

**EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2020/0424

BETWEEN:

[1] JOSE RAFAEL PADRON SALAZAR

Claimant/Applicant

-AND-

[1] BOI BANK CORPORATION

Defendant/Respondent

Appearances:

Dr. David Dorsett for the Applicant

Mr. Craig Jacas and Ms. Talia Da Costa for the Respondent

2023: October 19th

October 23rd

RULING

- [1] **DRYSDALE, J.:** This is an application by the judgment creditor to appoint a receiver of the judgment debtor for the purposes of obtaining payments of the judgment debt from the income or capital assets of the judgment debtor. This ruling will closely resemble the ruling in the case of Sodecorp SA v BOI BANK CORPORATION claim number ANUHCV2020/0145 as an identical application was made with similar facts issues and submissions.
- [2] The judgment debtor stands in credit to the judgment creditor in the amount of US\$812,236.61. As a background, the judgment debtor is an off-shore international bank registered under the International Business Corporation Act (hereinafter IBC Act) under the laws of Antigua and Barbuda. Its office is located in St. John's Antigua. The judgment creditor is a former client of the judgment debtor who held several accounts with the bank.

- [3] The judgment creditor engaged the bank with the intention of closing all his accounts. The bank held on credit US\$1,082,980.61.00 for the applicant, and the parties entered into an agreement that the bank would pay the applicant all his money in eight (8) instalments ending in 2019. By virtue of the said agreement, two instalment payments were made which reduced the amount on account to the balance stated in paragraph 2 above. A summary judgment was entered in favour of the applicant as it was never disputed that the bank held money on account for the creditor.
- [4] The bank has failed to honour its judgment debt and among other methods employed by the judgment creditor for recovery of judgment debt, the applicant applied to this court for the following:
- (i) Cleveland Seaforth to be appointed as Receiver of the judgment debtor for the purposes of obtaining payment of the judgment debt.
 - (ii) The requirement for the Receiver to provide security be dispensed with.
 - (iii) That the Receiver has the powers provided by section 24 of the Eastern Caribbean Supreme Court Act.
 - (iv) That the receiver files accounts within 45 days of his appointment and every 90 days subsequently.
 - (v) Costs
- [5] Counsel for the applicant emphatically argued that the probable cost of appointing and remunerating the receiver is modest compared to the quantum of the judgment. The intended Receiver is qualified and competent to undertake the appointment of Receiver and has consented so to do.
- [6] The Respondent has strongly contested this application, mainly on the singular basis that the court will be acting in futility in granting the order sought by the applicant, as the appointment of a receiver is of no practical effect. The bank avers that its relationship with the relevant correspondent banks has either terminated or been limited in that the relevant correspondent bank has ceased to perform transactions in USD; a part of the agreement was the understanding that the transfer of monies to the applicant's beneficiary account was through a correspondent bank.
- [7] The evidence as presented before the court from the judgment debtor is that its only remaining correspondent bank 'Euro Exchange International Bank', refuses to execute transactions on behalf of clients with Venezuelan addresses. This is owing to the Global Financial Sector sanctions placed by the United States of America on Venezuela. The respondent also states that

owing to the sanctions, it is also precluded from conducting transactions to the benefit of a customer with a Venezuelan address.

[8] In response to these averments, counsel for the applicant states that they are aware of the respondent bank complying with a court order that required it to pay money into Antigua. Counsel is of the considered opinion that if there has been compliance with the previous order of the court, then there is nothing precluding the respondent bank from paying money into Antigua to satisfy its judgment debt. Counsel argues that he who asserts must prove and the respondent has failed to prove that the appointment of a receiver will not be effective and there is also no evidence that the bank is a sanctioned entity or is on any sanctions list. Further, counsel argues that “there is no doubt that the Bank has assets. The Bank has not advanced any proof that a receiver will not be able to marshal the Bank’s assets and so that the judgment debt will be paid”.

[9] Counsel also argues that the court must accept as absurd and in total contradiction of reality any argument from the Bank that no Venezuelan-based entities are able to transact business and move money internationally.

[10] The parties were also heard on oral submissions. Whilst the parties largely reiterated their various positions expressed in their filed speaking notes, counsel for the applicant attacked the veracity of the respondent’s suggestion about not having corresponding banking relations and being on the sanctioned list. Counsel pointed out that the documentation relied on by the Respondent was of some vintage being several years old and may not reflect the updated position. Counsel also argued that the respondent’s recent admission that it had recently filed new proceedings against the Financial Services and Regulatory Commission (FSRC) was indicative of it being seized with assets or resources.

[11] Counsel for the respondent argued that the appointment of a receiver is a significant and serious action effectively treating the company as if it were defunct. He argues that the court should exercise caution and not take this decision lightly recognising the profound implications it has. Counsel again reiterated that the appointment of a receiver is not a mere inconvenience but a serious matter. Counsel contends that appointing a receiver solely for the purpose of obtaining information is inappropriate. Instead, counsel argued that a receiver should only be appointed if the Court is convinced that the receiver can effectively collect assets to settle the debt. Counsel again highlighted the absence of a corresponding banking relationship and challenged whether in the face of this an appointment would be effective.

[12] Counsel for the respondent also informed the Court that the FSRC’s recent decision not to renew the licence of the bank has created an insolvency situation. The respondent relied on the

authority of **Parker v Camden London Borough Council**¹ and posits that this being the case that the IBC Act provides that the Regulator being the FSRC is the appropriate authority to initiate proceedings for the appointment of a receiver. The respondent further contends that this application is premature and not properly grounded as the applicant has not identified assets which a receiver may move against to satisfy the judgment debt. It suggests that the receiver will be undergoing a fishing exercise which is not the purpose of effecting such a draconian measure.

- [13] In response Counsel for the applicant clarified that he is not seeking the appointment of a receiver/manager but a receiver. He countered that there is no obligation on the FSRC to enforce debts relating to international banks or appoint receivers for enforcement of judgment debts and thus concluded that the utilization of the authority of **Parker v Camden London Borough Council**² is not relevant as it does not fit the reality. Counsel also referenced the case of *Coventry Capital Inc v Antigua Overseas Bank Ltd (In Receivership)*³ which also concerned an offshore bank in which a receiver was appointed by a private person.

THE ISSUE

- [14] The issue to be determined is whether it is just and convenient to appoint a Receiver in the totality of the circumstances.

LAW AND ANALYSIS

- [15] I adopt the helpful submission of counsel for the applicant on the law in relation to the appointment of a receiver. The court is empowered to appoint a receiver under **section 24** of the **Eastern Caribbean Supreme Court Act**. The provision reads as follows:

24. (1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just.

- [16] The Civil Procedure Rules (“CPR”) also instruct on instances where it is appropriate to appoint a receiver. In particular rule 45.2(e) and rule 45.3(1) (c). So far as is relevant to these proceedings,

¹ [1985] 3 W.L.R. 47

² [1985] 3 W.L.R. 47

³ Belize Civil Appeal No 4 of 2015

rule 45.2(e) reads '[a] judgment or order for payment of a sum of money other than an order for payment of money into court may be enforced by – ... (e) the appointment of a receiver under Part 51.'

[17] Rule 45.3(1)(c) reads:

“An order for the payment of money into court may be enforced by –
... (c) the appointment of a receiver under Part 51.”

(vi) In deciding whether to appoint a receiver to recover a judgment debt, the court must have regard to matters as specified in rule 51.3, which are as follows:

- (a) amount likely to be obtained by the receiver;
- (b) amount of the judgment debt; and
- (c) the probable cost of appointing and remunerating the receiver.

[18] It is trite law that the jurisdiction of the court to appoint a receiver should not be lightly exercised owing to its intrusive features and expense. In addition to the matters as set out above in the CPR, the legislation also instructs that the court must also be concerned with whether it is just and convenient to appoint a receiver.

[19] Though a judgment creditor can opt to employ more than one method in an aid of enforcement, or even as counsel for the applicant infers, opt to solely utilize the appointment of a receiver, notwithstanding, given the intrusive nature of the appointment, the court must have regard to the other methods employed by the applicant and the state of those proceedings. In the authority of **Richard Vento and others v Keithley Lake et al**⁴ Ramdhani J (Ag.) in quoting from the Halsbury Laws of England vol.88 stated the following in paragraph [38] of his judgment:

“A court must be concerned what steps would have been taken by the judgment creditor to enforce the judgment debt by other means but such an order may still be made at the instance of a judgment creditor notwithstanding that he has not taken advantage of the legal remedies open to him, provided the circumstances render it just and convenient.”

⁴ AXAHCv2013/0102

[20] Further, in paragraph 86 - 87 the court states:

'The appointment of a receiver has at its core the recovery of the judgment debt from the income or capital assets of the judgment debtor. It is not a jurisdiction which should be lightly exercised. The court should expect that other methods of enforcement have been resorted to and have either failed to satisfy this debt. A court must be concerned about the state of other enforcement proceedings and whether it is but a matter of some more time before the judgment debt is to be satisfied; in other words, a receiver in these cases ought not to be appointed simply to satisfy a judgment creditor who is simply anxious to have his money soonest in a case when a bit more time will see the settlement of the debt. A court is also to be concerned that the appointment of the receiver is financially practical in that the fees and the costs of the receiver does not weigh heavily on the assets of the debtor. The court must always be concerned that the order is proportionate.

[87] The court must also be concerned that the appointment will have practical utility, likely.'

[21] The considerations are addressed in turn, and the matter of remuneration and appointment of a receiver will be dealt with conjointly as to whether it is just and convenient to appoint a receiver in the circumstances of this case.

THE AMOUNT OF THE JUDGMENT DEBT

[22] It has been adjudged that the respondent owes the applicant the sum of US\$812,236.00. This amount is a substantial sum which underscores the gravity of the financial matter before the court. This is not to be viewed lightly, as it represents a significant financial obligation on the part of the judgment debtor, especially considering interest and costs in these proceedings. Such a considerable debt warrants a commensurate response to achieve a just resolution of this case. It is therefore apparent that the court must approach this matter with the utmost diligence. Therefore, careful consideration must be had in evaluating the necessity and appropriateness of appointing a receiver.

THE AMOUNT LIKELY TO BE OBTAINED

[23] This is but a short point. As stated previously, the money owed by the respondent is substantial in amount. Notwithstanding, there is no evidence from the respondent that the monies are not present on account in credit for the applicant. Additionally, as stated by counsel for the applicant, there is no doubt that the bank owns assets to which a receiver may be able to marshall in order to satisfy the full amount of the judgment debt. I am further convinced of this position having regard to counsel's admission that the respondent is a going concern. Naturally from the nature of the business it would require substantial assets to support its operations. Thus, I am satisfied that the full amount will likely be obtained.

THE PROBABLE COST OF APPOINTING AND REMUNERATING THE RECEIVER AND WHETHER IT IS JUST AND CONVENIENT IN THE CIRCUMSTANCES.

[24] A court must be concerned with whether the appointment of a receiver is financially practical. In other words, the appointment of the receiver must have practical utility "likely leading to the enforcement of the judgment debt so that the judgment creditor may enjoy the fruits of the judgment". In looking at the financial practicality, the receiver's fees are considered. In relation to the remuneration of the receiver, on the application this court is satisfied that the receiver is well versed in his field of qualification and has consented to act. The receiver's fee was tendered into evidence on the side of the applicant. The hourly fees were given as follows:

Partner – Receiver	USD 350
Senior Management	USD 200
Senior Staff	USD 140

[25] The respondent has not contested the stated amount. In fact, the only dispute is in regard to the practicality of the appointment. It may well be because if an appointment is made there are clear directions for reporting and a process for determining whether the appointment should continue. In any event, the posture of the respondent suggests that the quoted sums are reasonable and that there is no fear of them becoming exorbitant which would make receivership prohibitive. Given the acceptance of the respondent, this aspect of whether it is just and convenient to appoint a receiver is a non-issue.

[26] As indicated above the respondent has centered its arguments on the practical effect of appointing a receiver. The respondent argues that various international sanctions of the global financial sector have therefore discriminated against Venezuelan interests based on the perceived risk associated with conducting business with residents or citizens of Venezuela. Many

institutions in the global financial sector have therefore discontinued the provision of services to Venezuelan interests citing the increasing complexity of complying with U.S. sanctions. The respondent exhibited correspondence to this court with communications had with JNFX/ING, Novo Banco S.A. and its final correspondent bank, Euro Exchange International Bank. This court is satisfied that there has in fact been a termination of the relationship with JNFX/ING, Novo Banco and the bank and a limitation on transactions with its correspondent bank.

[27] Dr Dorset argues for the applicant that the court must accept as absurd and in total contradiction of reality any argument from the bank that no Venezuelan-based entities are able to transfer business and move money internationally. The Bank, for reasons peculiar to itself, simply chooses not to satisfy the judgment debt. It is entirely just and convenient that a receiver be appointed to take control of the Bank so that the undisputed judgment debts may be satisfied.

[28] Counsel for the applicant also states that the money owed to the applicant can be paid to his attorney on his behalf here in Antigua and Barbuda as this is the normal procedure of things. Counsel for the applicant also highlighted the order of Robertson J in a separate matter was to the effect that the respondent place the sum of US\$2,522,833.18 into a separate interest-bearing account until further order. Further, such account shall be immediately accessible upon an order of direction of the court. It is the counsel's argument that complying with this order is evidence that the bank can transfer money into Antigua and Barbuda. Counsel for the respondent countered that the effect of that order could not be interpreted as allowing the bank to transfer monies to internationally as the Judge found that '[t]he peculiar circumstance in these proceedings is that the bank is unable to transmit the funds so that the funds can be paid into Court. If the Court were to make an Order requiring the funds to be paid into Court the First Respondent is likely to be faced with an Order for which there cannot be compliance.' I agree with counsel for the respondent that the interpretation given by the applicant to the effect of that order is incorrect. To my mind however what is of importance is the admission of the respondent contained at paragraph 4 of the affidavit of Louise Edwards that it has complied with that order. Certainly, this admission is crucial as it indicates the respondent's willingness and ability to fulfil its obligations as required by the order. This demonstrates that the respondent was able to carry out the necessary financial transactions and thereby refutes the assertion that the respondent is unable or prohibited from acting due to a lack of corresponding banking relations.

[29] Although counsel for the respondent has strenuously argued that the lack of corresponding banking relationships due to the sanctions imposed has rendered the appointment of a receiver futile, I am of a different opinion. The presence of the sanction adds a layer of complexity to

financial transactions which makes it complicated but not impossible. To comply with these sanctions a receiver will need to navigate a series of legal and regulatory requirements. This may include obtaining special licenses or approvals, conducting thorough due diligence on the transaction, and ensuring that the payment process is in full compliance with the law. The receiver, as a neutral third party appointed by the court, must operate within the boundaries of the law, including compliance with U.S. sanctions. This means he must ensure that any actions taken, including the handling of funds, do not violate the sanctions regime. This requires the receiver and all parties involved to seek guidance from legal professionals with expertise in international sanctions and financial regulations to ensure that any actions taken are in full compliance with the law. Ultimately, while the presence of U.S. sanctions may complicate the situation, it does not necessarily render the appointment of a receiver futile. In any event the respondent has already demonstrated by its compliance with the order of Robertson J that the presence of the sanctions is not prohibitive in the transfer of monies to another account in Venezuela.

[30] A further prong in the argument against appointing a receiver is that it is premature, as the applicant has not identified that the respondent has any appreciable assets that a receiver may move against. I note that the respondent has not denied having assets but has simply chosen to express its difficulty with the transference of those assets on account of the sanctions and lack of corresponding banking relations. Whilst it is important that an applicant conduct due diligence to verify that the respondent possess assets which can become the subject of a receivership, in the context of a banking business, it is reasonable to assume that the respondent possesses money as it deals with financial assets. Therefore, the failure of the applicant to specifically identify available assets at this juncture is not fatal to the application.

[31] The respondent also submits that in any event the applicant is not the appropriate party to be appointed as receiver. It relied heavily on the decision of the FSRC to not renew its license thereby creating a possible insolvency situation. It posits that the legislation provides that the FSRC is the appropriate body to appoint a receiver and suggests that this application by the applicant is ill founded. Counsel for the respondent also relied on the authority of **Parker v Camden London Borough Council**⁵ which held that a receiver/manager will not be appointed to perform a duty which statute has imposed on a public authority. For context the Parker case concerns an application for a receiver/manager by tenants of housing estates. The housing authority was vested with the authority to manage these estates. A disagreement with some 75

⁵ [1985] 3 W.L.R.47

boilermen in terms of a proposed new system of work resulted in industrial action being taken by the boilermen. In the meantime, the boilers stopped functioning, and this adversely affected the tenants, many of whom were aged, sick and confined indoors and had no access to heat and water. The tenants applied to the court for a receiver/manager to be appointed to execute the repair to the boilers. The court, although expressing its sympathy to the tenants, nonetheless decided to refuse the application for the appointment of a receiver/manager. The court in refusing the application found that Parliament had entrusted the duty of maintaining the houses owned to the local authority under section 111 of the housing act and it would be improper for the court to usurp that duty by appointing a manager who would in effect be an agent of the court. This was felt to be a matter of jurisdiction. In these circumstances, the application was dismissed.

[32] The above case concerns the appointment of a receiver/manager as opposed to this case, which concerns the appointment of a receiver. The distinction between the two is important as they serve different roles. A receiver is appointed by the court to safeguard and preserve assets for the benefit of a creditor whilst a receiver/manager has the additional responsibility of actively managing the business to generate income for the benefit of the creditor. The considerations for the appointment of a receiver/manager as opposed to a receiver are somewhat varied. More importantly, and in any event, the International Banking Act does not preclude a private individual from commencing a claim for the appointment of a receivership.

[33] For context the International Banking Act provides that the FSRC referred to as the Commission may appoint a receiver for a licensed financial institution where the Commission is of the view that the institution:

- (a) is insolvent;
- (b) is not viable;
- (c) its capital is impaired or its condition is otherwise unsound;
- (d) it has experienced substantial dissipation of assets or earnings due to any of the grounds for action by the Commission under subsection 1 of section 59 of this Act;
- (e) it or its directors, officers, employees, or significant shareholders wilfully, violate or fail to comply with an order or direction of the Commission under sections 61;
- (f) its business is being conducted in an unlawful or imprudent manner;
- (g) the continuation of its activities is detrimental to the interests of its depositors;
- (h) it conceals or refuses to submit any of its records or its operations for examination as provided for 58 in this Act, or has otherwise obstructed such examination;
- (i) its licence has been revoked;

(j) official administration is terminated pursuant to paragraph (b) of subsection (2) of section 127; or

(k) it is carrying on banking business without a licence.

[34] Whilst admittedly the IBC Act does vest in the FSRC the powers to appoint a receiver, it does not necessarily prohibit any other person from attempting to do the same in circumstances which are not covered by section 137 above. Indeed, it would wax strange if the FSRC which is a regulatory body whose purpose is designed to oversee and enforce regulations of such entities would be tasked with the responsibly of enforcement of private debts. Whilst the FSRC has certain enforcement powers it is designed to prevent violations of the act and maintain industry standards. Thus, the power vested in the FSRC to appoint a receiver is not exclusionary where the circumstances do not fall within the ambit of its powers. The applicant therefore properly commenced this application pursuant to CPR 51.

[35] It is important to consider the actions taken by the applicant before proceeding with this application. The applicant has initiated proceedings for attachment of earnings. Even though this has not been determined yet, the information provided to the court suggests that the respondent, likely doesn't have local accounts for the applicant to target, which is not surprising given that the respondent is unlikely to require the services of another local bank. Further, it appears that other enforcement methods like judgment, summons or charging orders may not be viable options because the respondent's principles are not within the jurisdiction and there is no known stock or personal property within the jurisdiction that can be subject to a charging order.

[36] It is also concerning that the applicant has held a judgement for over a year with no opportunity to enforce it. The respondent's failure to pay the judgment or proposed a method to satisfy it is not an acceptable approach and it is not permissible for the respondent to claim that there is no way to satisfy the judgment debt without taking any action. Given the circumstances, I find that this application is not the product of an anxious creditor who has neglected to pursue any other enforcement procedures but of a frustrated creditor with no other viable solution.

[37] In light of all the circumstances the appointment of a receiver appears to be the only just and convenient solution.

Order

[38] It is hereby ordered as follows:

- (i) Cleveland Seaforth is appointed as Receiver of the respondent for the purposes of obtaining payment of the judgment debt.

- (ii) The requirement for the Receiver to provide security is dispensed with.
- (iii) That the Receiver has the powers provided by section 24 of the Eastern Caribbean Supreme Court Act.
- (iv) That the receiver shall file accounts with the court within 45 days of his appointment and every 90 days thereafter until the end of his appointment.
- (v) The receiver's appointment is for a period of 9 months and may be extended upon further application to the court.
- (vi) The respondent shall pay the applicant costs of this application in the sum of \$1,500.00.

Jan Drysdale
High Court Judge

By The Court

Registrar