

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: AXAHCV 2016/0032

BETWEEN:

- [1] National Bank of Anguilla (Private Banking and Trust) Limited
(In Administration)**
- [2] Caribbean Commercial Investment Bank Limited
(In Administration)**

Claimants

-and-

- [1] National Bank of Anguilla Limited (In Receivership)**
- [2] Caribbean Commercial Bank of Anguilla Limited
(In Receivership)**
- [3] National Commercial Bank of Anguilla Limited**
- [4] Eastern Caribbean Central Bank**
- [5] Martin Dinning**
- [6] Hudson Carr**
- [7] Shawn Williams**
- [8] Robert Miller**

Defendants

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Mr. Ronald Scipio, KC with him Ms. Eustella Fontaine and Ms. Yanique Stewart of counsel for the Claimants

Mr. James Christopher Willan, KC with him Mr. J. Alex Richardson and Mr. William Hare of counsel for 3rd Defendant

Mr. Paul Dennis, KC with him Ms. Navine Fleming and Ms. Nadine Whyte of counsel for the 4th to 7th Defendants

2022: November 14 – 25;
2023: October 12.

Judgment

- [1] **Moise, J.:** This is a claim for breach of fiduciary duties as well as the accounting and tracing of assets allegedly held on trust. The claimants assert that the 5th to 8th defendants owed them fiduciary duties in their capacity as *de facto* or *de jure* directors for the period 12th August, 2013 to 22nd April, 2016. It is alleged that these duties had been breached and, as a result, the claimants are entitled to recover various sums deposited into accounts with the 1st and 2nd defendants during the relevant period. This includes a personal claim as against the 5th to 8th defendants. Insofar as it is alleged that the 1st to 4th defendants are in knowing receipt of those funds and or their traceable proceeds, the claimants have also requested declarations of trust and an order for the tracing and accounting of those assets.
- [2] The matter came for trial on 14th to 25th November, 2022. Prior to the trial, the parties had filed pre-trial submissions. On 25th November, 2022, the court heard oral closing submissions from counsel. Having reviewed the evidence and the submissions made, I have determined that the claims should be dismissed with costs to the defendants. These are the reasons for my decision.

The Facts

- [3] The facts of this case arise out of a very unfortunate period in the history of the banking sector in Anguilla. In the case of ***National Bank of Anguilla (PBT) v. The Chief Minister et al'*** the Court of Appeal described the situation as one in which the territory was “***gripped in a financial crisis which threatened its banking system.***” The 1st and 2nd defendants were domestic banks which held 76% of the total banking assets in Anguilla. Those 2 banks were however facing significant challenges in their liquidity and the situation was such that the entire economy was under threat. As a result of regulatory intervention, and at the backend of a period of conservatorship, the 1st and 2nd defendants have been placed into receivership. The claimants, who are currently under insolvent administration, are wholly owned subsidiaries of the 1st and 2nd defendants and are seeking redress in relation to assets which had been deposited into the 1st and 2nd defendants during the period of conservatorship. In order to adequately address the issues for consideration in this case, it is

¹ AXAHC VAP2020/0001

important to establish a background of the events leading up to the dispute which has arisen between the parties.

- [4] The first defendant is the National Bank of Anguilla Limited (NBA). The second defendant is the Caribbean Commercial Bank (Anguilla) Limited (CCB). Both banks were initially incorporated under the laws of Anguilla and licensed to carry on local banking business on the island. They are in fact indigenous banks which played a leading role in the banking sector on the island. Their market share and the proportion of their assets to that of the banking sector in general were significant. For the purposes of this judgment, whenever these two defendants are referred to jointly, I will refer to them as the “Domestic Banks”. Both banks were regulated by the 4th Defendant, the Eastern Caribbean Central Bank (ECCB) which was incorporated in 1983 as the regulatory body for domestic banks within the Eastern Caribbean Currency Union (ECCU). After a period of conservatorship instituted by the ECCB, both Domestic Banks were placed into receivership on 22nd April, 2016.
- [5] In accordance with the **Anguilla Trust Companies and Offshore Act 2000**, domestic banks on the island are prohibited from conducting banking business in any currency other than the Eastern Caribbean Dollar. It is apparent from the evidence that the Domestic Banks each had a portfolio of customers with whom they conducted business in foreign currencies. As a result of the prohibitions contained in the legislation, the Domestic Banks each established wholly owned subsidiaries in order to conduct offshore banking business. These companies are the claimants in this matter. The first claimant is the National Bank of Anguilla (Private Banking and Trust) Limited (PBT). The second claimant is the Caribbean Commercial Investment Bank Limited (CCIB). On 22nd February, 2016, these offshore banks were placed in insolvent administration and Mr. William Tacon (Mr. Tacon) was appointed as administrator. Where I refer to those institutions jointly I shall refer to them as the “Offshore Banks”.
- [6] It is also important to note that offshore entities in Anguilla are regulated by the Anguilla Financial Services Commission (AFSC) and not the ECCB. However, at paragraph 26 of his witness statement, Mr. Kennedy Byron (Senior Specialist in the Office of the Governor of the ECCB) noted that as at the date of intervention in August, 2013, there was in place a Memorandum of Understanding between the ECCB and the Governor of Anguilla to collaborate in the supervision

and regulation of the Offshore Banks based on certain principles. There was no elaboration on what those principles were.

- [7] PBT was incorporated in 2005 and is wholly owned by NBA. On 1st April, 2005, NBA and PBT entered into a Service Agreement as well as a Memorandum of Agreement. In Schedule 1 of the Service Agreement, NBA agreed to provide certain operational and administrative services to PBT. It is not necessary to outline the full breadth of the services to be rendered in this judgment. It would suffice to say that these relate to facilitating the establishment and functioning of a Board of Directors and other associated corporate services for PBT. The agreement also covered a wide range of services provided in the areas of accounting and other administrative functions of PBT. In exchange for these services, PBT agreed to pay the sum of **One Hundred Thousand United States Dollars (US\$100,000.00)** to NBA on an annual basis.
- [8] Insofar as the Memorandum of Agreement is concerned, this document appears to relate primarily to the transfer of NBA's offshore portfolio to PBT in order to ensure compliance with the **Anguilla Trust Companies and Offshore Act 2000**. The Memorandum also sought to provide for the secondment of staff from NBA to PBT as well as make provision for the payment of salaries, wages, benefits and other operations of PBT. PBT was to become fully operational on 1st April, 2005.
- [9] In similar fashion, CCB entered into what was referred to as an Agreement of Service with CCIB. Although the document which was exhibited in this matter was not dated, it appears to have been executed sometime in May, 2010. This agreement is not particularly comprehensive and states simply that CCB will provide support services to CCIB in the areas of Credit, Internal Audit, Compliance, Proof and Certifications, Teller Services (Encashment/Deposits), Foreign Exchange, Finance, E-Payments, Messenger Services and Human Resources. These services were to be provided for a fee of **Forty Eight Thousand, Five Hundred and Sixty Six Eastern Caribbean Dollars and Eighty Seven cents (EC\$48,566.87)** per annum.
- [10] It would appear, from the evidence provided, that the Offshore Banks had established no distinct corporate or banking relationships with any institution other than their parent banks. The operations of the Offshore Banks were linked primarily to that of the Domestic Banks on whom they were entirely dependent. There were no separate bank accounts or any relationship with correspondent

banks outside of Anguilla. All of those services were provided within the corporate structures of the Domestic Banks. As I understand it, the offshore and domestic banks also shared a common directorship.

[11] It is also important to note that funds deposited by clients of the Offshore Banks were then placed in the intercompany accounts held at the Domestic Banks. According to the evidence presented, the Offshore Banks would keep a record of the individual depositors and their transactions in their own books. No distinct accounts were opened at the Domestic Banks for any customer of the Offshore Banks in particular. Each offshore bank held an intercompany account with the parent bank. However, those funds were not reported to the ECCB as separate deposits, but were rather listed as other liabilities. There was therefore a comingling of the funds of the Domestic and Offshore Banks. It was also not a point in contention at trial, that this comingling meant that funds deposited by the Offshore Banks were up-streamed into the Domestic Banks' own funds. This provided one pool of resources for the operations of the domestic and offshore institutions. This practice would have a significant bearing on the issues raised by the parties in this case and is a matter to which I will return later on in this judgment.

[12] Before addressing the circumstances under which the ECCB came to intervene into the affairs of the Domestic Banks, it is important to note that prior to the intervention, the AFSC expressed some concern with the management structures and operations of the Offshore Banks. There was some concern with the lack of separation between the management structures and the lack of a guarantee from the parent banks regarding the deposits of customers of the Offshore Banks. PBT had also not filed audited reports and there was a concern expressed about the lack of any contingency plan in the event of a winding up. On 30th June, 2011 a moratorium was placed on the acceptance of deposits from any new customers of each of the Offshore Banks.

The Intervention by the ECCB

[13] According to the evidence presented in this case, the global financial crisis experienced in 2008 had a negative impact on the banking sector within the ECCU. Anguilla was significantly impacted. As a result of this, records of 2009 revealed that capital levels deteriorated steadily and, as was asserted by Mr. Kennedy Byron in his witness statement, there were sharp declines in liquidity

levels at all commercial banks across the union. In Anguilla, the Domestic Banks suffered an increase in non-performing loans (NPLs), liquidity challenges and high levels of deposit withdrawals. The ECCB conducted targeted onsite examinations of the Domestic Banks between 28th October and 3rd November, 2011. During these examinations a number of weaknesses were identified in both Domestic Banks. In the case of NBA it was determined that its financial condition was unsatisfactory and liquidity risk was high. Liquidity risk management required improvement and capital was threatened by the bank's high exposure to credit risk. This was evidenced by the high NPLs, credit administration weaknesses and credit contractions.

- [14] As a result of this, the ECCB and NBA entered into a Stabilisation Memorandum of Understanding on 14th March, 2012. This required that NBA take steps to augment its capital and ensure compliance with the minimum capital adequacy ratio requirement. There was the additional concern that NBA had not submitted its financial statements for a number of years. The statements had at that point not been audited. This was a requirement in keeping with the ECCB's regulatory procedures.
- [15] As it relates to CCB, the onsite examination revealed that there was adequate liquidity. However, capital was at risk as a result of high and increasing trends in its exposure. CCB's NPLs were high and there were weaknesses in its credit administration. There were also concerns with CCB's credit concentration in certain economic sectors and its exposure to related parties that were not being serviced as arranged. The ECCB's findings also noted that CCB's exposure to market risk in its investment portfolio was high, as significant declines in the value of debt and equity investments had been recorded during the 3 year period leading up to the onsite examination. There were therefore significant audited losses, which resulted in CCB's financial statements being qualified for the years 2009 and 2010. The overall condition of CCB was rated poor.
- [16] It would appear from the evidence that the ECCB was not satisfied with the attempts being made to stabilize the financial position of the Domestic Banks. As a result, consideration was given to regulatory intervention. In accordance with the 1983 Agreement between the members of the ECCU, the ECCB has both general and specific powers to intervene in the affairs of domestic banks within the union. Those powers include the assumption and control of the bank's property and affairs. The ECCB is empowered to undertake such an intervention if it is satisfied that:

- (a) the interest of depositors and/or creditors of a financial institution are threatened;
 - (b) the financial institution is likely to become unable to meet its obligations or is about to suspend or has suspended payments to its creditors and/or depositors; or
 - (c) the financial institution is not maintaining high standards of financial probity or sound business practices.
- [17] Prior to intervening in the affairs of a domestic bank, the ECCB must also be satisfied that there is a risk or danger of disruption, substantial damage, injury or impairment in the territory where the domestic bank is located. In the circumstances of NBA and CCB, the ECCB consulted the Monetary Council of the ECCU and was directed to exercise its powers under Part IIA Article 5B of the Agreement in assuming control of the Domestic Banks. On 12th August, 2013, the ECCB, acting pursuant to that directive and on the basis of the powers conferred by Article 5B, intervened in the affairs of the Domestic Banks and published notices of this intervention in the Official Gazette of the Government of Anguilla.
- [18] The notices published on 12th August, 2013 in each case noted that the ECCB was of the opinion that the Domestic Banks were likely to become unable to meet their obligations or are about to suspend payments to creditors or depositors. The notice also indicated that:
- (a) the situation at the banks had threatened the interests of depositors and creditors of the banks;
 - (b) the banks are likely to become or are unable to meet their obligations should the situation persist; and
 - (c) the financial system in Anguilla is in danger of disruption, substantial damage, injury or impairment as a result of the prevailing circumstances.
- [19] The notices also went on to outline the intentions of the ECCB in the exercise of those powers. Ultimately the ECCB had assumed control of the Domestic Banks and in its gazette notices of 12th August, 2013 indicated that “... *banking activities will continue. Customers are therefore required to*

continue to service their loans with the Bank(s).” The objectives of the intervention, as stated in the notices were to:

- (a) ensure the stability of the banking system in Anguilla and by extension the entire Eastern Caribbean Currency Union;
- (b) address the corporate governance and liquidity issues which adversely affected the financial position of the Domestic Banks so as to contain the threat to them and their depositors and creditors;
- (c) safeguard the interest of depositors and creditors of the Domestic Banks, which were threatened by the difficulties being experienced by the Domestic Banks in carrying out their normal functions;
- (d) halt the further deterioration in the financial position of the Domestic Banks and preserve the banking system in Anguilla and by extension the financial systems of the ECCU; and
- (e) maintain the operations of the Domestic Banks while a resolution plan was being formulated and funding was being sourced for the resolution.

Appointment of Conservators

[20] On 13th August, 2013, by way of letter, the then Governor of the ECCB, Mr. K. Dwight Venner, appointed the 5th defendant, Mr. Martin Dinning and the 8th Defendant, Mr. Robert Miller, as conservators of the Domestic Banks. For the purposes of addressing certain arguments which have been raised in this case, it is important to outline in some detail the responsibilities of the conservators. For that I refer to section 3 of the Terms and Conditions of Appointment which states as follows:

To the extent permitted by law, the Appointee (conservator) will –

- (a) *Assist in managing and carrying on the operations and affairs of CCB for and on behalf of the Appointer (ECCB). In so doing the Appointee shall direct and supervise the day-to-day business and affairs of CCB;*
- (b) *Establish maintain or cause to be established or maintained in respect of CCB policies and procedures in keeping with standard banking practices;*
- (c) *monitor the performance of staff of CCB;*
- (d) *take any decisions on steps which it considers to be necessary and within the competence to protect CCB's financial position and CCB's ability to meet its debts and other obligations when they fall due;*
- (e) *keep and maintain or cause to be kept and maintained all records, books and accounts usual and proper to be kept in CCB;*
- (f) *keep the Appointer informed in respect of the management of CCB. In that regard the Appointee will provide weekly reports in writing to the Appointer. In addition to such reports the Appointee shall, at the request of the Appointer, produce any ad hoc reports concerning the management of CCB at any time;*
- (g) *Assist with any restructuring, re-capitlisation, or sale of the assets and liabilities of CCB as the Appointer deems necessary;*
- (h) *Act in accordance with such directions and instructions which may be issued in writing by the Appointer from time to time in respect of the management of CCB; and*
- (i) *Efficiently and diligently carry out his responsibilities and directions given to him by or under the authority of the Appointer in respect of the management of CCB and with a view to protecting and promoting the interest of CCB.*

The Appointee may, subject to the approval of the Appointer:

- i. *engage such officers, servants and/or agents as he deems necessary to assist him in the performance of his functions; and*

ii. *employ or terminate any officer or employee of CCB*

[21] Insofar as it relates to the responsibilities of the ECCB, the Terms and Conditions of Appointment states the following at paragraph 4:

To the extent permitted by law, the Appointer will

(a) Provide the Appointee with such information and/or documents and assistance as are reasonably necessary and in such a manner as to enable the Appointee to properly discharge his responsibilities under the terms of his appointment;

(b) Provide such directions and instructions to the Appointee in the management of CCB as may be deemed necessary or appropriate by the Appointer;

(c) Respond promptly to all requests for information or direction made by the Appointee.

[22] The Terms of Appointment for NBA were in identical terms to that of CCB. On the basis of those terms, Mr. Dinning and Mr. Miller were appointed as conservators on 13th August, 2013. It is important to note that neither Mr. Dinning nor Mr. Miller were employees of the ECCB. They were in fact members of the consultancy team from the International Monetary Fund (IMF), who were providing technical assistance to the ECCB in developing strategies towards the financial stability of the ECCU. The intervention in the Domestic Banks was said to be one such strategy. Both Mr. Dinning and Mr. Miller were experts in this particular field and had many years of experience.

[23] In his witness statement filed on 10th November, 2020, Mr. Dinning outlined the facts leading up to his actual appointment as conservator. He notes that although he and Mr. Miller arrived in Anguilla on 13th August, 2013, they did not formally take on the role of conservator of NBA and CCB until two weeks later. An intervention team from the ECCB went into NBA and CCB on 12th August, 2013 and did preparatory work for the conservatorship. That included the dismissal of the directors of NBA and CCB. Mr. Dinning goes on to describe the role of himself and Mr. Miller at that point to be mere observers.

- [24] Mr. Kennedy Byron, in his own witness statement, noted that prior to intervention, the offshore and onshore banks had a common directorship. He went on to state that the ECCB and the newly appointed directors/officers of the Domestic Banks also thought it necessary to remove the directors and officers of the Offshore Banks. In light of this he notes that the Directors and Officers of PBT and CCIB were removed by their respective shareholders, NBA and CCB. This was done by way of letters each dated 15th August, 2013. The evidence suggests that at that point, neither Mr. Dinning nor Mr. Miller had been involved in those decisions. By October, 2013, Mr. Dinning had replaced Mr. Miller as conservator of NBA and was at that point conservator of both Domestic Banks.
- [25] Mr. Dinning indicates that he performed the functions of conservator at all times on behalf and on the instructions of the ECCB. These instructions were conveyed by the Oversight Committee of Intervened Banks (OCIB) which was chaired by the then Deputy Governor of the ECCB, Mr. Trevor Braithwaite. According to Mr. Dinning, the OCIB was the body to whom he reported matters relating to the banks. It provided oversight for all banks into which the ECCB had intervened. During his tenure he would provide weekly reports on the affairs of the banks to the OCIB which were discussed during weekly meetings. Proposals and recommendations were discussed and various decisions were taken at those meetings. Mr. Dinning was then tasked with implementing the decisions made by the OCIB. Mr. Miller did not provide any statement on his brief role as conservator of NBA and played no part in the trial. Counsel for the claimants also noted during the trial, that they were no longer pursuing a claim or any remedy against Mr. Miller.
- [26] Mr. Hudson Carr took over the role of conservator of the Domestic Banks after Mr. Dinning resigned on 24th October, 2014. At that point the IMF's technical assistance program, of which Mr. Dinning was a part, had come to an end. Prior to that Mr. Carr was appointed as Officer in Charge of NBA in October, 2013. During that time he reported to Mr. Dinning and Mr. Kennedy Byron in relation to his functions. In describing his role as Officer in Charge of NBA, Mr. Carr states that he was entrusted with the management of PBT. His duty at that point involved the supervision of the day to day operations of PBT, with particular emphasis on ensuring that it continued to provide banking services to its existing customers. That customer base comprised overseas businesses mostly operating from St. Maarten with local transactions being done primarily through local

offshore agents. The transactions carried out in relation to those customers were primarily requests for wire transfers and the acquisition of bank drafts in the conduct of their businesses.

- [27] Mr. Carr defined his role as conservator in much the same way as Mr. Dinning. He carried out those duties on the instructions of the ECCB, which were conveyed through Mr. Byron and the OCIB, which was chaired by Mr. Braithwaite. He too was required to provide weekly reports to the OCIB. Those reports were discussed at the weekly meetings. Mr. Carr states that he would submit proposals and recommendations at the meetings and would be tasked with implementing any decisions taken by the OCIB. Mr. Carr remained as conservator of the Domestic Banks until 22nd February, 2016, at which point Mr. Shawn Williams took up this role until the end of the conservatorship two months later. Mr. Williams' own stint as conservator was rather brief, as the Domestic Banks were placed into receivership on 22nd April, 2016. At that point, the Offshore Banks had already been placed in administration.

The Alleged Assurances

- [28] The claimants have partially hinged their claim on certain assurances which were allegedly made at the time of the intervention regarding the safety of deposits made by the customers of the Offshore Banks. At paragraph 25 of his witness statement, Mr. Tacon states that *"the conservator directors also advised the depositors of PBT and CCIB that the bank's deposit taking business would continue as normal, and that monies deposited with PBT and CCIB during the relevant period would be repaid in full."*
- [29] Mr. Tacon referred to correspondence dated 10th September, 2013 in which Mr. Dinning is alleged to have advised certain depositors of CCIB that there would be operational changes at CCIB due to a takeover by the ECCB and that the operations of CCIB would remain normal. He states that a similar e-mail was sent to certain depositors of PBT by Mr. Robert Miller. One of the correspondences to which Mr. Tacon refers is a letter which is in fact dated 24th September, 2013 and addressed to Maria-Ines Almeida of Williamsburg, Virginia in the United States. The following paragraphs of the letter highlight the substance of this communication:

"We are however pleased to inform that notwithstanding the operational changes at CCB and CCIB since 12th August, 2013, both institutions are operating as normal, all services are in

place and their employees remain ready and willing to provide the excellent service which you have enjoyed. The ECCB's immediate concerns are twofold: the stability of the banking system in Anguilla and the interests of the depositors and creditors of the banks. The ECCB is diligently and urgently pursuing an orderly and speedy resolution to the situation with the assistance of the Government of Anguilla, the British Government and the banking community of the Eastern Caribbean Currency Union.

To that end, the ECCB has placed CCB in conservatorship for a period of 6 months while a sustainable resolution strategy is implemented. It is in this context that the operations, policies and the products offered by CCIB are being reviewed and in some cases revised. Effective September 2, 2013, in order to better serve our customers, the bank has implemented a hold on withdrawals on DDA balances below 2 months average. However, there are no restrictions on withdrawals on balances less than \$50,000.00."

- [30] The letter goes on to highlight certain limitations on withdrawals and revisions which had been implemented on interest rates on savings. Mr. Tacon indicates that similar assurances were given to Mrs. Fiona Curtis, who gave evidence in this matter. The court also had sight of letters written to other offshore customers in similar terms. In addition to that, Mr. Tacon asserts that similar assurances were given to him by Mr. Trevor Brathwaite of the ECCB on 8th March, 2016 after he took over as administrator of the Offshore Banks.
- [31] For her part, Mrs. Curtis, in her witness statement, stated that she is the Managing Director of a firm named Counsel Limited, which is located in The Valley, Anguilla. Counsel Limited is a management company which also acts as secretary and director to companies incorporated in Anguilla. It was Mrs. Curtis' evidence that Counsel Limited administered a significant number of accounts for companies doing business with PBT. As a result of this, upon reading and hearing press briefings which indicated that NBA was to be placed under conservatorship, she made enquiries regarding the affairs of Counsel Limited's clients. Mrs. Curtis was referred to Mr. Robert Miller, who was then in charge of the operations of PBT. She states that she spoke with Mr. Miller at a meeting and he informed her that despite the conservatorship, everything was business as usual for PBT and that the customers could continue to make deposits into their bank accounts.

- [32] Mrs. Curtis goes on to state that, on the basis of this assurance, she understood that there would be no withdrawal restrictions on customer deposits made after the onset of the conservatorship. Despite this, she experienced withdrawal restrictions being placed on one customer who needed to access funds due to an ongoing construction project in the Bahamas. She met with Mr. Carr, who was then the advisor to the ECCB's Bank Supervision Department and Mr. Dinning in order to discuss the challenges. After that meeting, withdrawals on the customer's account were authorized. She states that at a meeting on 8th October, 2013, Mr. Carr assured her as well as Mr. Hope-Ross that there would be no restrictions on deposits of her customers made after the intervention. A particular customer however, had a larger balance on the account at the end of the conservatorship period than at the beginning. She states that despite the assurances those new deposits had not been returned to the customer.
- [33] In cross-examination Mrs. Curtis stated that her understanding was that new deposits post August, 2013 would not be subject to holds or any restrictions. She also referred to bank statements which were attached to her witness statement. These statements were provided in relation to two customers. At paragraph 12 of her witness statement she stated that customer, DWS Group Limited, deposited funds into its bank account after 12th August, 2013 as the company had an ongoing project at the Lynden Pindling International Airport in Freeport, Bahamas. The company needed access to funds monthly in order to purchase material and make the payroll. She stated that the bank statements attached will show that large sums of monies were deposited by this customer after 12th August, 2013 and the customer experienced difficulty in withdrawing those funds.
- [34] However, a close examination of the bank statements attached to the witness statement does not necessarily substantiate Mrs. Curtis' assertions. The first statement presented was for the period 31st August, 2013 to 30th September 2013. This statement commences with a balance brought forward in the sum of US\$1,180,892.62. This does not stand as evidence that the totality of this balance as at 31st August, 2013 was deposited after the onset of the conservatorship. No document was presented to show the dates in which those sums were deposited so as to lead up to this balance being brought forward and the trends of the deposits made during the period covered in the statements seem to show that such a large sum of money was not deposited as a lump sum.

[35] The statement for that period up to 30th September, 2013 however shows that there were total debits for that month in the sum of US\$116,239.80. There was also a credit in the sum of US\$192,214.30 and one of US\$581.68 which appears to be interest credited to the account by the bank. For the month of October 2013 however, there were total debits of US\$884,662.96. However there was one deposit credited to that account in the sum of US\$138,108.10. This was the full extent of the statement provided in relation to DWS Group Limited. At most the court can glean from the statement that the sum of US\$330,322.40 was deposited in September and October of 2013 whilst the total withdrawals of US\$1,000,902.76 were approved by the conservators. It is therefore doubtful that the entirety of those withdrawals was allowed primarily from funds deposited into the account after the onset of the conservatorship. I appreciate that the accounts which I have referred to did not go further than October, 2013, but what has been submitted shows that there were substantially more withdrawals than deposits during that two month period. Significant access was therefore likely to have been allowed from funds which had already been in the account at the time of intervention. Even if the court were to be wrong about that fact, the evidence shows that sizeable withdrawals were also allowed from that account during the period.

[36] In response to these allegations, both Mr. Dinning and Mr. Carr denied that there was any such assurance given that funds deposited after the onset of the conservatorship would be returned to customers. In cross-examination, Mr. Carr stated that he never gave such an assurance. The assurance given was that depositors would have access to the funds in order to maintain their businesses. They were given access to the funds but it would be subject to what was available in the correspondent banking account. Customers had access but not necessarily access to all the funds at any one given point in time. It depended on the funds which were available.

[37] For his part, Mr. Dinning referred to the very letter which Mr. Tacon exhibited which clearly indicated that there would be restrictions on withdrawals and outlined the basis for the ECCB's intervention. The letter states that the conservatorship would be for a period of 6 months while a sustainable resolution strategy was being considered. It was within that context that various policies related to the Offshore Banks were being revised. Mr. Dinning therefore stated that there was "*no assurance given in those letters or by any other means or on any other occasion that deposits made during the conservatorship would be repaid in full.*" Mr. Dinning noted further that to have given such an assurance would have placed the depositors of funds during the conservatorship

period, at an unfair advantage over those who had had deposits prior but were inactive during that time.

[38] Mr. Shawn Williams, for his part, stated that he gave no such assurances during the period of his appointment as conservator. Whilst this was a representation made in his witness statement and in oral testimony at trial, Mr. Williams did express some concern during the period of his own conservatorship as to the legal implications of whatever assurances which had in fact been given. He acknowledged that assurances had been given to customers, who had deposited funds during the period of conservatorship that they would have access to those funds. These assurances were given so as to ensure that the banks operated as going concerns during the period of conservatorship. Mr. Williams also acknowledged that it could be legally contentious if the funds were not returned to those customers. He also went on to express concern regarding the impact to the ECCB's reputation if it is perceived that new deposits were accepted during the period of conservatorship with the knowledge that they would not be returned at the end of that period.

[39] However, in cross-examination, like Mr. Carr and Mr. Dinning, Mr. Williams also insisted that the statements made regarding deposits were that there would be access to those deposits during the period of conservatorship. This did in fact take place as withdrawals were allowed. As to the return of those funds at the end of the conservatorship, that was a separate issue altogether.

The Operations of the Offshore Banks

[40] As it relates to the officers and directors of the Offshore Banks during this period, the claimants pleaded that the conservators were "*purported*" *de jure* and/or *de facto* directors of those entities. In the pleadings, Mr. Dinning and Mr. Carr both acknowledged that they were directors and officers of the Offshore Banks respectively at various times. However, they made different representations during the course of the trial. Mr. Williams did not make such an acknowledgement and NCBA, as a defendant in the matter, had not conceded this issue in its defence and challenged this assertion at trial.

[41] Mr. Dinning, in his own evidence, states that he was not involved in the process when the directors of either the domestic or offshore entities were relieved of their duties. As was noted earlier, Mr. Dinning indicated that although he arrived on the island on 13th August, 2013, he and Mr. Miller did

not begin formal service as conservators until about two weeks later. If this evidence is accurate, it means that even the dismissal of the directors of the Offshore Banks was done by the ECCB's intervention team and not directly by the conservators serving at the time. I understand that Mr. Carr as officer in charge of PBT was involved in the process of the dismissal and/or resignation of the directors at that point. That was however before he was appointed as conservator.

[42] For his part, in his witness statement, Mr. Carr states that he does not recall ever being informed, either formally or in writing, that he was being appointed as a director of PBT or CCIB, or even consenting to such an appointment. Notwithstanding that, he acknowledged that Annual Returns filed by both banks indicated that he was appointed officer of PBT on 1st August, 2014 and director of CCIB on 15th January, 2015.

[43] As it relates to these annual returns, Mr. Tacon was cross examined on their accuracy during the course of his oral testimony. It was pointed out to him that in 2018, even after he was appointed as Administrator, annual returns were also filed which indicated that Mr. Carr was the officer in charge of PBT. Mr. Tacon accepted that this would not have been accurate, given that he was already appointed as Administrator. He stated that *"as regards these annual returns, I don't even know under Anguillian law whether an annual return is even required after administration. I don't know that. I was not consulted about whether an annual return should be submitted or what would be in it so I've never seen that document nor was I consulted about its preparation."* He noted also that the annual returns prior to his appointment were apparently prepared and signed by an administrative secretary in the corporate service provider and not by Mr. Dinning or any one of the other conservators. Mr. Tacon also acknowledged that he had not seen any resolution appointing Mr. Dinning, in particular, as a director of the Offshore Banks. Despite what was pleaded in the defence of the 4th to 7th Defendants, there is a question to be raised about the accuracy of the content of these annual returns insofar as it relates to there ever being an actual appointment. I find therefore, that on balance they are not a reliable source of information on an actual appointment of the conservators as directors of the Offshore Banks.

[44] In cross-examination Mr. Carr, for his part, insisted that his role as a conservator was to manage the day to day affairs of the banks. Insofar as it related to policy decisions, those were taken by the OCIB. He stated for example that he was not involved in the firing of the directors of the Domestic

Banks. However, one of the letters issued to the directors of the Offshore Banks informing of their dismissal was signed by Mr. Carr. That was nonetheless done when he served as officer in charge of PBT. He stated that decisions such as the setting of withdrawal limits, interest rates and the ring-fencing of funds would have all had to be taken at the level of the ECCB and not by himself as conservator. He was not in a position to decide on the segregation of accounts of the Offshore Banks. Those were decisions taken at what he referred to as a higher level.

- [45] Mr. Carr goes on to state that as part of his role as officer in charge of NBA and later as conservator of the Domestic Banks, he managed the affairs of the Offshore Banks pursuant to the management agreements which were already in place. Mr. Carr gave evidence regarding the history of the operations of the Offshore Banks. It is important to note that this historical evidence is not in dispute and has not been controverted. It is important however, to examine those issues in some detail.
- [46] Mr. Carr states that upon examination of the affairs of the Offshore Banks he observed that, prior to the ECCB's intervention, their operations were managed by the Domestic Banks. Each offshore bank and its parent domestic bank shared staff, operations, services and resources. In Mr. Carr's view, these entities were so *"inextricably intertwined that there was no discernable distinction between them, in each case."* Mr. Carr indicated that his interactions with customers, even prior to the intervention, gave him the impression that even they did not perceive any distinction between the Offshore Banks and their parent institutions.
- [47] It was Mr. Carr's view that any attempt at that point to separate the operations of the Offshore and Domestic Banks would have led to the immediate closure of the Offshore Banks. In order for those institutions to have continued operations they needed correspondent banking accounts; both local and foreign. In particular, foreign corresponding accounts were necessary for the Offshore Banks to provide services to their customers. Given the international onslaught on the offshore sector in the Caribbean as a result of accusations of money laundering and tax evasion, it would have been impossible to procure corresponding accounts and none of the local banks were able and willing to assist in providing such services. PBT and CCIB therefore had to rely on their parent banks if they were to be able to continue operations.

[48] Mr. Carr also states that at the time of the intervention it was determined that it was in the best interest of the Offshore Banks and their customers for them to continue trading and for the relationship with the Domestic Banks to continue as normal. It was as a result of this, he continued to manage the day to day operations of the Offshore Banks as it related to staffing, compliance and customer service. Insofar as it relates to those operational issues, Mr. Kennedy Byron explains the challenges faced from the onset of this intervention in the following manner:

“Given the extent of the services provided by the Onshore Banks, any attempt at the time to have separated the operations of the Onshore Banks and the Offshore Banks without instituting the appropriate management structures would have led to the immediate closure of the Offshore Banks. This is so because firstly, the Onshore Banks were not in a financial position to settle the balances owed to the Offshore Banks, and this would have been the most significant step towards segregation of the operations. Secondly, for the Offshore Banks to operate independently they would have had to employ the requisite staff to conduct daily operations, including the accounting, recording, securities, telling and investment functions. The purchase and placement of the appropriate vaults would have also been required. And thirdly, the Offshore Banks would have had to establish their very own correspondent banking relationships, which, at that time, would have been difficult to do, given their financial condition and the lack of up to date audited financial statements.”

[49] Mr. Byron therefore went on to state that the conservators continued to manage the day to day operations of the Offshore Banks to allow their customers to continue trading. There were some restrictions placed on withdrawals but regard was had to the fact that most of those depositors were commercial enterprises which needed their banking services to be maintained.

[50] In returning to Mr. Carr’s evidence, he went on to elaborate on the issue of the comingling of funds between the Offshore and Domestic Banks. It is worth repeating that this evidence was uncontroverted and to a great extent conceded by the claimants. It was observed that intercompany accounts were maintained at NBA for PBT and CCB for CCIB. Funds deposited with the Offshore Banks by their depositors were transferred into their respective intercompany accounts at NBA and CCB and used to facilitate transactions on behalf of PBT and CCIB respectively. Funds would therefore move from the Offshore Banks to the Domestic Banks to facilitate withdrawals by

depositors. Mr. Carr observed therefore that those funds were so significantly comingled with the funds of the Domestic Banks, that it was impossible to segregate them without adverse repercussions.

[51] Even in his own oral evidence before the court, Mr. Tacon acknowledged this reality and conceded that even after the intervention, any attempt to segregate or ring-fence those funds would have had a negative impact on the liquidity of the Domestic and by extension the Offshore Banks. He specifically stated that the ring-fencing of the funds, in the manner which was done after his appointment as administrator would have made it *“extremely difficult for liquidity to be made available for normal operations to continue.”*

[52] In further explaining the state of affairs at that stage, Mr. Carr noted the following in his witness statement:

“... deposits in currency other than Eastern Caribbean Dollars from customers of the Offshore Banks and Onshore Banks were placed in the Onshore Banks’ foreign correspondent banks, for example, The Bank of America. In other words, there were no separate accounts at the foreign correspondent banks based on the origin of the funds. Transactions, in particular withdrawals, were constrained by the amount of money in the foreign correspondent accounts of the Onshore Banks at a particular time. As I recall, in the case of NBA, the balances in the foreign correspondent accounts were inadequate to meet the significant withdrawals from customers of the Offshore and Onshore Banks.”

[53] In Mr. Kennedy Byron’s evidence, he states that the ECCB discovered what he described as a “long-standing practice” of the Domestic Banks to use funds from the inter-company accounts of the Offshore Banks to invest in real estate projects and investment securities. These investments were severely impacted by international and economic conditions at the time. This meant that there was further deterioration of the financial condition of the Domestic Banks which affected their ability to repay the balance owed to the Offshore Banks. Mr. Byron also notes that because those funds from the Offshore Banks were not recorded as deposits in reports to the ECCB, the Domestic Banks also made no allocation for the 6% reserves which was a requirement of the ECCB. This 6% on deposits with Domestic Banks were to be paid over to the ECCB on an annual basis. In the case of NBA and CCB, the funds from the Offshore Banks were merely co-mingled with those of the

Domestic Banks and not identified as separate deposits for which the 6% reserve was paid. This practice continued during the period of conservatorship.

[54] It is therefore apparent, and not in dispute, that this state of affairs meant that a run on the banks at the point of intervention would have had significant consequences for both offshore and domestic banks. There would simply not have been sufficient liquidity to facilitate withdrawals and normal operations. This would have led to a collapse of both institutions and, as has been conceded, would have had a major impact on the banking sector and wider economy of Anguilla. It is argued that this would have potentially had an impact on the entire ECCU. Although there appears to be evidence that a run on the banks had in fact begun, the evidence suggests that soon after the intervention, customers, even of the Offshore Banks, had returned deposits to the institutions. It was therefore important, as was conceded by Mr. Tacon, to avoid a disorderly winding up of either of the entities. Mr. Tacon also conceded that a collapse of the banks at that point in time would have been catastrophic and *“would have probably led to an enclosure of the Anguillian economy.”*

[55] In addition to that, the evidence suggests that the portfolio of customers of the Offshore Banks included a number of persons and companies doing business in Anguilla. These customers needed to continue to trade with the banking institutions in order to facilitate their business operations. It was therefore submitted that the decision to continue trading, with some restrictions on withdrawals, was the only plausible decision to take in the best interest of all of those involved. Mr. Carr, in cross examination, stated that the intervention was done in two phases. The first was to stabilize the situation and the second was to come up with a resolution plan. His role as conservator was to hold the fort and keep operations going as usual. Deposits as well as withdrawals was necessary to keep the system operating while a plan of action was being worked out with the ECCB, the Government of Anguilla, the Foreign Office of the UK and the IMF.

[56] I understand from the evidence that the conservators were not part of the team working out this resolution plan. Although it was initially thought that a period of 6 months was sufficient to complete this process, this appeared to have not been possible. Audited accounts which had been sought from the onset were not complete until December, 2014 and the resolution plan was not complete until February 2016 and fully implemented in April of that year.

The Actions of the Conservators

- [57] As it relates to the operations of the banks during that period, a question arises as to what exactly is the allegation being made here regarding the conservators? It is argued that the conservators were *de jure* or *de facto* directors of the Offshore Banks. This, it is argued placed them in a position of that of a fiduciary. It is also noted that by continuing to direct the affairs of both domestic and offshore banks, the conservators had placed themselves in a conflict of interest. However, even if the claimants are to prove that the conservators were *de jure* or *de facto* directors with a fiduciary duty towards the Offshore Banks, it is important to consider the facts relied upon to show that there was any breach of that duty.
- [58] Mr. Tacon attempted to address the issue of whether, in his mind, the Domestic and Offshore Banks were even solvent at the onset of the conservatorship. He argues that they were obviously not and was at pains to point out what he thought ought to have been done in order to preserve the assets of the Offshore Banks in those circumstances. However, in my view, whatever duty existed on the part of the conservators that would have to be interpreted within the context of a regulatory intervention in banks which were clearly troubled at the time and the general impact this was likely to have the Anguillan economy and that of the ECCU in general.
- [59] Mr. Tacon states, in his witness statement at paragraph 20, that NBA and CCB were plainly insolvent. He also goes on to state at paragraph 20(c) that he had *“not become aware that there was ever a discussion or intention that NBA and CCB should “trade out” of their financial difficulties; rather, the intention appears always to have been to manage NBA and CCB’s insolvency by means of an organized entry into a formal insolvency process – conservatorship – leading to some kind of insolvent reorganization.”* He goes on to state that, at all material times, the principal assets of the Offshore Banks were held with the Domestic Banks. As such, at the beginning of the period of conservatorship, the Offshore Banks were therefore also insolvent. It was Mr. Tacon’s view that while permitting the funds of the Offshore Banks to be dealt with in the way they did, the conservators took no steps to ring-fence those funds or take any steps to ensure that the funds were protected or dealt with in such a manner so as to ensure that PBT’s and CCIB’s continued trading did not occur at the expense of their depositors.

[60] In cross examination Mr. Tacon stated that *“the two tests of insolvency are assets being less than liabilities, and inability to pay debts as they fall due.”* He went on to state that *“at the very beginning, restrictions were placed on withdrawals of the old money. That fails one of the tests, inability to pay debts when they fall due. The second test of assets being less than liabilities, in 13 I think 12, the assets in the Offshore Banks were very, very slightly greater than liabilities, but that predicated that the intercompany balance was recoverable in full.”*

[61] Having remained fortified in his view that the banks were insolvent at the time of the intervention, Mr. Tacon made the following comment during cross-examination:

“At the time of insolvency ... the creditors outstanding at the time of the insolvency or their interest, they're locked in, there's nothing that they can do about that. People who put money in after the onset of insolvency have to be repaid. That's a fundamental principle of any trading insolvency, which is what this was from the time of intervention.”

[62] In further cross-examination Mr. Tacon highlighted the problem to be that the ECCB *“did not recognize the insolvency, and if they had, the rights of their creditors would have been recognized and protected. They were not.”* When pressed on the question of whether or not protecting the deposits of customers after the intervention would have unfairly prejudiced those who had deposited funds prior but had remained inactive, Mr. Tacon stated that *“there would be no preference if fundamental insolvency procedures had been followed, whereby ... those persons or parties who advanced credit to an insolvent party after the onset of insolvency it is a fundamental precept that those people should be repaid. That is not a preference in insolvency law.”* According to Mr. Tacon, there is nothing inherently wrong in trading out of insolvency *“pending a better realization of assets or reconstruction.”* He however stated that *“the regulator should have ... taken steps to protect the interest of all creditors, given the overall insolvency that was there either in place or about to happen within a foreseeable short period of time.”*

[63] However, given some of Mr. Tacon's concessions in cross-examination regarding the decision taken at the time of intervention to continue trading, it was unclear to me as to what precisely were the conservators to do in order to meet the obligations pleaded by the claimants. I say so especially in light of the fact that the intervention was a decision of the ECCB, which, by all accounts set the

policies in place for the continued trading of those institutions. How much of those policies were actually within the purview of the conservators to dictate is an issue which will be worth some consideration later on in this judgment. There were some propositions placed in the legal submissions filed in this case which the court will also give some consideration to.

[64] In response to issues raised by the defendants, Mr. Tacon stated that *“one particular very key step could have been taken at the start of the conservatorship was to address, at least in part, the issues, and that would have been to draw a line under the accounts existing in place at the onset of conservatorship... To do that is quite consistent with what would have happened in a regular insolvency, receivership or administration of a trading nature.”* In further cross-examination, Mr. Tacon sought to give clarity to this comment. He expressed the view that at the time of the intervention, the ECCB placed restrictions on the withdrawal of “old monies”. I take that to mean money which was already deposited with the Domestic Banks at the time of the intervention. That would have included funds from the Offshore Banks. However, in his view, there were no restrictions on the withdrawal of “new money”. Again I take that to mean that any funds deposited during the time of conservatorship were capable of withdrawal without restrictions.

[65] It is unclear to me as to whether that was in fact the case as the evidence suggests that withdrawals may have very well been contingent upon the availability of funds in the intercompany accounts. Given that new deposits were placed into those accounts with no ring-fencing mechanism, I express my doubts as to the extent to which those restrictions applied solely to old deposits in practice. Mr. Carr in his own oral evidence denies that there was such a distinction drawn when it came to withdrawals and the letter to the offshore depositors does not seem to draw such a distinction. The evidence suggests that the conservators were involved in approving withdrawals of a substantial amount so as to ensure that the already slim margins of liquidity were not further affected. In any event, given the liquidity challenges already faced by the Domestic Banks, it would seem likely that new deposits were perhaps the main source of available funds for any withdrawal requests made during that period. That would include new deposits from both the Onshore and Offshore customers.

[66] However, as far as Mr. Tacon was concerned, this all meant that the prudent approach to have taken was to ensure that new accounts could and should have been set up for customers. Pre-

existing customers of the Offshore Banks who continued to make deposits would have now had 2 accounts; one reflecting the “old money” and one reflecting money deposited with the Offshore Banks during the period of conservatorship.

[67] However, in cross-examination Mr. Tacon conceded that this was merely an accounting issue. All that would have done was to place those institutions in a better position to identify the net new money which had come into the banks during the period of conservatorship. In fact Mr. Tacon accepted that the ability to repay the depositors new money in those accounts would still depend on the solvency of the Domestic Banks. That was the case because, as was noted in the evidence earlier, the funds were still being up streamed into the intercompany balances held at the Domestic Banks’ correspondent banking accounts. Mr. Tacon himself noted that the opening of the new accounts would not have helped with liquidity. Also the implementation of a ring-fencing mechanism would have had catastrophic consequences not just for those banks, but potentially for the banking sector in Anguilla in general. However, for the purpose of reconciling the evidence in this case, it is important to take a closer look at this ring-fencing mechanism which was referred to throughout the proceedings.

[68] Mr. Tacon accepted that the ring-fencing mechanism can be described as segregated accounts held at the Domestic Banks on trust for depositors. In this case, the depositor would have been the Offshore Banks; however, I assume that corresponding records with the Offshore Banks would also reflect the new deposits as being separated from the old. That would have guaranteed that if those depositors wished to have their funds withdrawn, they were available as isolated balances. Those balances would not have been up-streamed into the intercompany balances. However, Mr. Tacon went on to concede that the implementation of such a policy would have likely resulted in a lack of liquidity, which would have been detrimental to both Domestic and Offshore Banks. In what Mr. Tacon described as “very stark terms” he noted that this would have inevitably led to a run on the banks as all depositors would have been trying to recover their funds before things got worse. A run on the banks was precisely one of the outcomes the ECCB was attempting to prevent in order to give some time for a resolution plan to be worked out. Although he argues that the approach could have been more nuanced and that recapitalization for example, could have been sought, it is conceded that the ring-fencing mechanism was likely to have adverse consequences. I am also of the view that there is no evidence to suggest that the conservators were empowered to take

decisions on their own regarding the re-capitalisation of the banks. Therefore if one were to fence off new monies coming in, the ability of the banks to continue functioning would have been adversely affected.

- [69] I make just one observation here. I express some concern regarding the issue of ring-fencing when balanced against the argument that there was no restriction placed on the withdrawal of new deposits as opposed to money deposited prior to the intervention. Take the example of the company referred to by Mrs. Curtis in her evidence. Apparently, this company needed to continue trading in order to complete a construction project in the Bahamas. As I indicated earlier, I doubt that the opening balances outlined in the accounts for the period 31st August, to 30th September, 2013 were all new deposits. The company also appeared to have continued to make deposits into its account with the offshore bank. When withdrawals were made therefore, were they withdrawals from the new or from the old deposits? If one assumes that the opening balance was not new money then the sizeable amount of withdrawals could not have been entirely from monies deposited after the intervention. Therefore, given the need for these companies to continue trading, it is unclear to me as to precisely how this mechanism would work and whether it was even practical to implement such a policy given the need for the customers to have continued access to the facilities provided by the banks in general and that liquidity was essential in order to fulfill that objective.

The Morgan Stanley Smith Barnley Investments (MSSB)

- [70] From the evidence led at trial, it is apparent that CCB and CCIB had made separate investments with the US firm, Morgan Stanley Smith Barnley (MSSB Investments). Mr. Tacon stated in his evidence that he became aware of those investments after he was appointed as administrator of the Offshore Banks. According to his evidence, these investments were realized during the period of conservatorship. He states that from information received, on 29th October, 2013 Mr. Dinning, as conservator of CCB, authorized the realization of those investments. The securities were sold on 7th November, 2013 and the proceeds in the amount of US\$8,942,000.00 were paid into an account with Bank of America (BOA) in Miami. This account was in the name of CCB. This amount was credited to the BOA account on 8th November, 2013.

[71] Mr. Tacon goes on to allege, that despite the fact that those funds belonged to CCIB, they were wholly utilized by CCB. He states that an analysis was commissioned in order to ascertain how the funds were used during the period of conservatorship. This commission was undertaken by FTI Consulting from the British Virgin Islands and the Cayman Islands under the supervision of Mr. Andrew Morrison. The process which was undertaken in relation to the ledger and the BOA account was stated to be as follows:

(a) A reconciliation was undertaken as between the Ledger and the BOA Account;

(b) Ledger entries were matched to transactions in the BOA Account, using various search parameters so as to identify a set of relevant ledger entries. On the 877 relevant ledger entries in the data set, 860 were matched to the BOA Account. The 860 entries are referred to as CCIB debits and credits.

(c) Having identified a data set of matched transactions, a model was then constructed to trace how the proceeds of the MSSB Sum were used by applying a lowest intermediate balance approach to the balances in the BOA Account.”

[72] According to Mr. Tacon’s evidence, in applying this model it was revealed that on 8th November, 2013 the proceeds of the MSSB sum in the amount of US\$8,942,000.00 were held in CCB’s BOA account. By 31st October, 2014 the MSSB sum and any subsequent deposits from CCIB in the BOA account had been wholly utilized by CCB. He also states that of the proceeds of the MSSB funds a total of US\$4,850,000.00 was paid over to ECCB accounts. It was unclear to Mr. Tacon as to why such payments were being made.

[73] In response to those allegations, Mr. Dinning indicates that he examined the books and records of CCB and CCIB and realized that they both had separate foreign investment accounts with MSSB. He also observed that both of those investments were suffering losses as a result of the global financial crisis taking place at the time. Mr. Dinning goes on to state that CCB was not managing those accounts separately, to the extent that they were being reported as one portfolio in the management accounts of CCB.

[74] Mr. Dinning states that a decision was taken to liquidate both accounts on account of the losses the investments were suffering. The CCB account was liquidated on 4th November, 2013 and CCIB's on 10th November, 2013. From Mr. Kennedy Byron's evidence it is apparent that the proceeds from CCB's investments were US\$32,200,000.00. From this amount, the sum of US\$24,800,000.00 was used to repay CCB's line of credit held with MSSB. The balance was paid into the Bank of America Account and earmarked to provide liquidity for its banking operations. The funds from CCIB investment were deposited into CCB's Bank of America account because CCIB did not have any banking relations with any other international bank. The funds therefore could not have been transferred elsewhere. Mr. Dinning goes on to state that internal entries were made in the books and records of CCB and the funds were added to the balances of the inter-company account and were used to facilitate transactions on behalf of CCIB.

[75] During the course of the trial, Mr. Dinning was cross-examined on the use of those funds. No one from the team of accountants referred to in Mr. Tacon's evidence was presented to this court to give any explanation of the assessment conducted insofar as it relates to the funds deposited in the Bank of America accounts. The ledger balances for the Bank of America Account were exhibited. The current statement dated 29th November, 2013, showed an opening ledger balance in that account of US\$8,006,184.38. I appreciate the fact that approximately US\$8,000,000.00 would have been deposited from CCB's own investment after paying off its line of credit with MSSB. A number of deposits were made on 8th November, 2013, including the sum of US\$8,942,000.00. The ledger balance for 31st December, 2013 stood at US\$22,583,044.48. From the information presented there was a debit on the account of US\$2,000,000.00 on 10th December, 2013 which apparently was for the purpose of payment to the ECCB. On 13th December, 2013, there was a further debit of US\$2,500,000.00 which similarly shows an apparent pay over to the ECCB. A further debit of US\$800,000.00 appears to have been paid out for a similar purpose on 30th December, 2013. By my calculations, that would be a total of US\$5,300,000.00 paid over to the ECCB by December, 2013.

[76] I must state that in an assessment of the limited evidence presented, it does not appear to me that one can conclude on balance that the funds from CCIB's investment which were paid over into the Bank of America account were in fact funds used for payment to the ECCB. Subject to my assessment of the law in relation to the status of those funds once they had been deposited into the

account, I am unable at this stage to accept the submissions that the CCIB funds from the MSSB investments were what were used to pay monies over to the ECCB. There were opening balances and additional deposits into this account which may serve the purpose of undermining that argument. I also accept Mr. Dinning's evidence that the funds were also used to assist in facilitating CCIB's own financial obligations at the time.

The Appointment of the Administrator of the Offshore Banks

- [77] According to the evidence presented to the court, Mr. Tacon was appointed as the administrator for PBT and CCIB by the High Court on 22nd February, 2016. This was done upon an application by the Anguilla Financial Services Commission. The evidence suggests that the AFSC came to the conclusion that adequate provision had not been made in the resolution plan for depositors of the Offshore Banks. As such the authority was exercised to place those institutions into administration.
- [78] Upon his appointment, Mr. Tacon assumed the operations of the Offshore Banks; although he does indicate in his evidence that he allowed Mr. Williams to exercise some measure of control of the management of the Offshore Banks for a short period of time. According to his evidence, Mr. Williams indicates that Mr. Tacon discussed arrangements regarding the assets and proceeds of assets of the Offshore Banks. At Mr. Tacon's request accounts were established at NBA and CCB with funds identified as ring-fenced funds for all deposits from PBT and CCIB. These ring-fenced funds were placed into sub-accounts created for persons who deposited monies into the offshore accounts. Those funds were eventually transferred to the National Commercial Bank of Anguilla on 22nd April, 2016 at which point the resolution plan was put into effect and the good assets of NBA and CCB were bought over by NCBA. Those included the ring-fenced funds of the Offshore Banks after Mr. Tacon's appointment.
- [79] For his part, Mr. Tacon states that upon his appointment as administrator he sought to get a clearer understanding of the manner in which these various entities were operating. After various meetings and discussions with Mr. Williams and other personnel from the ECCB, Mr. Tacon thought it fit to separate the operations of the Offshore and Domestic Banks. Mr. Tacon was informed that any newly created banks would have to be authorized by the ECCB and a 6% reserve on the deposits had to be paid over. For my part, I am unsure as to the accuracy of that issue. The Offshore Banks

were not regulated by the ECCB and as such it is doubtful that a reserve was necessary. Nonetheless it was determined that this was not a viable option.

[80] Discussions were also had in relation to the repayments of any new monies deposited by customers of the Offshore Banks. That would have depended on the availability of liquidity. Mr. Tacon pointed out that after some research it was apparent that even other domestic banks in Anguilla were unwilling to accept the funds. An attempt at obtaining a guarantee from the ECCB for the return of the funds also proved futile. An arrangement was therefore made for the ring-fencing of those funds as was stated above.

[81] In his witness statement, Mr. Tacon stressed that by way of letter dated 8th March, 2016, Mr. Trevor Braithwaite indicated that *“it is the position of the ECCB that any net funds due to the offshore subsidiaries since the appointment of the conservator will be repayable, either before, upon or after the implementation of the resolution plan.”* Mr. Tacon states that he took this to be broadly consistent with the assurances given to the depositors of the Offshore Banks by the conservators. However, it is important to take a closer look at the full content of this paragraph in Mr. Braithwaite’s letter. It states as follows:

“The policy and practice to date for the Eastern Caribbean Central Bank’s (ECCB) conservatorship, is that additional funds introduced via the offshore banking subsidiaries to the onshore banks since the date of intervention (12 August, 2013) are available for access. This position was taken primarily with consideration of maintaining the business operations of the offshore banks’ customers as going concerns. In addition, it is the position of the ECCB that any net funds due to the offshore subsidiaries since the appointment of the conservator will be repayable either before, upon or after the implementation of the resolution plan.”

[82] To my mind this statement by Mr. Braithwaite draws a clear distinction between two policies. The first is the assurance that access to funds by way of withdrawals would be facilitated during the period of conservatorship. In fact, at one point in her cross examination Mrs. Curtis was careful to point out that in her experience, all of her clients who deposited funds after 2013 were actually able to have those funds returned and to have the use of those funds. Although I accept that her reference to “all” of her clients may not have been accurate or deliberate, she does indicate that the clients were able to withdraw the funds on an ongoing basis. That was the assurance given in the

letters written to the customers by the conservators. The difficulty which she expressed with a withdrawal in October, 2013 appears to me to relate to the size of this withdrawal. DWS Group Limited requested a withdrawal of in excess of US\$600,000.00. Given the liquidity challenges faced by the bank at that point one can well imagine the caution with which this request was honoured. However, it appears that in general the conservators had fulfilled the assurances of allowing access to funds deposited in the Offshore Banks during the period of conservatorship.

- [83] On the other hand, Mr. Braithwaite's letter highlights a separate policy of the ECCB that any net funds due to the offshore subsidiaries since the appointment of the conservator will be repayable either before, upon or after the implementation of the resolution plan. He stated in that letter that the resolution plan was still a work in progress and needed to be finalized. However, one can glean from the letter that this was an undertaking of the ECCB and I have doubts in my mind that this was an assurance given by any of the conservators in their own capacity so as to attach personal liability on them as having undertaken this function. The evidence does not suggest that they were part of the team negotiating the resolution plan. If anything, Mr. Braithwaite's letter seems to underscore the work of the conservators as holding the fort and keeping the banking business of both the domestic and offshore banks going while this plan was being worked on. What seems to be the main quarrel in this case, is that no provision was made for the guaranteed return of the net funds in the resolution plan. The intercompany balances were simply left in the receivership.

The Resolution Plan

- [84] As I indicated earlier, the ECCB's intervention initially led to the appointment of conservators over the affairs of NBA and CCB. It would have been clear at that point that this state of affairs would have only been temporary. The information published by the ECCB and noted in the letters of the conservators to the clients of the Offshore Banks also indicated that the initial conservatorship was to last for a period of 6 months whilst a resolution plan was being pursued between the ECCB and the Government of Anguilla, among other stake holders. In his evidence Mr. Carr indicates that one of the first actions of the ECCB was to commission audited financial statements on the status of the Domestic Banks. He stated in cross-examination that it was anticipated that those statements would have been available in 6 months but they were not. This may have had an impact on the

ability to address the concerns of the status of the banks within a period of 6 months as initially thought.

- [85] Mr. Kennedy Byron himself noted in cross-examination that there was no one decision taken to extend the intervention period to a 3 year mark, as opposed to the 6 months period initially proposed. What happened was that during the time of intervention the ECCB was working along with the Government of Anguilla and other stakeholders on the resolution plan. The financing for that plan was sourced. That included the establishment of a bridge bank and getting the necessary capital for that bank in case there was a run on the bank. Mr. Byron expressed the view that this funding would have been negotiated throughout that time. There was also the need to update the legislation which was then in place regarding the powers of the ECCB as regulator. The legislation itself was not passed until 2015 and could not have been implemented until April 2016. It would also appear to me that, on balance, the timing of the completion of the negotiations leading up to the finalization and implementation of the resolution plan was not in the hands of the conservators against whom this claim has been substantively lodged.
- [86] The court has been furnished with further insight in relation to the resolution plan from the witness statement of Mr. Miclos Swift, who was a Senior Policy Analyst in the Office of the Governor of the ECCB at the time of its signing. Between April, 2010 and September, 2019, Mr. Swift was the Bank Examiner with the ECCB. He was a member of the pre-intervention team in 2013 and joined the closing/resolution team in 2016.
- [87] Mr. Swift states that he was involved in identifying the liabilities and assets of CCB which would be transferred to NCBA. It was Mr. Swift's evidence that before and during the intervention, the ECCB was actively engaged in the formulation of a resolution plan in conjunction with the Government of Anguilla, the Monetary Council, the British Government through the Foreign Commonwealth Office, the Caribbean Development Bank and the IMF. The aim of the resolution plan in broad terms was to safeguard the stability of the financial system in Anguilla and the ECCU and to protect the depositors/creditors of the Onshore Banks.
- [88] Mr. Swift stated that the resolution team's objective in relation to protecting depositors/creditors involved formulating a plan to place the Domestic Banks in a position to continue providing banking

services. In the event that this was no longer possible, then a plan was to be formulated to ensure that depositors/creditors would end up in a better position, or at least in no worse position than they would have been had the Domestic Banks gone into liquidation.

[89] Mr. Swift indicated that the resolution plan was finalized in February, 2016 but could not be implemented until April, 2016. This was because the new Banking Act, though passed by the Legislature in November, 2015, did not come into force until April, 2016. That Act made specific provision for the appointment of a Receiver over the affairs of the Domestic Banks and the formulation of NCBA as a bridge bank. Without this legislation, the ECCB would not have been able to implement the plan. The resolution plan was therefore implemented on 22nd April, 2016. It must also be noted however, that the full terms of the resolution plan remained confidential. Mr. Swift noted that the strategy as set out in the plan entailed:

(a) the appointment of a receiver of the Domestic Banks;

(b) a good bank/bad bank process to split the banks' balance sheets. Deposits up to a threshold of EC\$2,800,000.00 and assets of the same amount were transferred at book value plus accrued interest, to NCBA. Non-Performing Loans were left in the estate of the Domestic Banks to be liquidated and distributed to creditors; and

(c) the proposal of a Deposit Protection Trust to cover amounts above the threshold. Those deposits would be repaid over a period of 10 years at an annual interest rate of 2%. This was to be funded by the Government of Anguilla.

[90] Mr. Swift went on to give evidence regarding the implementation of the plan. He was assigned the task of identifying deposit accounts with CCB which were to be transferred to NCBA. Once depositors were identified, their total deposits were split into two. All amounts below the threshold of EC\$2,800,000.00 were transferred to NCBA. Deposits above that amount were transferred to the Deposit Protection Trust.

[91] Mr. Swift, like most persons involved in this intervention, also observed that inter-company accounts were being maintained at CCB for CCIB. These funds were placed into the inter-company accounts to facilitate transactions on behalf of CCIB. Mr. Swift made the observation from the

books and records that the funds in CCIB's inter-company accounts were not treated as deposits by CCB. They were listed as other liabilities and no allocations for the 6% reserve to the ECCB were made. In fact, in the 2011 audited financial reports, the CCIB funds were referred to as "Loan to Parent". It was on account of this that the funds in the inter-company account, including those belonging to CCIB, were not considered deposits and therefore not transferred to NCBA along with all of the other deposits which were allocated between NCBA and the Deposit Protection Trust. However, the funds which had been ring-fenced as at 24th March, 2016, were transferred to NCBA as these were reported as deposits during the brief period after Mr. Tacon had taken over administration of CCIB.

[92] Mr. Swift explains that NCBA was in fact a bridge bank when it was incorporated as part of the resolution plan. I understand that under the plan, the NCBA agreed to buy over only good assets from NBA and CCB. The intention here was for any disputed claim from creditors to remain with the Domestic Banks and to be dealt with in the receivership. On 22nd April, 2016, the ECCB appointed Mr. Gary Moving as receiver over NBA and CCB. Prior to that the members of the resolution team had gone into NBA and CCB and confirmed the deposit accounts and assets which would be transferred to NCBA. The assets which remained with the Domestic Banks were mainly non-performing loans and financial assets as well as other non-financial assets. Once the receiver has recovered those assets, the creditors will be paid in order of priority. Since the government has guaranteed payment of deposits pursuant to the Deposit Protection Trust, those will be paid first in line after payment of the Receiver's remuneration.

[93] Insofar as it relates to NCBA's own role in the matter, I understand from the evidence that a Board of Directors was put in place and Mr. Dinning was appointed as the chairperson of this board. One other member of the board was Mr. Carl Harrigan who appeared as a witness in this matter. Mr. Harrigan stated that NCBA entered into an agreement with NBA and CCB in relation to the assets which were to be transferred over upon implementation of the resolution plan. This was referred to as a Purchase and Assumption Agreement (PAA). This was designed to ensure that only good assets were transferred to NCBA from the Domestic Banks. In fact the agreement contained a put back clause in relation to any assets transferred to NCBA which were later determined to have fallen outside of the scope of the PAA.

- [94] According to Mr. Harrigan, the Board of Directors of NCBA met on 22nd April, 2016 in order to sign the agreement. This was an important meeting both in substance and timing, as NCBA was to commence operations on 25th April, 2016. The meeting on the 22nd took place on a Friday and it was important to finalise those issues to ensure the operationalization of NCBA by Monday morning. That meeting commenced at 11:30am and concluded at 12:30pm. By the conclusion of the meeting, the NCBA board had approved the agreement.
- [95] In light of the substance of the claim against NCBA in these proceedings, the date and time of this meeting is also important as it relates to attempts being made by Mr. Tacon to place NCBA on notice of PBT's and CCIB's intention to commence proceedings in order to recover any of the net new monies or assets which may have been transferred to NCBA. On 19th April, 2016, Mr. Tacon wrote a letter addressed to Mr. Shawn Williams, who was then the conservator of the Domestic Banks. This was a pre-action letter in which the Offshore Banks indicated an intention to pursue a claim for the recovery of the net balances of money deposited into the Domestic Banks during the period of conservatorship. Under cover of a letter dated 22nd April, 2016, this letter was delivered to the registered agent of NCBA on that very day. The letter was however only emailed to the members of the Board by the administrative employee of the registered agent at 1:56pm on 22nd April. As such, the Board of Directors had not considered nor were they made aware of this letter at the time of the approval of the PAA.
- [96] Mr. Tacon, in cross-examination accepted that the letter in and of itself would not have satisfied the board of NCBA that the Offshore Banks probably had a valid proprietary claim. He described the letter as having been urgently prepared and having been prepared for Mr. Williams' attention. The issue which Mr. Tacon complains of is that the resolution plan was being implemented and a new bridge bank set up with little information provided to him regarding the assets of the Offshore Banks; especially the funds which had been deposited into the Domestic Banks after the onset of intervention. For his part, Mr. Harrigan accepted that the content of the letter could have been given some consideration thereafter. Perhaps a meeting could have been held to discuss the issues raised by Mr. Tacon. However, he remained adamant that there was some urgency in ensuring that the PAA was signed on the Friday in order for NCBA to commence operations on the Monday. Throughout that process the Board of NCBA remained steadfast in their advocacy in ensuring that only good assets were transferred to the bank.

[97] Having examined the facts of this case, it would appear to me that on balance, the remaining funds in the intercompany accounts were left in the receivership and were not transferred to NCBA. As such, it is unnecessary to consider the question of whether NCBA was a bona fide purchaser for value of those assets. It would also appear that it was in fact critical to ensure that NCBA commenced operations on the Monday as failure to do so would have had a negative impact since the Domestic Banks had by then been placed into receivership. Nonetheless, if a letter had been left with the registered agent prior to the meeting, that would have sufficed for the relevant notice to have been provided to the board of the intention to commence proceedings.

The Issues

[98] Having examined the facts as presented in this case, the pleadings between the parties and the Pre-Trial Memorandum of each party, I am of the view that there are four general issues for consideration in this case. Firstly, the court must consider whether the conservators were *de jure* or *de facto* directors of the Offshore Banks; Secondly, if the court is of the view that the conservators were in fact *de jure* or *de facto* directors, the court must consider whether there was a breach of any fiduciary duty which arose as a result of this directorship; Thirdly, the court is to consider whether the conservators are to be personally liable for any damages which arise as a result of this alleged breach; and fourthly, the court is to consider whether there are any grounds for a tracing of the proceedings of the assets of the Offshore Banks into those of the ECCB and NCBA.

Were the conservators de jure or de facto directors of the Offshore Banks?

[99] As I stated earlier in this judgment, the defence of the 4th to 7th defendants appears to have accepted that Mr. Dinning and Mr. Carr were “directors and officers” of the Offshore Banks. An attempt was made during the course of the trial to amend the pleadings. The court did not allow this application at that late stage in the proceedings. In light of this, counsel for the Offshore Banks refers the court to the case of ***George W. Bennett Bryson’s & Co. Ltd. v George Purcell***² in support of the submission that these defendants are bound by their pleadings. In that case, after assessing the authorities on the issue Blenman JA noted that:

² ANUHCVP2011/0023

“In short then, the function of pleadings is to “give fair notice of the case which has to be met and “to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.” It is duty of the court to firstly examine the pleadings and then to decide the case in view of, or more properly, on the basis of the pleadings. In the present case, as alluded to earlier, it is immediately apparent from Mr. Purcell’s pleadings that the substance of his claim was that the loss and damage he suffered was as a result of Bryson’s Shipping’s breach of duty as bailee of his cargo in its failure to exercise proper care and custody of said cargo. Mr. Purcell had not pleaded breach of contract in his claim form nor in his statement of claim; he based his entire claim on breach of duty in bailment. This Court is in complete agreement with learned Queen’s Counsel Mr. Simon that proper consideration of the submissions and evidence on bailment was crucial to a determination of the issues in dispute between the parties and could have materially affected the outcome of the case. In our opinion, it was fundamentally unfair to Bryson’s Shipping for the learned trial judge to find in favour of Mr. Purcell on the basis of a breach of contract without that cause of action having been specifically pleaded as it deprived the parties of the opportunity to make their case on that issue.”

[100] I make the observation here that the general purpose behind the rule is to ensure that the other side to the proceedings is aware of the case he has to answer and to define the issues which the court is called upon to consider. In that case, the trial judge appeared to have decided the matter on an entirely different cause of action than that which was pleaded. However, in order to address this issue in the circumstances of the case before me, it is important to first give closer consideration to the pleadings, when balanced against the evidence which had been presented.

[101] In paragraph 9 of the amended statement of claim, it was pleaded that *“in the period 15th August, 2013 to 22nd February, 2016, PBT had no de jure directors ...”* It was further pleaded that *“in the period 15th August, 2013 to 15th January, 2015, CCIB had no de jure directors.”* The claimants go on to plead that from 15th January, 2015 to 22nd February, 2016 *“Mr. Hudson Carr was the*

“purported” de jure and/or de fact director of CCIB.” The claimants’ case was therefore that there was no *de jure* director appointed for PBT during the relevant period and that only Mr. Hudson Carr was “purportedly” appointed as *de jure* director of CCIB from 15th January, 2015 to 22nd February, 2016. There was also a question raised elsewhere in the claim as to whether the ECCB even had the legal authority to justify its actions in relation to the Offshore Banks.

[102] In response to this particular paragraph, the 4th to 7th defendants denied the content thereof and stated that:

(a) The affairs of PBT were conducted in accordance with the instructions given by and under the management and control of its officers appointed by its sole shareholder, NBA, which was under the control of the ECCB. The officers of PBT during the relevant period were Martin Dinning and Hudson Carr. In managing the affairs of PBT, they had regard to a management agreement between PBT and NBA dated April, 2005.

(b) The affairs of CCIB were conducted in accordance with the instructions given by and under the management and control of its directors appointed by its sole shareholder, CCB, in accordance with a management agreement between CCIB and CCB dated May, 2010. The directors of CCIB during the relevant period were Martin Dinning and Hudson Carr.”

[103] It was denied that Shawn Williams was ever appointed as director of either offshore bank; neither did he purport to act as such. The defence went on to state that Mr. Martin Dinning was appointed as officer of PBT by NBA on 12th August, 2013 and director of CCIB on the same date. It was asserted that Mr. Hudson Carr was appointed as officer of PBT on 15th January, 2015 and director of CCIB on 15th January, 2015. Therefore, insofar as paragraph 9 of the amended statement of claim is concerned, no *de jure* director was ever appointed for PBT. That was not disputed in the defendants’ response to paragraph 9. However, it was stated that Mr. Dinning and Mr. Carr were appointed as directors in CCIB.

[104] The claimant however went on in paragraph 10 of the amended statement of claim to state that the *“conservator directors acted as de facto directors of PBT and CCIB (save that Mr. Hudson Carr acted as a purported de jure and/or de fact director of CCIB...)”*. It was further pleaded that:

- (a) *“during the relevant period, management, trading and administrative decisions of PBT and CCIB were made by, or subject to the control of, the conservator directors. Personnel within PBT and CCIB took instructions and directions from the conservator directors, who established the policy to be adopted by PBT and CCIB during the relevant period for making deposits and permitting withdrawals.*
- (b) *the conservator directors assumed to act as directors of PBT and CCIB and as part of the corporate governing structure, and were the sole persons exercising the powers of, and discharging the functions of directors of PBT and CCIB, when causing PBT and CCIB to continue banking business.*
- (c) *The conservator directors undertook functions which would only be discharged by a director of PBT and CCIB.”*

[105] In response to those allegations, the 4th to 7th defendants denied paragraph 10 save for the fact that Mr. Carr was appointed as *de jure* director of CCIB. They however went on to state that *“upon taking control of NBA and CCB, the ECCB and the conservators continued to manage the affairs of CCIB and PBT on behalf of CCB and NBA, respectively pursuant to those management agreements”* for reasons which were set on in the defence at paragraph 23 therein. They go on to state that:

- (a) *“Martin Dinning and Hudson Carr were appointed directors and officers of CCIB and PBT respectively. This was done to ensure that PBT and CCIB would be compliant with the Trust Companies and Offshore Banking Act which requires that they have directors and officers to operate;*
- (b) *if the appointments ... were not made, CCIB and PBT would have had to cease providing banking services;*
- (c) *The Financial Services Commission was fully aware of the pre-intervention and pre-resolution concerns of the ECCB and failed to take any steps to take control of PBT and CCIB;*

(d) *the appointment of Martin Dinning and Hudson Carr as directors and officers of CCIB and PBT respectively was approved by the FSC.”*

[106] The 4th to 7th defendants then went on to state that *“the conservators continued to manage the affairs of CCIB and PBT pursuant to the management agreements between PBT and NBA on the one hand and CCIB and CCB on the other.”*

[107] I must state that when one examines the pleadings it is somewhat ambiguous as to what is being admitted or denied here. Insofar as that is the case an argument could be made that this ought to be weighed against the 4th to 7th defendants as the issues ought to have been more clearly pleaded. However, when taken in conjunction with the response to paragraph 9 of the amended statement of claim it does not appear to me that there is an admission that a *de jure* director was ever appointed in relation to PBT. Where in response to paragraph 10 of the amended statement of claim it is stated that Mr. Dinning and Mr. Carr were appointed as “directors and officers” of CCIB and PBT respectively, this must be read in light of the direct response to what was pleaded in the amended statement of claim in the first place. It seems to me on balance that neither pleadings alleged nor admitted that a *de jure* director was ever appointed in relation to PBT. There was however, an admission that Mr. Carr was appointed as director of CCIB and an assertion that Mr. Dinning was so appointed at some point. The Pre-Trial Memorandums also appears to outline this as a fact to be decided in the case.

[108] However, when one examines the evidence (even that which was presented by the claimants) there is reason to doubt that there was ever an actual appointment of a *de jure* director of either of the Offshore Banks. Although this was acknowledged in relation to Mr. Dinning and Mr. Carr in the defence as it related to CCIB, the NCBA made no admission to this in their pleadings and Mr. Williams had denied he was ever so appointed himself. Although it is noted in the defence of the 4th to 7th defendants that the AFSC had approved this appointment of Mr. Dinning and Mr. Carr in particular, the court was not furnished with any formal appointment of any of the conservators as directors of PBT nor CCIB or any formal approval of such. In his own witness statement, Mr. Tacon continued to assert that there were no *de jure* directors appointed for PBT. He continued to assert in his witness statement that up until January, 2015, CCIB had no *de jure* directors. This suggests

to my mind that the claimants did not approach this case under the premise that directors were appointed for PBT at any point and that only Mr. Carr was appointed in relation to CCIB (that was a date subsequent to the major policy decisions which are under scrutiny in this case). In cross-examination, Mr. Tacon accepted that he had not seen any resolution or documents appointing any of the conservators as a director. He never saw any documents in which either of them agreed to be so appointed and that they never represented themselves as being so appointed in any document that he had sight of.

[109] The conservators who filed witness statements in the matter all deny ever discussing or agreeing to be so appointed and never signed any document to that effect; and having witnessed the evidence myself I believe what they had to say. In fact, Mr. Dinning points out that he had not properly taken up his appointment when the directors of PBT and CCIB were relieved of their duties. At one point in his cross-examination, even Mr. Tacon acknowledged that there may not have been any formal appointment in relation to Mr. Williams. For the reasons which I have already explained earlier in this judgment, the annual returns which refer to any of the conservators as directors or officers are not a reliable source of evidence that there ever was an actual appointment. As such, I find that on balance the conservators were not *de jure* directors. That is not a decision which is so far outside of the scope of the pleadings when taken in light of the evidence so as to fall foul of the admonition outlined in the case of **George W. Bennett Bryson's & Co. Ltd. v George Purcell**. The question is whether they are to be viewed as *de facto* directors.

[110] I must repeat my earlier observation that there is general ambiguity in what was pleaded in the defence of the 4th to 7th defendants. There was on the one hand a denial of the relevant paragraphs in the amended statement of claim. On the other hand there was an acceptance that Mr. Dinning and Mr. Carr had been appointed as director and officer in relation to CCIB and so acted. There was also an assertion that they managed the operations of the Offshore Banks in accordance with the management agreements which were in place. It was Mr. Tacon's view that these agreements were not drafted so as to contain the powers of directors of those companies but were merely basic administrative powers. I agree with that view. However, counsel for all parties placed both pre and post-trial submissions before the court on the question of whether the conservators were in fact *de facto* directors. There was much cross-examination on the issue. I will therefore firstly consider the authorities presented on the point in question.

[111] In the case of *In re Hydrofoam (Corby) Ltd*³ Millet J provided the following definition:

“A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which could properly be performed by a manager below board level.”

[112] Millet J's approach was cited with approval by Lord Hope in the case of *Revenue and Customs Commissioners v Holland and another; In Re Pay Check Services Ltd. and others*⁴ when he made the following comment:

‘It is plain from the authorities that the circumstances vary widely from case to case. Jacob J declined to formulate a single decisive test in Secretary of State for Trade and Industry v Tjolle, as he saw the question very much as one of fact and degree. He was commended by Robert Walker LJ in In re Kaytech International plc for not doing so, and I respectfully agree that there is much force in Jacob J's observation. All one can say, as a generality, is that all the relevant factors must be taken into account. But it is possible to obtain some guidance by looking at the purpose of the section. As Millet J said in In re Hydrofoam (Corby) Ltd, the liability is imposed on those who were in a position to prevent damage to creditors by taking proper steps to protect their interests. As he put it, those who assume to act as directors and who thereby exercise the powers and discharge the functions of a director, whether validly appointed or not, must accept the responsibilities of the office. So one must look at what the person actually did to see whether he assumed those responsibilities in relation to the subject company.’”

³ [1994] 2 BCLC 180

⁴ [2010] UKSC 51

[113] Counsel for NCBA also referred to the case of **Official Receiver v. Atkinson**⁵ where this test was recently summarized. In light of that authority counsel submits that there are in essence four elements to the test. These are:

- (a) whether the conservators assumed the duties of a director, having regard to the corporate governance structure of the companies;
- (b) It is necessary to plead and prove that the person undertook functions which could only be discharged by a director;
- (c) If it is unclear whether the acts in question are referable to an assumed directorship, or to some other capacity such as a shareholder or consultant then the person in question must be entitled to the benefit of the doubt; and
- (d) Whether the individual was held out to third parties as a director and whether third parties considered him to be a director.

[114] I accept that these four principles must be considered in coming to a conclusion as to whether the conservators were in fact *de facto* directors of PBT and CCIB. In light of the dicta of Lord Hope and Millet J this would also encompass the fact that liability is to be imposed on those who were in a position to prevent damage to creditors by taking proper steps to protect their interests. Indeed the issue of protecting the interest of the depositors of net new monies is an argument which permeates the pleadings and submissions of the claimants.

[115] In my view, the court must also consider this issue in light of the prevailing circumstances at the time. The conservators were appointed in circumstances where the ECCB, as regulator, took over the affairs of the Domestic Banks. Although the ECCB did not have authority to regulate the claimants, the evidence suggests that some consideration had been given to that issue by the Government of Anguilla and the AFSC and some form of agreement had been arrived at. There was also the assertion that the AFSC took no steps to intervene as regulator of the Offshore Banks.

⁵ [2021] EWHC 175

It is accepted that the affairs of the Offshore Banks were so intertwined with those of the Domestic Banks, that those who managed the affairs of the latter, had traditionally been doing the same in relation to the former. There was in fact a common directorship and shared managerial and staffing personnel prior to intervention. Mr. Dinning stated in his evidence that the members of the board of directors of the Domestic Banks were relieved of their duties in relation to those banks prior to the conservators physically moving into their role. This was done by the ECCB's intervention team. Mr. Dinning indicates that although he arrived in Anguilla on 13th August, 2013, he did not commence operating as conservator until 2 weeks later. The directors of the Offshore Banks resigned on 15th August, 2013.

[116] In paragraph 20 of this judgment I outlined the terms of reference as it relates to the appointment of conservators. I am not of the view that the duties outlined in these documents established that the conservators were even appointed as directors of the Domestic Banks. In particular the reference starts off by stating that the conservators were to direct and supervise the day-to-day business and affairs of CCB and NBA. Even as it relates to the restructuring, re-capitalisation and the sale of assets of the Domestic Banks, the conservators' role was to assist with those processes as the ECCB deemed necessary. I understand from the evidence that the conservators sat on the OCIB. However, their evidence was that they reported on the affairs of the banks to the OCIB and implemented whatever strategies were approved by that committee. In my view, given the limited scope of the role played in the affairs of the Domestic Banks, one must consider this factor in determining the role undertaken in relation to the affairs of the offshore institutions.

[117] I consider firstly the question of whether the conservators therefore assumed the duties of a director within the corporate governance structure of the Offshore Banks. This is not a straight forward task in the circumstances of this case. Although there was no direct regulatory intervention in relation to the Offshore Banks, the significant link between the corporate governance structures of the Offshore Banks and those of the parent institutions makes it impossible to evaluate the corporate governance structure without recognizing that the conservators were put in place as a result of a regulatory intervention into the affairs of the Domestic Banks. In light of this intervention, broad policy decisions regarding significant issues such as interest rates, withdrawals restrictions and deposits had already been made by the ECCB even prior to the appointment of the individual conservators. Those decisions included the fact that it was in the best interest of the Domestic

Banks to continue trading whilst a resolution plan was being worked out with various stake-holders. It was also determined, with input from the conservators, that it was important for the status quo to be maintained in relation to the management and operations of the affairs of the Offshore Banks, due to the impact any immediate closure would have on liquidity in the market in general and that the customers of the Offshore Banks needed to continue trading in order to protect their own business interests in Anguilla.

[118] The evidence in this case suggests to me that neither Mr. Dinning nor Mr. Carr saw themselves as being responsible for making those broad policy decisions. At trial, Mr. Carr in particular, asserted that those were considered to be outside of the scope of the powers of the conservators acting in that capacity. In their witness statements, both Mr. Dinning and Mr. Carr saw themselves as managing the day to day affairs of the Domestic and Offshore Banks in keeping with the policy decisions as laid down by the ECCB and the respective management agreements which were already in place prior to intervention. Indeed their letters of appointment spelt out that limitation in the role they were called upon to play. I accept as a matter of fact that, with the exception of the MSSB funds which I will address separately, those actions under scrutiny here were not generally actions or decisions of the conservators. Those were decisions of the ECCB as regulator and, in any event, I find that there is little in the evidence or submissions to suggest any reason for impugning those decisions as not being proper in the circumstances of this case.

[119] On balance I find that the evidence does not show that the conservators had assumed the duties of directors of the Offshore Banks insofar as it relates to the actions they undertook. As submitted by counsel for NCBA, there is an obvious capacity in which the conservators could have been acting other than that of director. The functions as contained in the letters of appointment do not lead me to that conclusion as pleaded by the claimants. Within the corporate structure in place both before and after intervention, the conservators managed the day to day affairs of the Domestic and Offshore Banks and made decisions in relation to the approval of withdrawals, for example. There is insufficient evidence to suggest that their powers in that capacity extended to the powers normally associated with the directorship of such companies; even taking into account the context within which they were so appointed.

[120] I also find that the evidence does not show that the conservators held themselves out to third parties as directors. Neither was there any evidence presented which satisfied this court that third parties were led to believe this. Mrs. Curtis' evidence of her interactions with the conservators does not stand as proof that they held themselves out as directors to her. None of the conservators ever signed documents in that capacity or made any private or public statement which has been presented to the court to satisfy this test. The public statements and letters written to customers all indicate that the intervention was that of the ECCB. The letters and public statements outline the decisions taken by the ECCB in relation to the continuation of trade, reduction in interest rates and the limits to be placed on withdrawals. It was also clear that those arrangements, which were managed by the conservators, were temporary until a resolution plan was worked out. On balance, I find that this element of the test has not been made out by the evidence presented in this case.

[121] I also consider the question of whether the conservators were in a position to prevent damage to creditors by taking proper steps to protect their interests. This is an issue which I will examine in more detail later on. However, I find as a matter of fact that in the peculiar circumstances of this case, the conservators were not in a position to prevent such damage in the same way that a director would have been. If anything, the broad decision taken by the ECCB to allow for the continued trading of the Offshore Banks was a decision taken to protect their interests. The evidence suggests to me that this was necessary, given that those depositors were primarily business persons or corporations who needed to continue trading in order to advance their own business interests. The evidence also suggests that as a matter of policy, this was the right decision to take in order to prevent a disorderly winding up with a negative impact to the economy of Anguilla and the wider ECCU. But that was a decision of the ECCB. Mr. Carr was careful to point out that those decisions were taken at a higher level than that of his office and I accept his evidence as being an accurate reflection of the circumstances which prevailed at the time.

[122] Insofar as the case law requires that the court considers what the conservators actually did during the time of their appointment, I can find nothing specific in their actions to draw me to the conclusion that they were *de facto* directors of the Offshore Banks to which the fiduciary duties claimed can be attached. In their submissions, counsel for the claimants state that this is a claim about the actions and decisions of the conservators while exercising control over the claimants' property in a manner only a director can. It is submitted that the purpose of the conservatorship

was to work out a resolution plan for the Domestic Banks. The submissions go on further to state that at some point in that process a decision was taken to exclude the deposits of the Offshore Banks from being transferred to NCBA as part of the resolution plan. The deposits were therefore placed in the receivership of NBA and CCB. In light of this, I make two points here.

- [123] Firstly, this submission somewhat undermines the nature of the case which has been brought against the NCBA. That case seeks an account and tracing of the proceeds of any funds transferred to NCBA. Yet the submissions acknowledged that a decision had been made not to transfer the deposits of the Offshore Banks to the NCBA. In essence, what the evidence suggests is that the intercompany balances, which contained whatever was left of the monies up-streamed from the offshore deposits, were left in the receivership. This was on account of the good bank-bad bank principle which determined which assets were to be transferred to the bridge bank.
- [124] Secondly, the evidence suggests to me, that prior to the implementation of the resolution plan, the conservators had undertaken the task of implementing the broad policies of the ECCB as directed by the OCIB. Having taken the decision to intervene in the affairs of the Domestic Banks, the ECCB set the broad policy parameters within which this was to operate. There is no evidence to suggest that the conservators took any decision regarding the placement of the deposits into receivership. That was a decision taken by the ECCB, the Anguillian Government and other stake-holders who were represented on the team negotiating the resolution plan. The conservators' task was to hold the fort in managing the affairs of the banks, including the Offshore Banks, until such time as this plan was worked out and ready for implementation. They made decisions as to whether to honour individual requests for withdrawals based on the liquidity available and managed the daily affairs of the banks. They reported on the position of the banks, including the Offshore Banks, to the OCIB and implemented whatever decisions were made at that level. To my mind, the evidence does not point to any specific action of the conservators which show that they were acting in the capacity as *de facto* directors.
- [125] The liquidation of the MSSB funds has been pointed out as one action taken during the period of Mr. Dinning's conservatorship. I have already outlined the circumstances under which this decision was made and will not go any further into the details of such. However, I am not of the view that this decision is one which falls exclusively within the scope of that of a director. Firstly, the evidence

suggests that even the instruments outlining the management of this fund indicate that the Senior Manager and the Chief Financial Officer were empowered to make such decisions. Mr. Dinning was also so empowered. The evidence suggests that there were reports made to the OCIB on such issues and a decision was taken to liquidate the funds, given the challenges being faced in the market at the time and the losses which that investment was suffering. The evidence also suggests that there was no other bank account or institution capable of receiving this deposit other than the intercompany accounts held with CCB's corresponding bank in the United States. On balance, I do not find that this is the type of decision which falls to be made exclusively by a director for which the liabilities of a *de facto* director could now be attached.

[126] I therefore conclude that the evidence does not establish that the conservators were *de facto* directors of the Offshore Banks. As such, I express my doubts as to whether the liabilities attached to those positions as asserted in the claim can be attached to them. However, it must be noted that the 4th to 7th defendants acknowledged having fiduciary duties towards the Offshore Banks in their defence. Despite my findings in relation to the facts and submissions presented in this case, and in the event that I am wrong about that issue, I have also concluded that the evidence does not prove that there was a breach of fiduciary duty by the conservators. I will now examine the reasons for coming to that conclusion.

The Nature of the Fiduciary Duty

[127] Counsel for the claimants have argued that, as directors, the conservators acted as trustees over the affairs of the Offshore Banks. There is, it is argued, a fiduciary duty which is attached to this trusteeship. Reference is made to ***Fitcroft's Case***⁶ where it was stated that directors are ***"in the position of trustees and are liable not only for what they put in their own pockets, but for what they in breach of trust, pay to others."*** Reference was also made to the case of ***Re Land Allotment Company***⁷ where Lindley LJ stated that:

"Although Directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is

⁶ (1882) 21 Ch D 519

⁷ (1884) 1 Ch. 616

actually under their control; and ever since joint stock companies were invented directors have been held liable to make good monies which they have misapplied upon the same footing as if they were trustees, and it has always been held that they are not entitled to the benefit of the Statute of Limitations because they have committed breaches of trust, and are in respect of such monies to be treated as trustees.”

[128] I note here that, with the exception of the MSSB funds which will be considered separately, there is no clear and substantiated allegation to suggest that the conservators had misapplied funds deposited into the Domestic Banks intercompany accounts. The issue seems to be primarily one of whether the net deposits should properly be returned to the Offshore Banks and whether a proprietary as well as a personal claim can be maintained against the defendants. The evidence suggests that access was provided to those funds during the period of conservatorship. It is what occurred at the point of implementation of the resolution plan which appears to be the greater issue.

[129] It is also argued by the claimants that once it is proven that the conservators were in fact fiduciaries and had made the impugned transactions, the onus then shifts to them to explain the transactions. If the explanation is unsatisfactory then the court is entitled to conclude that there was no proper justification for the payment. For that proposition, the claimants rely on the case of ***Re Idessa (UK) Ltd.***⁸

[130] It is also argued that as directors, the conservators had a duty to act in the best interest of the Offshore Banks. Reliance is placed on the provisions of section 97(a) of the **Companies Act**⁹ as was in force at the time of the conservatorship. However, section 97(b) is also relevant to the issues at hand. The section states that:

“Every director and officer of a company in exercising his or her powers and discharging his duties shall – (a) act honestly and in good faith with a view to the best

⁸ (2012) BCC 315

⁹ RSA. c65

interests of the company. (b) exercise the care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances.”

[131] In the case of *Roberts v Frohlich & Anor*¹⁰ it was noted that “*an allegation of breach of fiduciary duty involves consideration of the question whether the director honestly believed that his act was in the interest of the company. If the act taken resulted in substantial detriment to the company the director has a harder task to persuade the court that he honestly believed it to be in the company’s best interest: but the test remains substantially subjective.*” However, counsel for the claimants argue that the test remains subjective only insofar as certain circumstances do not exist. In the right circumstance the subjective nature of the test is displaced by an objective standard. In the case of *HLC ENVIRONMENTAL PROJECTS LIMITED (in liquidation)*¹¹, the circumstances under which the subjective test is displaced is defined as follows:

... this general principle of subjectivity is subject to three qualifications of potential relevance in this case:

- (a) *Where the duty extends to consideration of the interests of creditors, their interests must be considered as “paramount” when taken into account in the directors’ exercise of discretion (per Mr. Leslie Kosmin QC in the Colin Gwyer case supra at [74]). Although I note the contrary view expressed by Owen J in the Supreme Court of Western Australia that although “the directors must ‘take into account’ the interests of creditors [i]t does not necessarily follow from this that the interests of creditors are determinative”(Bell Group Ltd v Westpac Banking Corporation [2008] WASC 239 at [4438]-[4439], applying the judgment of Mason J in Walker v Wimborne [1976] HCA 7, 137 CLR 1), so far as English law is concerned I respectfully agree with Mr. Kosmin QC loc cit that his use of “paramount” was consistent with the judgment of Nourse LJ in Brady v Brady [1988] BCLC 20 (CA) at 40h-i, where he observed that “where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality*

¹⁰ [2011] 2 BCLC 625

¹¹ [2013] EWHC 2876 (Ch)

the interests of existing creditors alone". I also note that this passage from Mr. Kosmin QC's judgment was cited with apparent approval by Norris J in Roberts v Frohlich [2011] EWHC 257 (Ch), [2011] 2 BCLC 625 at [85];

- (b) *As Miss Leahy submitted, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (Charterbridge Corpn Ltd v Lloyds Bank Ltd [1970] Ch 62 at 74E-F, obiter, per Pennycuik J; Extrasure Travel Insurances Ltd v Scattergood [2003] 1 BCLC 598 at [138] per Mr Jonathan Crow);*
- (c) *Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place. I reject the Respondent's contrary submission of law.*

[132] In the circumstances of the present case, it is also important to give regard to what has been described as the "rule in *West Mercia*." The issue for consideration under this rule is the shifting scope of the fiduciary duty in keeping with the financial viability of the company. Whilst the duty remains that of acting in the best interest of the company, the company's interest may shift from being primarily focused on its shareholders to that of its creditors as its financial viability is

worsened and the prospect of insolvency becomes more likely. In the case of **BTI 2014 LLC v. Sequana SA**¹² the UK Supreme Court noted that:

The treatment of the company's interests as equivalent to the shareholders' interests can therefore be regarded as justifiable while the company is financially stable, since it results in the directors being under a duty to manage the company in the interests of those who primarily bear the commercial risks which the directors undertake; and, as explained in para 47 above, creditors are also protected. But that ceases to be true when the company is insolvent or nearing insolvency. To treat the company's interests as equivalent to the shareholders' interests in that situation encourages the taking of commercial risks which are borne primarily not by the shareholders but by the creditors, who will recover less in a winding up if the company's assets have been diminished or if it has taken on additional liabilities. In economic terms, treating the company's interests as equivalent to the shareholders' interests in a situation of insolvency or near-insolvency results in the externalisation of risk: losses resulting from risk-taking are borne wholly or mainly by third parties.

[133] It would appear that the authorities had at one point began moving in the direction of recognizing a separate duty towards the creditors of a company in those circumstances. However, in **BTI 2014 LLC v. Sequana SA** the Supreme Court rejected this proposition and noted the following at paragraphs 11 and 12:

"In summary, I reject the contention, raised in some of the authorities, that there is a "creditor duty" distinct from the directors' fiduciary duty to act in the interests of the company; but I have come to the conclusion that there are circumstances in which the interests of the company, for the purposes of the latter duty, should be understood as including the interests of its creditors as a whole. As it seems to me, there is a risk of confusion if this is described as a creditor duty, as the parties described it, as there is not a duty owed to creditors, or any duty separate from the directors' fiduciary duty to the company. Rather, there is a rule which modifies the ordinary rule whereby, for the

¹² [2022] UKSC25

purposes of the director's fiduciary duty to act in good faith in the interests of the company, the company's interests are taken to be equivalent to the interests of its members as a whole. I understand all the members of the court to be in agreement on that point. Where the modifying rule applies – a rule which I shall describe as the rule in West Mercia, after the leading case of West Mercia Safetywear Ltd (in liq) v Dodd [1988] BCLC 250 - the company's interests are taken to include the interests of its creditors as a whole. The duty remains the director's duty to act in good faith in the interests of the company. The effect of the rule is to require the directors to consider the interests of creditors along with those of members. The weight to be given to their interests, insofar as they may conflict with those of the members, will increase as the company's financial problems become increasingly serious. Where insolvent liquidation or administration is inevitable, the interests of the members cease to bear any weight, and the rule consequently requires the company's interests to be treated as equivalent to the interests of its creditors as a whole.

The rationale of the rule which modifies how the company's interests are understood, for the purposes of the directors' duty of loyalty, does not appear to me to be satisfactorily explained in terms of contingent quasi-proprietary interests in the company's assets. It can be explained more simply and clearly on the basis that, where the rule in West Mercia applies, the company's creditors have an economic interest in the company, based upon their entitlement to be paid the debts owed to them, ultimately enforceable against the proceeds of realisation of the company's assets, which is distinct from the interests of its members and requires separate consideration: something which can be taken to occur when the company is insolvent or bordering on insolvency, or where an insolvent liquidation or administration is probable, or where the transaction in question would place the company in one of those situations. I understand that also to be the view of the other members of the court."

- [134] It is to be observed therefore, that there is no separate creditor's duty. In essence, the fiduciary obligations of the directors remain the same. That is to act in the interest of the company. If the company finds itself in financial difficulties, the interests of the company begin to shift from those of

its members to that of its creditors or perhaps those who carry the greatest financial risk at that point in time. In the case of insolvency or near insolvency, the interest of the creditors carries greater weight. However, the court must give due regard to the peculiar circumstances of each case. As is outlined in section 97(b) of the **Companies Act** the duty is to exercise the care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances. Even if the court is to apply an objective test it is to consider whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company. The court's duty here is not to substitute its own thoughts on what could have been done differently in hindsight.

[135] In this case, it is inescapable that a regulatory intervention of this nature possibly further compounds the scope of interests which may influence the direction of the various institutions involved. Whilst this was in fact an intervention in the affairs of the Domestic Banks, the facts clearly show that the manner in which the affairs of the domestic as well as offshore institutions were handled could have had an impact on the entire economy of Anguilla and the wider ECCU. All of these factors must be taken into account when assessing the actions of the conservators and the ECCB. I express my doubts here that the interest of the creditors in a broad sense would be considered narrowly in such circumstances where the interest of the entire economy is weighed in the balance in this way. It is not that the interest of the Offshore Banks and their depositors became less relevant, but that the collapse of the economy in a disorderly liquidation could certainly not have been in the best interest of the Offshore Banks and their depositors either as this would further compound the risk of their deposits not being returned to them.

[136] I also make one further point here. To my mind, the objective test seeks to equate the creditors' interest as being that of the company for one important reason. That is, that the creditors carry a greater risk if the company goes into liquidation. However, in the circumstances of the present case, that risk on the part of depositors is more complex. To view them as being merely creditors may obscure the issues which the conservators would have had to consider in the intervening period. They were customers of the institutions with the need to access banking facilities to carry on their businesses in circumstances where the entire market was at risk. The impact that the immediate closure of the banks or the decisions of the conservators in general could have had on

such operations in a broad sense was a major factor to consider. It is therefore important to elaborate on this point even at this stage.

- [137] As was noted in the submissions of counsel for NCBA, the relationship between a depositor and the bank is generally that of debtor and creditor. It is in a sense a purely contractual relationship. In the case of ***First City Monument Bank PLC v. Zumax Nigeria Ltd***¹³ the principle was highlighted in the following manner:

“The relation between customer and banker is a contractual relationship of creditor and debtor. What is represented by the balance in the customer’s account is the amount of the debt that the bank is required to pay the customer if he demands it. Its legal character is that of a chose in action. This has been settled law for over 150 years.”

- [138] There is therefore no doubting the contractual nature of the relationship between the bank and its depositors. These depositors, along with other creditors carry significant risk in the event of insolvency. However, I am of the view that in the case of a regulatory intervention of this nature where the banks have such a significant market share, the interests of the depositors are far broader than the demand placed on the balance in the account. Persons as well as corporations are in need of banking facilities in order to carry on their daily affairs. In the case of the Offshore Banks in particular, the evidence suggests that a significant number of the depositors were businesses or business persons carrying on their affairs in and out of Anguilla. In that context, given that the evidence suggests that the banks had no other correspondent banking relationships and it was difficult if not impossible to separate the functions of the two institutions without adverse repercussions, then the risks associated with the actions of the ECCB and the conservators extended beyond the deposits in the accounts but included the capacity of those very businesses to continue trading themselves if the relationship with the Offshore Banks was brought to an untimely and chaotic end. That relationship was inextricably linked to the liquidity and viability of the parent institutions.

- [139] Therefore, when the conservators and the ECCB personnel submit that they considered the interest of the customers of the Offshore Banks, their pleadings and witness statements all stress the need

¹³ [2019] EWCA Civ. 294

for those depositors to access the banking facilities to carry on their businesses. That is an apt and legitimate interest to have considered. The assurance therefore to provide access to deposits, albeit with some restrictions was designed to fulfill that purpose. However, that assurance must have depended on the liquidity and viability of the Domestic Banks, given the level of dependence which the two sets of institutions had on each other. I simply make the point here that the interests of the depositors of the Offshore Banks were not limited to the relationship of debtor and creditor in a narrow sense. The return of deposits is an important interest, but at the time of intervention, there were further interests which needed to be weighed in the balance and carefully navigated so as not to impact the business interests of many of those very depositors.

[140] Counsel for the claimants also argue that the fiduciary duties of the directors include the obligation to act for proper purposes. Counsel referred to the case of ***Extrasure Travel Insurances Ltd v Scattergood***¹⁴ in support of the following propositions:

- (a) The claimants do not have to prove dishonesty on the part of the director. Nor is it necessary to prove that the director was aware that he was acting for a collateral purpose;
- (b) The court must (a) identify the power, the exercise of which is in question; (b) identify the proper purpose for which this power was delegated to the director; (c) identify the substantial purpose for which the power was exercised; and (d) decide whether the purpose was proper.
- (c) The third stage is a question of fact in identifying the motive of the directors at the time of the exercise of the power.

[141] Reference is therefore made to the case of ***HLC ENVIRONMENTAL PROJECTS LIMITED (in liquidation)*** where the following was noted at paragraph 99:

“On facts such as the present, the application of the first two tests is not complicated. The power in question is to deal with the Company’s assets in the course of trading. The proper purpose for which that power was delegated to its director(s) is to advance the Company’s business and commercial interests. As to both, compare Extrasure

¹⁴ [2003] 1 BCLC 598

Travel supra at [140]. Furthermore, and notwithstanding Mr. Roe's contrary submission, it seems to me necessarily to follow from the common law principle (preserved post-codification by s.172(3) CA06) concerning directors taking into account the interests of a company's creditors, that the proper purposes for which the said power may be exercised must, where that duty is triggered, necessarily then include advancing the interests of that company's creditors."

[142] The claimants' submissions then went on to refer to paragraph 106 of that very judgment where the learned judge concluded that:

"I find that the substantial purpose for which the Respondent caused these payments to be made was to assist Engenharia, and that the decision to make them was made without giving any consideration to the best interests of the Company's creditors as a whole, nor specifically those of its contingent creditor FRIE Grupo, despite the Company having (and the Respondent knowing it to have) substantial creditors, substantial net current liabilities and overall net liabilities, no live projects or revenue stream, and no realistic prospect of gaining any. The Respondent was in effect choosing which creditors to pay, and which to leave exposed to a real risk of being left unpaid. An intelligent and honest man in the Respondent's position could not, in the circumstances, have reasonably believed that making the Engenharia Payments was for the benefit of the Company, nor of its creditors as a whole. I am not persuaded on the evidence that making the Engenharia Payments was a necessary step to enable the Company to collect its expected aggregate realisations from the Wrexham Project of around £2.3 million (and note that the preferred bidder status was held by HLC Wrexham, not the Company), or that the same would in some way have been forfeit had the Engenharia Payments not been made (as to which see paragraph 63 above). Breach of both the common law duties relied on by the Applicants is therefore made out.

[143] In addition to those duties, the claimants argue further that the conservators had a duty to ensure that they did not put themselves in a position of conflict between their duties towards the Offshore

Banks and any other interest. In support of that argument, reference is made to the decision of Lord Cranworth in the case of *The Aberdeen Railway Company v. Messrs. Blaikie Brothers*¹⁵, where he stated that:

“The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents; and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.”

[144] In the case of *Boardman v. Phipps*¹⁶ Lord Upjohn referred to this passage of Lord Cranworth and noted that: ***“The phrase ” possibly may conflict” ... means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.”***

[145] The rule is said to be a strict one and not contingent upon bad faith or the subjective state of mind of the fiduciary¹⁷. Where there are multiple directorships within a group of companies, the directors must give consideration to the interests of each company individually. This is especially the case where the company has separate creditors.¹⁸

Was There a Breach of Duty?

[146] The question for consideration therefore, is whether or not the conservators, if they were to have held such duties towards the Offshore Banks, had acted in breach of those duties. The first

¹⁵ [1854] UKHL 1

¹⁶ [1966] UKHL 2

¹⁷ *Richmond Pharmacology Ltd. v. Chester Overseas Ltd.* [2014]EWCH 2692

¹⁸ *Charterbridge Corporation Ltd. v. Lloyds Bank Ltd.* [1970] Ch62

argument raised by counsel for the claimants is that the conservators were in breach of duty by procuring the payment of funds to the Domestic Banks during the relevant period. According to counsel for the claimants, this was a breach of fiduciary duty because:

- (a) The Domestic Banks were clearly insolvent, or likely to become insolvent from the onset of the conservatorship;
- (b) Both the ECCB and the AFSC had themselves questioned the practice of co-mingling the funds of the Offshore and Domestic Banks even when they were solvent. Therefore the continuation of this practice during the conservatorship was not appropriate. It is also argued that the creditors of the Offshore Banks were non-residents of Anguilla and therefore clearly were entitled to have their interests considered separately from the creditors of the Domestic Banks;
- (c) There is no contemporaneous evidence to suggest that the conservators gave any thought to the separate interests of the Offshore Banks or their creditors. The court is invited to find that such evidence has not been adduced and to draw adverse inferences from this.
- (d) An honest and intelligent person placed in the position of the conservators could not have thought that the up-streaming and co-mingling of the funds into the Domestic Banks without adequate safeguards to ensure their return to the Offshore Banks was in the best interest of the Offshore Banks. Doing so had exposed the depositors to the high risk of non-payment.
- (e) It was important for the conservators to ensure that the continued trading was justified and that this did not occur at the expense of the Offshore Banks and their customers. Against the backdrop of the financial challenges facing the banks this decision was an unacceptably high risk to have undertaken.
- (f) The position of the Offshore Banks was materially worsened as a result of the decisions taken by the conservators. It is argued that the conservators (a) caused a deficiency in the new deposits after the onset of the conservatorship in that those funds were not repaid to the customers; and (b) The Offshore Banks were left with no good assets at the end of the period of conservatorship.

[147] In response to those assertions, the conservators in particular have argued, that at the onset of intervention consideration was in fact given to the interest of the Offshore Banks and their customers. Mr. Dinning, Mr. Carr and Mr. Byron all stated firstly, that upon assuming control of the affairs of both the Domestic and Offshore Banks it was realized that the customers of the Offshore Banks were primarily business people operating out of Saint Martin, who needed to continue to have access to the services of the Offshore Banks in order to carry on their businesses. Notwithstanding the concerns regarding the up-streaming and co-mingling of the funds of both banks, it was realized that the separation of those funds at that point in time would have had adverse consequences to both institutions. The very liquidity issues which were a cause for concern may have been exacerbated and even the customers of the Offshore Banks would have been affected by this. It was also determined that those institutions had no relationship with any other banking institution and would have been unable to make use of the services of any banks in or outside of Anguilla to facilitate their businesses.

[148] It is important to note that the evidence presented in this case does not generally contradict the assertions made by the conservators. Even Mr. Tacon in his own evidence accepted how difficult it would have been to separate the operations of the Offshore and Domestic institutions at that point in time. A ring-fencing of the funds, as had been pleaded by the claimants themselves, may have had significant consequences on the economy in general and also the interest of the customers of the Offshore Banks at the time. The conservators, and in particular Mr. Carr, noted that the liquidity issues faced by the banks at the time meant that any significant run on the banks by their depositors would have led to the immediate closure and, to my mind, this may have led to the disorderly liquidation which Mr. Tacon himself acknowledged may have had significant consequences.

[149] As it relates to the submission that adverse inferences should be drawn against the conservators for the alleged failure to produce contemporary evidence of their consideration of those issues, I do not accept it. I accept the evidence of Mr. Dinning, Mr. Carr and Mr. Byron as it relates to the state of affairs which they found to have existed at the time of the intervention and why it is that the status quo was maintained. Letters were written even to the customers of the Offshore Banks from the very beginning. Even Mrs. Curtis was allowed access to the conservators and officers of the organization to lay out her own case for the continued access of her clients to funds in their

accounts. Those issues were certainly given consideration and her clients, as well as other customers of the Offshore Banks were allowed access to their funds. Mrs. Curtis' evidence underscores, rather than undermines, the need for continued trading as the very customers she highlighted needed access to their accounts as well as the banking services in order to conduct their business affairs. Those were considerations made from the very onset or in the early days of the conservatorship.

[150] In his letter of 8th March, 2016, Mr. Braithwaite also pointed out to Mr. Tacon the reasons taken for allowing access to the accounts of the offshore customers. He indicated then that the *"decision was taken primarily with consideration of maintaining the business operations of the offshore banks' customers as going concerns."* I accept this as being a true motive behind the decision to continue trading and find that this particular interest was an important one to have considered. I also do not find this to be an interest which was in conflict with those of the Domestic Banks in general.

[151] It is also argued, by counsel for NCBA in particular, that the Domestic Banks were not "clearly insolvent" from the onset of the ECCB's intervention and it was "emphatically not a case where an insolvent liquidation was inevitable where the only course open to the conservators was to cease business and to try to wind down the Domestic Banks." In light of this, it was the ECCB's aim at the start of the conservatorship to manage the Domestic Banks as going concerns until shortly before they entered into receivership. The goal was to improve the financial position of the banks by reducing non-performing loans and increase liquidity. This would have benefited the Offshore Banks who held substantial funds in the intercompany accounts. It was submitted that the view held by the ECCB that the Domestic Banks were capable of continuing as going concerns was eventually underscored by the findings of the audited accounts issued by KPMG, who agreed that management's use of the going concern basis was appropriate in the circumstances.

[152] Insofar as the submissions are concerned, if the decision to continue trading and accept deposits from the offshore customers can be attributed to the conservators in any way, as opposed to the ECCB, I find that on balance that this decision was taken in honesty and in good faith and in the interest of the Offshore Banks. The evidence suggests that:

- (a) The Domestic Banks were not “clearly insolvent” from the onset of the conservatorship. The public notices issued by the ECCB at the time do indicate that “*the banks are likely to become or are unable to meet their obligations should the situation persist.*” That is not the same as suggesting that they were clearly insolvent. However, it does indicate that there was a likelihood of insolvency if steps were not taken to address the liquidity issues which persisted at the time. That would be enough to trigger a duty towards the interest of the depositors. But that was a duty the ECCB acknowledged in their Notice of Intervention. The facts also show that audited reports were commissioned, which were not available until December, 2014. That would have assisted in giving a clearer picture of the financial position of the banks, but was not available at the time.
- (b) A disorderly liquidation of both the Domestic and Offshore Banks would have had a catastrophic effect on the economy of the country in general and threaten the interest even of the depositors of the Offshore Banks. That was not a conflicting interest of either set of institutions. They shared a common interest in ensuring that a disorderly liquidation did not take place;
- (c) The customers of the Offshore Banks needed continued access to the banking facilities in order to carry on their businesses and other interests in Anguilla. It is not merely a question of access to withdrawals of funds in the accounts but access to banking services in general, given that these customers could not do business with any other local banks on the island;
- (d) Failure to facilitate this access, including deposits, would have potentially led to a disorderly winding up which would have threatened the more immediate interests not only of the Offshore Banks and their customers but of the entire economy;
- (e) Given the state of affairs at the time and the liquidity challenges, it is difficult to see the circumstances under which access to funds could have been assured without deposits also being accepted. It is unlikely that withdrawals could have been approved if there were no funds coming into the inter-company accounts.

- (f) I accept the evidence of the defendants where it is stated that it was difficult, if not impossible, at that point in time to separate the operations of the Offshore and Domestic Banks. At the very least I find that, on balance, this was an honestly held belief and the decision to continue the status quo in that regard was not done in bad faith. The evidence suggests that the Offshore Banks had no other correspondent banking relationships in order to do business. No local banks were capable, under the legislation, of accepting their monies and to do business with them. Whilst the co-mingling of the funds was criticized prior to intervention, the possibility of implementing a different policy at that point in time appears on the evidence to be a difficult if not impractical course to pursue.
- (g) Mr. Tacon in his own evidence acknowledged, that a ring-fencing of the funds, as was pleaded in this case, would have deepened the liquidity problems already being experienced. On balance it does not appear to me to have been a course of practice to pursue in light of the mandate to stabilize the banks rather than exacerbate the problems already being experienced. I therefore do not accept that the decision to continue trading was not justified.

[153] It is also important to give deeper consideration to the submission that the position of the Offshore Banks was materially worsened as a result of the decisions taken by the conservators. There is a genuine divergence between the parties as to how the court is to approach this issue. I will therefore address the submissions in some detail.

[154] On the one hand, it is argued on behalf of the Offshore Banks that the actions of the conservators resulted in a deficiency in the new monies deposited into the Domestic Banks after the onset of the ECCB's intervention. In fact it is a general theme in this claim that the conservators ought to have taken steps to protect the "net new monies" obtained from depositors of the Offshore Banks, as those banks were clearly insolvent at the time. In his evidence, particularly in cross-examination, Mr. Tacon expressed the view that deposits placed with the Domestic Banks prior to the ECCB's intervention, were "locked in" and therefore could not be subject to any preference in insolvency. However, he argued that, given that from the onset of the Conservatorship all 4 banks were either insolvent or likely to become insolvent, then basic insolvency principles ought to apply. As such, net new monies ought to have been protected so as to be available as a preference to those depositors upon receivership.

- [155] However, Mr. Tacon accepted that although he had had experience as an insolvency practitioner, that did not extend to the circumstances of an insolvent or potentially insolvent bank. In any event, there is the added issue of Mr. Tacon not being presented as an expert witness in this case. Although the court takes into account his years of experience in this issue and the fact that he is the Administrator of the Offshore Banks, consideration has to be given to the peculiar circumstances of this case which involves the potential collapse of financial institutions holding approximately 76% of the banking assets of the entire country.
- [156] Counsel for the Offshore Banks goes on to submit that it was plainly possible to put in place adequate protections for the funds which were up-streamed into the intercompany accounts. It was submitted that the defendants' assertion that this was not the case was undermined by the fact that Mr. Tacon did in fact put in place a ring-fencing mechanism after his appointment as administrator of the Offshore Banks. It was argued further that the ring-fencing mechanism was not the only method of securing those deposits. In a letter to the ECCB dated 27th March, 2016, Mr. Tacon recommended either (a) an on-demand indemnity from the ECCB, (b) the payment of the equivalent of the deposited funds in a trust account at a third party bank, or (c) payment of a sum of money into court. All three propositions were rejected by the ECCB. Counsel therefore argues that these safeguards were not impossible, but merely undesirable on account of the ECCB's objectives of keeping the Domestic Banks operating as a going concern at all costs pending a resolution.
- [157] Counsel for the Offshore Banks then go on to argue that a ring-fencing mechanism would not have resulted in any preference to a class of depositors, as the new monies deposited would have been subject to a "Kayford Trust." The ring-fencing would have ensured that the new deposits were not at the Domestic Banks' free disposal. It is therefore argued that what in fact occurred was that the conservators gave a preference to "old depositors" whose withdrawals from their accounts would have been funded by new monies which were deposited during that period.
- [158] Counsel for the defendants argue on the other hand, that the fixation on net new monies obscures the issue. What the court ought to consider, is that the evidence establishes the fact that the actions of the conservators substantially reduced the level of risk exposure of the Offshore Banks during the period of conservatorship. It was submitted that, the balance sheets presented show that at the onset of the ECCB's intervention, PBT had an opening balance of US\$27,960,000.00 with

NBA. By March, 2016, when Mr. Tacon had insisted on different arrangements, the balance stood at US\$19,130,000.00. There was therefore a reduction of US\$8,830,000.00. In the case of CCIB, the figures were not as easily calculable. Mr. Harrigan in his own evidence states that the actions of the conservators improved the aggregate collective position of the depositors of the Offshore Banks. It was his view that this proved that there was no policy of increasing the Offshore Banks' exposure. To the contrary, the actions served the purpose of maintaining the status quo whilst reducing the risk of destabilizing the banks. In my own assessment of the balance sheets presented it would appear that by the one year mark of the conservatorship the balance "due to PBT" as recorded in NBA's statements had reduced by in excess of 30%. It was noted in meetings of the OCIB that this decline was on account of *"withdrawal of funds by various customers."*

[159] In light of these submissions, it is also important to give consideration to some of the specific facts pleaded by the claimants. As it relates to PBT it was pleaded that during the course of the conservatorship a total of US\$174,959,675.75 of deposits was placed in the inter-company account with NBA. Of that amount, it is submitted that US\$9,100,000.00 remained at the end of the period. To my mind, whilst the in excess of US\$9,000,000.00 is significant, it also underscores the role played by the conservators in allowing access to those funds. If the claimant's approach to calculating the effect of those transactions is to be taken into account, it means that approximately 94.8% of the funds paid into those accounts were returned to the depositors of PBT during the period of conservatorship. By my calculations, the funds withdrawn by CCIB's depositors show a similar picture. I say so with the one caveat that I have my own doubts as to whether this is the proper approach to take in relation to the calculations; considering that even "old monies" were also withdrawn. However, given the specific submissions put before this court, I agree with counsel for the defendants that too narrow a view of the approach taken by the conservators and the ECCB obscures the nature of the challenges faced and the task which the conservators were to perform.

[160] When one considers the fact that the conservators were not as successful in reducing the portfolio of NPLs, it would mean that deposits may have formed the primary source of funds not only for withdrawals but for the general operations of the banks. I understand that the ECCB may have injected some liquidity into the process as well. However, in my view, to have kept even the Offshore Banks open, maintain the operating expenses and allow for such a significant amount of

withdrawals, appears to me to have been no easy task for the conservators to have performed in such difficult circumstances.

[161] Therefore, having considered the evidence and the submissions of counsel on this issue, I accept the submissions put forward by counsel for the defendants. The difficulty which the court expresses in accepting the submissions of the claimants, is that the arguments focus primarily on the deposits made to the Domestic Banks during the period of conservatorship, but fail to take into account the level of access which was provided to those very customers during the relevant period and the impact this could have had on liquidity issues already being experienced by the Domestic Banks. Reference in the claimants' submissions to a preference given to "old depositors" whose withdrawals from their accounts would have been funded by new monies which were deposited during that period is not an entirely accurate reflection of what transpired. There had already been a moratorium placed on accepting new customers prior to the intervention. There is no evidence to suggest that the conservators had breached that restriction which had been imposed by the AFSC. On balance therefore, the new deposits were made by existing customers who also sought withdrawals from their accounts at various times during the conservatorship.

[162] As I have stated earlier, I find on balance that it was important to ensure that the customers of the Offshore Banks continued to have access to the banking facilities available in order to carry out their own businesses. Mrs. Curtis' evidence establishes that even her clients had a concern about access to their accounts during that time. When one examines the accounts presented for DWS Group Limited, the debits to this account show that this was an operating account used to meet the basic obligations of this company. As I have indicated earlier, I doubt that the US\$1,180,000.00 recorded as an opening balance for the period commencing 31st August, 2013 was a reflection of new monies deposited into that account. Let us assume therefore for a moment that this was "old money" already deposited at the time of intervention. When, in October, this client was seeking to withdraw as much as US\$647,000.00 from that account, it would have had to have come from new monies of various customers deposited into the banks. This underscores the need for continued trading and undermines the argument that old and new deposits ought to have been treated any differently.

[163] Mr. Carr was careful to point out in his own evidence that the assurance which had been given to the customers of the Offshore Banks was that they would have access to the funds in order to maintain their businesses. That would have however depended on the liquidity available at the time of the request. The court therefore cannot simply isolate net deposits during the conservatorship in order to determine whether there was a breach of a fiduciary duty on the part of the conservators. It is important to view the interest of those depositors from a broader perspective in that they were customers of the Offshore Banks who needed to access the facilities available. If anything, the calculation of the net new monies as put forward by counsel for the claimant proves that the conservators had done a good job in balancing those interests in difficult circumstances.

[164] Therefore, if, as the claimants argue, the banks were already facing liquidity issues from the onset, then it seems unlikely that withdrawals from those accounts could have been facilitated without deposits also being accepted. Once the customers were allowed to make withdrawals, those withdrawals were likely to have been facilitated by deposits being made by customers of both the Offshore and Domestic Banks during the period of conservatorship. It seems to me therefore, that the defendants are right in arguing that in those circumstances one could not prejudice the interest of one class of depositors over another; especially given the fact that the funds available to facilitate those withdrawal requests were coming from depositors of both the Domestic and Offshore Banks. The basic insolvency principles highlighted by Mr. Tacon may very well not have resulted in a workable solution to the issues which were being faced at the time without some modification; at least not insofar as it relates to the powers specifically conferred on the conservators and the need to keep the banking sector open and functioning whilst a resolution plan was being negotiated elsewhere.

[165] It is clear that a disorderly winding up would have had catastrophic consequences and a failure to provide access to old monies would have been equally challenging for all depositors, including those of the Offshore Banks. The impression given in the submissions is that the deposits of the Offshore Banks were primarily used to provide liquidity for depositors of the Domestic Banks. To some extent that may be the case, as the evidence shows at one point there was a tightening of the liquidity in CCB in particular and the conservator had brought this to the attention of the OCIB. However, the co-mingling of the funds meant that the opposite is also true. Whatever funds were available in the inter-company accounts were made available to facilitate the operations of both

Domestic and Offshore Banks as had been done in the past. When one considers that withdrawals from PBT amounted to approximately 94.8% of the funds deposited into NBA, it is difficult then to accept that the actions of the conservators can be viewed in the light portrayed by the claimants; especially given the liquidity challenges which already existed at the time.

[166] The court must therefore consider the fact that the withdrawals which were made during the period included withdrawals of “old money”, as well as “new money.” I also find on balance that the restrictions already placed on the Offshore Banks prior to the intervention meant that there were no new depositors. Therefore, the fact that there was a reduction in the amount of money owed to the Offshore Banks by the time of Mr. Tacon’s own actions meant that the conservators’ actions had resulted in a reduction of the risk of exposure and did not put the Offshore Banks in a worse position than they were at the start of the conservatorship. If anything, the objective of maintaining the status quo while not increasing the risk to depositors was met. As to what was eventually worked out in the resolution plan, that was outside of the scope of the authority of the conservators acting in that capacity.

[167] In addition to this, as I have noted earlier, it would be wrong to view the interest of the depositors of the Offshore Banks as being limited to the interests of a creditor in the usual way. The issue here for consideration is not merely whether those funds were returned to the customers at the end of the period. Their interests were broader and included the need for access to banking facilities in general. They were more than mere creditors but also customers of the institutions with the specific need to ensure that their various businesses did not suffer from a collapse of the Offshore or Onshore institutions from the very start of the conservatorship. They were allowed to both deposit funds and access those funds during the period of conservatorship and the access other facilities which were made available to them. A return of those funds is no doubt important, but that falls outside of the remit of the conservators.

[168] In my view therefore, not only am I satisfied that the conservators acted with an honest belief but the objective test is also not met here. I am not of the view that the evidence presented in this case substantiates the notion that an intelligent and honest person in the position of the conservators could not, in the circumstances, have reasonably believed that their actions were for the benefit of the Offshore Banks. The issue here is not for the court to look back in hindsight and determine that

matters may have been dealt with differently. In my view, having been appointed as conservators of the Domestic Banks there was an objective on the part of the conservators to ensure that there was no further deterioration of the banking system whilst a resolution plan was being worked on. In those circumstances, and for reasons I have already explained, I do not find that an intelligent and honest person in that position would have determined that the continuation of trade was unjustified. Further to that, whilst there may have been concerns raised about the co-mingling of the funds of the Offshore and Domestic Banks, the unraveling of this status quo at the point of intervention may very well have resulted in negative consequences. The maintenance of the status quo is therefore not an action I am prepared to find as having breached the objective standard established by the law.

[169] In addition to this, I do not accept that an honest person in the position of the conservators would have ring-fenced those funds at the point of intervention. Counsel for the claimants submits that Mr. Tacon was able to do this after his appointment. However, at that point the circumstances were quite different. The resolution plan was either complete or very near completion. This would have meant that the conservatorship itself was about to come to an end. The impact of the ring-fencing at that point on the liquidity and other issues facing the banks was not the same as it would have been at the start of the conservatorship. On balance, I find that the consequences at that point in time would have been rather different and the conservators' actions were not an offence to the objective test which the court is called upon to apply.

Proper Purpose

[170] Counsel for the Offshore Banks have argued that the power granted to the conservators was to deal with the assets of the Offshore Banks in the course of trading. The purpose of that power was to advance the commercial interests of the Offshore Banks. Those interests extended to the interest of the creditors given the state of insolvency in which the banks had already found themselves. It is submitted therefore that the substantial purpose for which the power was actually exercised by the conservators was to assist the Domestic Banks. That, it is submitted, was improper and subordinated the interests of the Offshore Banks to those of the Domestic Banks. For that proposition counsel refers to paragraph 59.6 of the witness statement of Mr. Kennedy Byron.

[171] Having examined the paragraph in question and the facts of the case in general, I do not accept this submission. The paragraph itself states as follows:

“Having decided that it was in the best interest of the Offshore Banks for them to continue to carry on banking business while a resolution plan was being formulated, and given the intertwined nature of the operations of both sets of banks and the co-mingling of funds in the inter-company accounts with those of the Onshore Banks, the ECCB and the Conservators decided that the most viable option was to maintain the status quo which existed between the banks prior to the intervention because:

- (a) it was impractical to get an alternate third party bank to accept the Offshore Banks as depositors or creditors as a result of their failing financial position;*
- (b) The ECCB and the conservators honestly believed that paying the funds into the Onshore Banks, together with the other measures which were being taken by the ECCB as part of the intervention, would have solved the liquidity issues of the Domestic Banks and prevent them from actually becoming insolvent; and*
- (c) had those measures had the intended effect, that, in turn, would have redounded to the benefit of the Offshore Banks because if the Onshore Banks became insolvent that would have resulted in the Offshore Banks themselves also becoming insolvent.*

[172] I find as a matter of fact, that the conservators, as well as the ECCB, had given consideration to the separate interests of the Offshore Banks from the start of the conservatorship and had applied their powers for a proper purpose. For reasons which I have already explained throughout this judgment, it was necessary to continue to provide services to their customers and access to their accounts. Given that there already existed funds which the Domestic Banks had undertaken to provide access to in order for the customers to carry on their business, the viability and liquidity of the Domestic Banks was an important factor in fulfilling this purpose. I must repeat that even Mrs. Curtis' own evidence establishes that her customers were generally capable of gaining access to their accounts. By prioritizing the liquidity of the Domestic Banks, the conservators were able to fulfill that assurance and ensure that the interests of the offshore depositors in accessing their

accounts were maintained throughout the period of the conservatorship. I therefore do not find that the conservators had relegated the interests of the Offshore Banks. To have allowed a potential collapse of either set of institutions would not have redounded to the benefit of the Offshore Banks or the customers.

- [173] As I have indicated before, the evidence suggests that on balance it was difficult if not impossible to deposit the funds from the Offshore Banks into a third party bank. Even Mr. Tacon had difficulty in accomplishing this after he was appointed. The evidence also suggests that ring-fencing would have affected liquidity and posed an operational challenge. Insofar as that is the case, I do not accept the submissions of counsel for the claimants when it is argued that the conservators had used their powers for an improper purpose.

Conflict of Interest

- [174] It is submitted that there was plainly a real sensible possibility of a conflict of interest between the affairs of the Domestic and Offshore Banks. The tensions were exacerbated by the insolvency context in circumstances where the interest of the distinct creditor constituencies became paramount. In light of this, it is again argued that the conservators subordinated their duties to the Offshore Banks in favour of those of the Domestic Banks. It is argued that all of the actions of the conservators were geared towards the stabilization of the Domestic Banks irrespective of the effect on the Offshore Banks. This position was exacerbated by the plan to place the Domestic Banks into receivership and exclude the Offshore Banks from the resolution plan. In closing submissions in reply, Mr. Scippio stressed that the conservators put themselves in a hopelessly conflicting position and ought to have recommended that separate directors be appointed to the Offshore Banks to secure their interests. I do not agree with those submissions.

- [175] I do appreciate that there were certain key distinctions between the operations of the two institutions. For one, the fact that the deposits of the customers of the Offshore Banks were not recorded as deposits from the onset of the formation of those banks is one issue. That was a factor taken into account in the implementation of the resolution plan. However, there is nothing to suggest that the conservators would have been aware from the onset that this fact would have had

such an impact on the provisions made or the lack thereof on the plan. Mr. Braithwaite's letter of 8th March, 2016 clearly indicates that there was a certain policy in relation to the return of those funds. Whatever legal implications which arises from that assurance is a matter for the ECCB. The conservators' role was to ensure that there was access to those funds during the period of conservatorship. That role was fulfilled to the point where even Mrs. Curtis acknowledged that a majority of her customers were able to access those funds.

[176] However, there was also the distinction of there being no other institution within the country to which the offshore customers could take their business. Local persons and businesses making use of the banking facilities of the Domestic Banks certainly had an option of depositing their funds in other banks on the island. The Offshore Banks and their customers did not have this option. I also note how intertwined the operations of those institutions had been from the onset. In light of this, the conservators' actions of prioritizing the stabilization of the financial position of the Domestic Banks were not done irrespective of the effects on the Offshore Banks as submitted by counsel for the claimants. If anything, in doing so the conservators were able to provide access to the accounts of the offshore customers for the entirety of the period of the conservatorship and certainly in the case of PBT the risk of exposure was reduced. This is not a fact which gives rise to a conflict of the various interests of the Offshore and Domestic Banks. If anything, they shared a common interest in the continuation of trade.

[177] It is worth repeating that the interest which the conservators appeared to be concerned with protecting was the access of the offshore customers to banking facilities to ensure that they could carry on their businesses. That was a significant and legitimate purpose for which their powers were exercised. In light of this I do not agree with the submission that the tensions were exacerbated by the insolvency context in circumstances where the interest of the distinct creditor constituencies became paramount. If anything those circumstances could have put the offshore depositors, who needed access to banking facilities, at a significant disadvantage if steps were not taken from the outset to allow them to continue to access those banking facilities. Nothing in the evidence satisfies me that this was not the proper course of action to pursue. I am also not satisfied that the appointment of separate directors could have resulted in any other course of action being taken. What appears to be the issue is that no provision was made for the return of those deposits in the resolution plan. In light of the content of Mr. Braithwaite's letter outlining the policy of the

ECCB on that issue, I am not of the view that liability can be attached to the conservators for the alleged failure to fulfill that policy within the context of the resolution plan. There was therefore no breach of fiduciary duty on the part of the conservators on account of there being any conflict of interest.

Adverse Inferences and lack of disclosure

[178] Before concluding I make just one final point. This is in relation to submissions put forward by counsel for the claimants in relation to the fulfillment of the disclosure obligations of the defendants. In particular, concern was raised about the fact that no emails or limited correspondence regarding the deliberations of the conservators and the ECCB were disclosed. An application had previously been made for specific disclosure, which also sought disclosure of drafts of the PAA which was supposedly in circulation among some of the defendants at some point in time. I will not repeat the issues raised in that application for the sake of brevity. However, having taken into account the submission of counsel for the claimants on this point, and the plethora of documents disclosed, I am satisfied with the court's capacity to draw conclusions on the issues raised in this matter.

Conclusions

[179] In closing, it is important to return to the specifics of what has in fact been pleaded in this case. Although the Domestic Banks are named as parties to this claim, no specific allegation has been made against them. In any event, these are banks in receivership and there is no doubt that the Offshore Banks have a claim in the receivership for whatever funds and assets which were left with the Domestic Banks. Whether there is a preference which ought to be attached to net new monies paid during the conservatorship is a matter which can adequately be dealt with in that process.

[180] With regard to the ECCB and NCBA it must also be noted that there is no express allegation of a breach of duty pleaded. These defendants are said to be in knowing receipt of funds and/or assets which are subject to a trust on account of the alleged breach of fiduciary duty of the conservators.

In light of this, I make two points. Firstly, as against NCBA, on balance there is no evidence to suggest that this institution is in receipt of funds or assets which are liable to be traced. I find as a matter of fact that the net new monies of the Offshore Banks have remained in the receivership and none were transferred or bought over by NCBA. I also find that, as against the ECCB, the facts do not prove that there were assets or funds of the Offshore Banks which were transferred to the ECCB. The funds paid over to the Bank of America account from the MSSB investments were not subject to a trust and, furthermore, there were sufficient funds in the Bank of America account to facilitate the payment of the 6% reserve to the ECCB without the use of the MSSB funds. In addition to that, having found that there was no breach of fiduciary duty on the part of the conservators, the court can find no basis for a tracing order as against the ECCB and NCBA based on what has been pleaded in this case.

[181] The substance of this claim is that the conservators owed a fiduciary duty towards the Offshore Banks as directors, to act in the interest of the Banks and their customers, to use their powers for a proper purpose and to ensure that there was no conflict of interest. Having examined the facts and the submissions I find that:

(a) the evidence does not establish that the Conservators were *de jure* or *de facto* directors of the Offshore Banks. However, given that there was an admission of the fiduciary duty in the pleadings, and even if they were *de jure* or *de facto* directors, the conservators had not breached this duty because:

- (1) They acted at all times in good faith and honestly believed that their actions were for the benefit of the depositors of the Offshore Banks;
- (2) They did exercise the care, skill and diligence which a reasonably competent director would have exercised in the circumstances which existed at the time;
- (3) They used the powers available to them for a proper and legitimate purpose; and
- (4) None of their actions can be said to have compromised the interest of the Offshore Banks on account of any conflict of interest which existed.

[182] Having made such findings, I therefore order that the case be dismissed with costs against the claimants. However, I will reserve final determination on the precise nature of the costs award pending further submissions by counsel on behalf of the parties. The submissions are to be filed within 21 days from the date of this judgment.

Ermin Moise
High Court Judge

By the Court

Registrar