct in holding that a prima facie case of infringement was established, there would be no contravention of sections 3(a), 3(c), 9(1) and 9(2) of the Constitution because Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement is required in the public interest or is reasonably justifiable in a democratic society.

Sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution of Antigua and Barbuda, 1981** Cap 23 of the Laws of Antigua and Barbuda.

JUDGMENT

Introduction

- [1] **VENTOSE JA:** This is an appeal against the decision of the learned trial judge in which she held that Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement (the “**ECCB Agreement**”), which is found in a Schedule to the **Eastern Caribbean Central Bank Act** (the “**ECCB Act**”),¹ does not contravene sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution of Antigua and Barbuda** (the “Constitution”).²
- [2] On 15th March 2019, the appellant filed an originating motion seeking various declarations and orders, including the following:
 1. A declaration that Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement, 1983, is void as it is inconsistent with the appellant’s right to the protection of law as guaranteed by section 3(a) of the Constitution of Antigua and Barbuda (“the Constitution”).
 2. A declaration that Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement, 1983, is void as it is inconsistent with the appellant’s right against deprivation of property without compensation as guaranteed by section 3(c) of the Constitution.

¹ Cap 142 of the Laws of Antigua and Barbuda.

² Cap 23 of the Laws of Antigua and Barbuda.

3. A declaration that the actions of the respondents in failing to release, upon the appellant's lawful instructions, funds lawfully due to the appellant and held by the first respondent, amounted to the compulsory taking possession of the appellant's property and which compulsory possession was not for a public use and constituted an interference, by the respondents, with the appellant's rights as guaranteed by section 9(1) of the Constitution.
4. A declaration that Article 5C(5)(a) of the Eastern Caribbean Central Bank Agreement, 1983, is void as it is inconsistent with the appellant's right to access to the court as guaranteed by section 9(2) of the Constitution.
5. An order for the recovery of all sums demanded by the appellant from 5th March 2012.

[3] In support of the originating motion, the appellant averred that the second respondent, the Eastern Caribbean Central Bank (the "ECCB"), assumed control of the operations of the first respondent, ABI Bank Limited ("ABI Bank") pursuant to Article 5B of the **ECCB Agreement** and that by virtue of Article 5C(3) of the **ECCB Agreement**, the powers of control and the property of ABI Bank vest in the ECCB. The appellant also averred that she is a depositor of ABI Bank by virtue of having deposited property, namely money, with ABI Bank and that by being a depositor she has property, namely a chose in action, to bring an action to recover the sums she deposited with ABI Bank. The appellant stated that Article 5C(5)(a) of the **ECCB Agreement** provides that no creditor, shareholder, depositor or any other person shall have any claim against ABI Bank while ABI Bank remains under the control of the ECCB. The appellant also stated that Article 5C(5)(a) of the **ECCB Agreement** deprives her of a chose in action, without compensation, and accordingly is contrary to her right against protection from deprivation of property without compensation as guaranteed by section 3(c) of the **Constitution**.

[4] The appellant stated that since 2012 she has issued lawful demands and instructions for the recovery of her money held by ABI Bank, but that ABI Bank has consistently failed to abide by her demands and instructions and in so doing has compulsorily acquired her property, namely money, contrary to her rights guaranteed by section 9

of the **Constitution**. The appellant also stated that the respondents have acted in a high-handed manner and have profited by the unlawful retention of monies belonging to her. The appellant claimed that the actions of the respondents were unlawful and unconstitutional entitling the appellant to relief under section 18 of the **Constitution** and other lawful relief.

The decision in the court below

- [5] The learned trial judge considered two issues. The first issue considered was whether section 5C(5)(a) of the **ECCB Agreement** was: (1) void as it is inconsistent with a person's right to protection of the law; (2) inconsistent with a person's right against compulsory acquisition in accordance with the law as provided by section 9(1) of the **Constitution**; (3) inconsistent with a person's right against deprivation of property without compensation as guaranteed by section 3(c) of the **Constitution**; and (4) in violation of a person's right to access to the court as guaranteed by section 9(2) of the **Constitution**. The second issue considered was whether the appellant has or has had available an adequate means of redress and whether the court ought to decline to exercise its powers by virtue of the proviso of section 18 of the **Constitution**.

- [6] In a written judgment dated 16th March 2021, the learned trial judge dismissed the application by way of originating motion. There was no determination of whether there was a breach of sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution**. However, after examining the relevant legislation, applicable constitutional provisions and the ambit of the right to the protection of law emerging from decisions of this Court, the learned trial judge stated at paragraph [28] of the judgment that:

“Where a claimant makes out a *prima facie* case of an infringement of a fundamental right, the burden is then placed upon the respondent(s) to show that the measures are justifiable to protect the fundamental rights and freedom of others and/or are in the public interest. In the circumstances of this case the consideration is with respect to public interest.”

- [7] The written judgment of the learned trial judge does not reflect any specific finding that a *prima facie* case has been made out by the appellant in her originating motion.

The learned trial judge applied the test of proportionality stated by the Privy Council in **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing**³ and **Surratt v Attorney General of Trinidad and Tobago**,⁴ concluding at paragraph [46] that:

“As a consequence of the foregoing this court has determined that the respondents have discharged their burden and have proven that the limitation imposed is proportionate and necessary to fulfil the objective of the Statutory Instrument such Instrument being necessary for the operation of a democratic society.”

- [8] The learned trial judge consequently dismissed the appellant’s originating motion and at paragraph [49] of her judgment she concluded that redress is and was available to the appellant.

The Appeal

- [9] The appellant, on 28th April 2021, filed an appeal against the decision of the learned trial judge with one ground of appeal, namely, the learned judge erred in finding that the limitation on constitutional rights imposed by Article 5C(5)(a) of the **ECCB Agreement** was no more than is necessary to achieve the objectives of the statutory instrument.

The material provisions of the Agreement

- [10] The **ECCB Agreement** has the force of law in Antigua and Barbuda by virtue of section 4 of the **ECCB Act**. Where the **ECCB Agreement** is amended and accepted by the Government of Antigua and Barbuda, section 6(1) provides that the Minister may by Order amend the Schedule for the purpose of including the amendment. In 2013, the Minister of Finance signed the **Eastern Caribbean Central Bank Act (Amendment of Schedule) Order**,⁵ which amended, among other Articles, Article 5C(5) of the **ECCB Agreement**. The Order came into effect on 31st December 2013.

³ [1999] 1 AC 69.

⁴ [2008] 1 AC 655.

⁵ Statutory Instrument No. 56 of 2013.

[11] Article 5C(5)(a) of the **ECCB Agreement** provides as follows:

“

(a) no creditor, shareholder, depositor or any other person shall have any remedy against the financial institution in respect of any claim and without prejudice to the generality of the foregoing, no creditor, shareholder, depositor or any other person shall commence or continue any action, execution or other proceedings or seek to enforce in any way any judgment or order obtained against the financial institution or its successor or the transferee of the whole or any part of any property, assets or undertaking of the financial institution for the recovery of any claim or in respect of any other liability, until the publication of a notification under Article 5E(1) in relation to the financial institution or without the prior leave of the court unless the court directs otherwise.”

.....

[12] Article 5E(1) of the **ECCB Agreement** provides as follows:

“(1) Where the Bank has under Article 5B assumed control of a financial institution, the Bank shall, subject to sub-paragraph (2) (sic), remain in control of, and may continue to carry on the business of that financial institution until such time as the Bank publishes in the Gazette and in such newspapers as it thinks appropriate in the territory where it has assumed such control a notification that it has ceased to be in control of the financial institution.

(2) The Bank shall relinquish control and shall not continue to carry on the business of a financial institution where -

(a) the circumstances on the basis of which the Bank assumed control of the institution under Article 5B have ceased to exist;

(b) the Bank is of the opinion that it is no longer necessary for it to remain in control of the business of the financial institution; or

(c) the Bank has sold or otherwise disposed of the property, assets and undertakings of the financial institution.”

The relevant provisions of the Constitution

[13] Section 2 of the **Constitution** states that it is the supreme law of Antigua and Barbuda and that any other law is inconsistent with this Constitution is void to the extent of the inconsistency.

[14] Section 3 of the **Constitution** provides as follows:

“Fundamental Rights and Freedoms of the Individual.

3.- Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

- (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association; and
- (c) protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without fair compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

[15] Section 9 of the **Constitution** is also relied upon by the appellant. So far as material, section 9 provides:

“Protection from Deprivation of Property

9.- (1) No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except for public use and except in accordance with the provisions of a law applicable to that taking of possession or acquisition and for the payment of fair compensation within a reasonable time.

(2). Every person having a interest in or right to or over property which is compulsorily taken possession of or whose interest in or right to or over any property is compulsorily acquired shall have the right of access to the High Court for-

- (a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and
- (b) the purpose of obtaining payment of that compensation:

Provided that if Parliament so provides in relation to any matter referred to in paragraph (a) of this subsection the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the interest in or right to or over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) of this section or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which application or appeals to the High Court or applications to the other tribunals or authority may be brought).

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section-

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right-

- i. in satisfaction of any tax, rate or due;
- ii. by way of penalty for breach of the law or forfeiture in consequence of breach of the law;
- iii. as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
- iv. in the execution of judgements or orders of a court in proceedings for the determination of civil rights or obligations;
- v. in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or likely to be injurious to the health of human beings, animals or plants;
- vi. in consequence of any law with respect to the limitation of actions;
- vii. for so long as may be necessary for the purposes of any examination, investigation, trial or enquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relation to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out),
- viii. and except so far as the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;

- (b) to the extent that the law in question makes provision for the taking of possession or acquisition of any of the following property (including and interest in or right to or over property), that is to say-
- i. enemy property;
 - ii. property of a deceased person, a person of unsound mind or a person who had not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;
 - iii. the property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or
 - iv. property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or by order of a court for the purposes of giving effect to the trust."

[16] The enforcement section in the **Constitution** provides that:

"Enforcement of Protective Provisions

18.- (1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction-

- (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
- (b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3) of this section,- and may make such declaration and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleges are or have been available to the person concerned under any other law."

The submissions of the parties

- [17] The principal submission of the appellant is that the words “no creditor, shareholder, depositor or any other person shall have any remedy against the financial institution in respect of any claim” (the “First Part”) in Article 5C(5)a) of the **ECCB Agreement** are the only ones that matter and that the language is clear in that “no ... person shall have any remedy against the financial institution in respect of any claim”. In the appellant’s view, the words which follow the First Part, namely, “and without prejudice to the generality of the foregoing”, mean that anything mentioned thereafter does not in any way dilute or lessen the effect of the First Part. The appellant contends that the First Part of Article 5C(5)(a) of the **ECCB Agreement** is overly broad in terms and is therefore unconstitutional. The appellant views Article 5C(5)(a) as a freestanding provision which operates outside the rest of that Article. In other words, if the financial institution has wronged a person in any way, Article 5C(5)(a) means that that person has no remedy and that whatever remedy that person might have had, is thereby extinguished. The appellant submits that, so read, Article 5C(5)(a) of the **ECCB Agreement** infringes sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution**.
- [18] Although not covered in submissions filed for the appeal, the first respondent nonetheless submitted at the hearing of the appeal, that Article 5C(5)(a) of the **ECCB Agreement** does not infringe any of the constitutional rights of the appellant, because access to the court is preserved by the very article at issue in the proceedings. The second respondent submitted that: (1) the First Part is meant to be a general prohibition against seeking a remedy, whilst the Second Part particularises the types of actions that are enjoined; (2) the Third Part is a proviso to both the First Part and the Second Part in that one cannot seek a remedy, including bringing an action, unless a notification under Article 5E(1) is published or the court otherwise directs; (3) this is the natural meaning of the words used; (4) Article 5C(5)(a) expressly retains the right of an affected person to access the court and there can be no argument that section 3(a) of the **Constitution** is breached; and (5) the appellant did not argue that the requirement for leave is in itself a breach of section 3(a).

[19] The second respondent submits that the interpretation advanced by the appellant runs counter to at least two principles of statutory interpretation. The first is the presumption that every word in an enactment is to be given meaning; and that the interpretation advanced by the appellant denudes the provision relating to the obtaining of leave from the court of any meaning or effect. The second is the presumption against absurdity; and that it is absurd to interpret Article 5C(5)(a) as depriving a party from any remedy whatsoever, and then giving the court the power to grant leave to that party to bring an action in respect to a remedy that they cannot assert.

[20] The third respondent submits that the appellant's interpretation of Article 5C(5)(a) cannot be sustained because the literal reading of Article 5C(5)(a) does not in any way produce any absurdity or lead to the conclusion that the appellant has no remedy against the financial institution or that such remedy if it exists, is extinguished once and for all. The third respondent also submits that there is no deprivation of a person's legal remedy and that the words, "without prejudice to the generality of the foregoing" properly read within the context of the entire Article 5C(5)(a) clearly means that notwithstanding the stay on claims having been provided for in the provision, it is acknowledged in the Third Part that an affected person can seek redress with the leave of the court.

A question of interpretation

[21] As mentioned earlier, the learned trial judge made no specific finding that Article 5C(5)(a) of the **ECCB Agreement** infringes any of the constitutional rights of the appellant. Before any determination is made as to whether the State is justified in limiting any of the fundamental rights or freedoms, it is first necessary to determine whether Article 5C(5)(a) of the **ECCB Agreement** contravenes sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution**.

[22] In **Bennion, Bailey and Norbury on Statutory Interpretation**,⁶ it is stated that:

Drafters will sometimes include express provision to make it clear that a specific provision is not intended to modify the meaning of a wider general provision. A traditional formula is 'without prejudice to the generality of [the general provision]'. Nowadays drafters will usually seek to avoid this legal archaism, for example by providing that the specific provision does not 'affect' or 'limit' the operation of the general one. Alternatively, the specific provision may be expressed as a particularisation or example of the general provision. **Whatever form of words is used, the courts may in an appropriate case take account of the specific provision when construing the wider general provision.** (Emphasis added)

[23] The example cited is the decision of the Court of Appeal of England and Wales in **Regina (JM (Zimbabwe)) v Secretary of State for the Home Department**⁷ where section 35(1) of the United Kingdom Asylum and Immigration (Treatment of Claimants) Act required a person to take specified action for the purpose of obtaining a travel document to facilitate the person's deportation or removal from the United Kingdom and section 35(2) provided that, in particular, the Secretary of State may require a person to do certain things which were then itemised in (a) to (h). The question was whether the Secretary of State could under section 35(1) require a person to do something that conflicts with the examples specified in section 35(2)(a)-(h). Flaux LJ stated that:

"74. However, as Underhill LJ pointed out during the course of argument, there is a halfway house between the two extremes advocated by the parties. The section follows a commonly used Parliamentary drafting technique of granting a general power in subsection (1), albeit subject to (a) and (b), then specifying in subsection (2) the principal areas in which that power will be exercised. When a particular area in which the power can be used is specified and given express or implied limitations, then the Secretary of State cannot use the general power to undermine the limitations of the specific. In my judgment, that is the correct construction of section 35. **It is an example of the application of the principle of construction *generalia specialibus non derogant* (general provisions do not override specific ones):** see *Bennion on Statutory Interpretation*, 6th ed (2013), p 1039." (Emphasis added)⁸

⁶ Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) pp 20-21.

⁷ [2018] 1 WLR 2329.

⁸ [2018] 1 WLR 2329 at 2349.

[24] The United Kingdom Supreme Court in **Regina (O) v Secretary of State for the Home Department, Regina (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department**⁹ placed emphasis on the importance of interpreting statutory words in their context. The Supreme Court stated that:

“29. The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated: “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.” (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: “Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”

...

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:

“The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of

⁹ [2022] UKSC 3; [2023] AC 255.

individual members of either House ... Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

- [25] In **R (on the application of Quintavalle) v Secretary of State for Health**,¹⁰ the House of Lords noted at paragraph [8] that "[t]he basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed". However, the Privy Council in its recent decision of **Sheikha Amena Ahmed H A Al-Thani and another v Sheikha Aisha Mohammed Ali Abdullah Al Thani and 2 others**¹¹ stated at paragraph [23] that this task "is not a licence simply to interpret literally the particular provision and neglect the purpose which the legislature intended to achieve when it enacted the statute". It also made clear at paragraph [24] that reading a provision in its statutory and historical context assists in determining the purpose of the provision, citing the following at paragraph [8] from **Quintavalle**:

"Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

- [26] From these authorities, I derive the following: (1) statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered; (2) statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context; (3) words and passages in a statute derive their meaning from their context; (4) a phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections; (5) other provisions in a statute and the statute as a whole may

¹⁰ [2003] UKHL 13; [2003] 2 AC 687.

¹¹ [2024] UKPC 35.

provide the relevant context; and (6) the statute as a whole should be read in the historical context of the situation which led to its enactment.

[27] It is necessary to restate the text of Article 5C(5)(a) which provides as follows:

(a) no creditor, shareholder, depositor or any other person shall have any remedy against the financial institution in respect of any claim [**the First Part**] and without prejudice to the generality of the foregoing, no creditor, shareholder, depositor or any other person shall commence or continue any action, execution or other proceedings or seek to enforce in any way any judgment or order obtained against the financial institution or its successor or the transferee of the whole or any part of any property, assets or undertaking of the financial institution for the recovery of any claim or in respect of any other liability [**the Second Part**], until the publication of a notification under Article 5E(1) in relation to the financial institution or without the prior leave of the court unless the court directs otherwise [**the Third Part**]. (Emphasis added)

[28] When construing Article 5C(5)(a) of the **ECCB Agreement**, the court must consider all operative parts. The First Part states that “no creditor, shareholder, depositor or any other person (the “Affected Persons”) shall have **any remedy** against the financial institution in respect of any claim” (Emphasis added). The plain and ordinary or obvious meaning is that although the Affected Persons may have a claim against a financial institution, they shall not have ‘any remedy’ against that financial institution for that claim. The existence of a claim is acknowledged but the provision makes clear that the Affected Persons shall have no remedy. The subject matter of the First Part is the **remedy** that the Affected Persons may obtain from the claims they might have against the financial institution.

[29] The Second Part prevents Affected Persons from: (a) commencing or continuing any action, execution or other proceedings or (b) seeking to enforce in any way any judgment or order obtained against the financial institution or its successor or the transferee of the whole or any part of any property, assets or undertaking of the financial institution for (i) the **recovery of any claim** or (ii) in respect of any other liability. Among other things, the Second Part therefore prohibits Affected Persons from commencing any action against the financial institution for the recovery of any

claim. 'Recovery' in respect of 'any claim' is essentially a remedy for that claim. The Third Part, among other things, prevents an Affected Person from commencing any action against the financial institution for any remedy: (i) until the publication of a notification under Article 5E(1) in relation to the financial institution; or (ii) without the prior leave of the court unless the court directs otherwise. It is arguable that the word 'or' is missing between 'without the prior leave of the court' and 'unless the court directs otherwise'. However, for present purposes nothing turns on this.

[30] With respect, the appellant's approach to the interpretation of Article 5C(5)(a) of the **ECCB Agreement** is misconceived. It fails to read the First Part of Article 5C(5)(a) in the context of the words of the Article as a whole. The first context for that purpose is the very words of Article 5C(5)(a) itself. No authority was cited by the appellant in submissions or during oral argument that permits the court to construe and apply only part of a statutory provision, which was intended by Parliament to be read as a whole, to find that specific part unconstitutional without recourse to the entire provision enacted by Parliament. If Article 5C(5)(a) contained only the First Part, there would be a strong argument that it would be unconstitutional for contravening sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution**. However, the First Part is not an isolated statutory provision; it is part of the entire Article 5C(5)(a) and must always be interpreted and applied with the other parts firmly in mind. The purpose of Article 5C(5)(a) is arguably to prevent persons from having any remedy against a financial institution until the publication of the notification or the court otherwise permits. This must be borne in mind when interpreting Article 5C(5)(a).

[31] **Bennion, Bailey and Norbury on Statutory Interpretation**, as mentioned above, states that "[i]n whatever form of words is used, the courts may in an appropriate case take account of the specific provision when construing the wider general provision". Similarly, in **ex parte JM (Zimbabwe)**, the Court of Appeal of England and Wales stated that "[w]hen a particular area in which the power can be used is specified and given express or implied limitations, then the Secretary of State cannot use the general power to undermine the limitations of the specific". The First Part is

linked to the Second Part and the Third Part using the word 'and'. If the drafters intended the construction contended for by the appellant, the First Part would constitute the entire Article 5C(5)(a) and would not be inextricably linked by the use of the word 'and' to the Second Part and the Third Part. The general words in the First Part cannot be used to undermine the limitations of the specific examples given in the Second Part including the proviso contained in the Third Part. The combined effect of the Second and Third Parts is to give an Affected Person the right, among other things, to seek leave of the court to commence any action against the financial institution for the recovery of any claim. The general words in the First Part cannot override the specific words found in the Second and Third Parts. It must yield to them. The express right granted to an Affected Person will be nullified if the general words of the First Part were still to apply in the context of the other two parts. As the second respondent submits, any such interpretation would lead to the absurd result that the access to an Affected Person for leave (the Third Part) to pursue an action for the recovery of any claim (the Second Part) would be illusory if the court cannot grant any remedy because of the effect of the general words contained in the First Part.

- [32] The Second Part and the Third Part, when read together, make plain that the commencement of any action in respect of the recovery of any claim cannot be done without, *inter alia*, leave of the court or where the court so directs. Giving the entire Article 5C(5)(a) of the **ECCB Agreement** its plain meaning when read in the context of Article 5C(5)(a) as a whole, there is no contravention of sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution**..
- [33] The appellant concedes that without the First Part, the Second and Third Parts of Article 5C(5)(a) of the **ECCB Agreement** do not contravene sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution**. If the appellant is correct that Article 5C(5)(a) contravenes these sections, it would then be necessary to determine whether Article 5C(5)(a) is required in the public interest or is reasonably justifiable in a democratic society.

[34] Applying the proportionality test from **de Freitas** and **R v Oakes**¹² the learned trial judge found that the legislative objective is sufficiently important to justify limiting the fundamental right. I agree with the reasoning of the learned trial judge that the limitation on an Affected Person's right to a remedy in the context of managing the affairs of a financial institution while it is under the control of the ECCB is sufficiently important to justify limiting the right of access to the court and the right to protection from deprivation of property. In answering the second question of whether the measures designed to meet the legislative objective are rationally connected to it, the learned trial judge relied on the rationale for Article 5C(5)(a) as a whole. The First Part does not seek to regulate access to the court by an Affected Person. It makes plain that the Affected Person has no remedy against the financial institution in respect of any claim. However, it cannot be ignored or doubted that the Second and Third Parts, when read together, confer on an Affected Person the right to seek leave of the court to commence any action against the financial institution for the recovery of any claim. I therefore agree with the learned trial judge that when read as a whole Article 5C(5)(a) of the **ECCB Agreement** is rationally connected to the legislative objective.

[35] In respect of the third question, whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective, the learned trial judge held that this criterion was satisfied. If Article 5C(5)(a) is read as a whole, incorporating, as it should, the right of access to the court, there is no difficulty as the appellant concedes that the Second and Third Parts are constitutionally valid. What the appellant seeks impermissibly to do, is to read the First Part of Article 5C(5)(a) as a stand-alone provision without reference to the other parts and submit that the First Part is not necessary to achieve the objective of Article 5C(5)(a) as a whole. In my view, Article 5C(5)(a) read as a whole properly balances the interests of society and the proper management of the assets of financial institutions under the control of the ECCB with those individuals and groups who have claims against the financial

¹² [1986] 1 SCR 103.

institution by providing Affected Persons with the right to seek leave of the court to commence any action against the financial institution for the recovery of any claim. If the learned trial judge was correct in holding that a prima facie case of infringement was established, there would be no contravention of sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution** because Article 5C(5)(a) of the **ECCB Agreement** is required in the public interest or is reasonably justifiable in a democratic society.

Conclusion

- [36] Accordingly, I am of the opinion that on any analysis, Article 5C(5)a) of the **ECCB Agreement** read as a whole does not contravene sections 3(a), 3(c), 9(1) and 9(2) of the **Constitution** and in my judgment the learned trial judge should have so found. However, if the learned trial judge was correct in concluding otherwise, her conclusion that there was no constitutional infringement because Article 5C(5)(a) of the **ECCB Agreement** is required in the public interest or is reasonably justifiable in a democratic society is unassailable.

Disposition

- [37] Based on the foregoing, I would dismiss the appeal against the decision of the learned trial judge, affirm the order (albeit for different reasons) found at paragraph [48] of the judgment dismissing the appellant's application by way of originating motion, and make no order as to costs.

I concur.
Hon. Mde. Vicki Ann Ellis
Justice of Appeal

I concur.
Hon. Mde. Esco L. Henry
Justice of Appeal

By the Court

Chief Registrar