

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA
(CIVIL)
A.D. 2021**

CLAIM NO. AXAHCV 2021/0015

BETWEEN:

PAMELA RILEY

Applicant

and

**NATIONAL BANK OF ANGUILLA
(IN RECEIVERSHIP)**

Respondent

Appearances:

Ms. Merlanih Lim of Counsel for the Applicant

Ms. Jacinth Jeffers of Counsel for the Respondent

2021: May 20;
July 6.

ORAL RULING

- [1] **INNOCENT, J.:** This is an application by Ms. Pamela Riley ('the Applicant') seeking leave of the Court to lift the statutory stay imposed by section 143(c) of the Banking Act, 2015 (the 'Banking Act') thereby permitting the Applicant to proceed with her claim for wrongful dismissal against the National Bank of Anguilla (the 'Bank') now in receivership presently being heard before the Labour Tribunal.
- [2] The proceedings came before the Labour Tribunal on or about the year 2014. The Bank went into receivership on 22nd April 2016. The relief claimed by the Applicant before the Labour Tribunal is derived from the provisions of the Fair Labour Standard Act and the Labour Relations Act, 2018.

- [3] The Bank objected to the proceedings before the Labour Tribunal on the basis that the provisions of section 143(c) of the Banking Act was a bar to the proceedings before the Labour Tribunal and that the proceedings could not have properly been brought without leave having first been obtained from the Court.
- [4] Ultimately, the Labour Tribunal decided that the Applicant was required to seek leave of the High Court in order to continue her claim against the Bank pursuant to section 143(c) of the Banking Act.
- [5] The issues that arise are, whether the statutory stay provided for by section 143(c) of the Banking Act ought to be lifted and what are the matters that the Court should take into account in deciding to exercise its discretion in relation to whether or not to lift the stay.
- [6] The grounds relied on by the Applicant in support of the application to lift the statutory stay, were that the substantive claim before the Labour Tribunal was in relation to an employment dispute in which the available remedies are pecuniary in nature and cannot be dealt with in the process of winding up; the lifting of the stay would not adversely impact the financial stability of the Bank or the discharge of the receiver's functions in the process of winding up.
- [7] In opposition to the Applicant's application, the Bank contended that the Applicant's claim is not a proprietary claim and that the lifting of the statutory claim would have a debilitating effect on the winding up process and would prevent the receiver from discharging his functions. These matters, the Bank contended, are countervailing factors militating against the lifting of the statutory stay.
- [8] The Respondent also argued that the Court, in the exercise of its discretion ought also to consider the purpose and object of section 143(c) of the Banking Act, which is ostensibly, to prevent legal proceedings from disrupting the functions of the receiver.

- [9] Section 143(c) of the Banking Act provides that upon and after appointment of a receiver, all legal proceedings against the licensed financial institution or licensed financial holding company are stayed and a third party shall not exercise any right against the licensed financial institution's or licensed financial holding company's assets, without the prior leave of the court unless the court directs otherwise.
- [10] The operation of section 143(c) of the Banking Act is automatic and it is irrelevant whether the legal proceeding was commenced before or after the commencement of the receivership. Therefore, section 143(c) had the effect of staying the Applicant's existing claim until such time as she had obtained leave to proceed with the claim against the Respondent.
- [11] Section 143(c) makes no provision with respect to either the procedural aspects attendant on an application to lift the statutory stay or the matters upon which the Court should rely in exercising its discretion to grant leave.
- [12] There is no doubt that the Court, in considering whether to lift the statutory stay should seek to do what is right and fair in all the circumstances.
- [13] In **National Bank of Anguilla (Private Banking and Trust) Limited (in Administration) and others v National Bank of Anguilla Limited (in Receivership) and others**¹ the Court alluded to what was not intended to be an exhaustive list of the matters to which the court should advert its attention in exercising its discretion to lift the statutory stay. Those matters included, the purpose of the receivership, whether the nature of the claim made it conducive to be dealt with in the winding up process, the effect the lifting of the stay would have on the parties and the public interest. In exercising its discretion, the Court should carry out a balancing exercise taking all of these factors into consideration.

¹ [2018] ECSCJ No. 197

- [14] In deciding whether to exercise its discretion in favour of lifting the stay, the court has adverted its mind to the purpose of the receivership under the Banking Act. The receiver was appointed by the Eastern Caribbean Central Bank due to the Respondent's insolvency pursuant to section 137(1)(a) of the Banking Act. For the purposes of section 137(1)(a) of the Banking Act, the Respondent would have been considered insolvent, because as a licensed financial institution or licensed financial holding company, it was not paying or was unable to pay its obligations as they fell due, or the value of its liabilities exceeded the value of its assets.²
- [15] The function of the receiver appointed under the Banking Act is to liquidate the licensed financial institution or licensed financial holding company for which it has been appointed receiver and wind up its affairs in an orderly manner that minimises any risk to financial stability, minimises disruption to depositors, and, consistent with the preceding goals, maximizes the value of the assets of the licensed financial institution or licensed financial holding company.³
- [16] Therefore, the reason for imposing the statutory stay in the winding up process is to preserve the limited assets of the company in the best way for distribution among all the persons who have claims upon them. There being only a small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase costs against the company and diminish the assets which ought to be divided among the creditors. It is contemplated that the court shall be seized of all these matters and shall see that the affairs are wound up in a dignified and orderly way.⁴
- [17] The purpose of provisions of this nature therefore includes, preventing a company in liquidation (including a financial institution) from being subjected to a multiplicity of actions which would be expensive, time-consuming, in some cases

² Banking Act, section 137(3)

³ Banking Act, section 137(2)

⁴ Langley Construction (Brixham) Ltd v Wells and another [1969] 1 WLR 503 at 509

unnecessary, and which would take the liquidator's attention and available funds away from the orderly winding up of the company.⁵

- [18] It is plain that the general scheme of the Banking Act as it relates to the winding up process, is geared towards depositor and creditor protection. Support for this view is found in the provisions of section 152 of the Banking Act, which establishes the priority in which claims are to be paid and distributed among creditors and depositors.
- [19] The Applicant would not fall within the category of a secured creditor under section 152(1) of the Banking Act. Also, the Applicant does not fall within one of the categories of "other allowed claims" under section 152(2) of the Banking Act. Therefore, the Applicant has no claim or interest in the assets held by the Bank and no issue arises between her and Bank in relation to the conduct of the winding up process. Therefore, the nature of the Applicant's claim is such that it cannot be dealt with in the winding up process.
- [20] In any event, the Applicant does not have a proprietary claim against the Bank. Proprietary claims arise where the claimant has retained a proprietary interest in the payment or other property transferred to the defendant or on the fact that the claimant retains, or is deemed to have retained, ownership of the property in the defendant's hands. The Applicant's claim is a personal claim. This distinction is particularly important where the defendant is insolvent, since a proprietary claim may entitle the claimant to have priority over the defendant's general creditors. A proprietary claim may also entitle the claimant to look to subsequent transferees, rather than the immediate recipient, for recovery.
- [21] Therefore, the Court is of the view that leave should not be granted to the Applicant under section 143(c) of the Banking Act to pursue these proceedings, because the Applicant's claim is not a proprietary claim. The Applicant's claim does not present

⁵National Bank of Anguilla (Private Banking and Trust) Limited (in administration) and another v National Bank of Anguilla Limited (in receivership) and others at paras. 49 – 50

a situation where the proof of debt procedure does not permit a proprietary claim to be advanced or adjudicated, which would justify the grant of such leave. The Court is satisfied, that for the purposes of the relevant application, that the Applicant's claim to a proprietary interest has no solid foundation and does not give rise to a serious dispute in relation to that issue, so that a serious question to be tried in that respect has not been established, that would support the grant of leave.

[22] In the circumstances, the Applicant's reliance on the assertion that her claim is a proprietary claim that could not be dealt with in the winding up process, and there being no countervailing factors that militate against the lifting of the statutory stay, and therefore meets the threshold requirements for the lifting of the stay, is misguided and fallacious. In the court's view, the Applicant has incorrectly asserted that her claim fell within the ambit of those requirements that would justify the lifting of the stay imposed by section 143(c) of the Banking Act.

[23] Section 143(c) is designed to ensure that a company in liquidation is not subjected to a multiplicity of actions which would be both expensive and time-consuming, as well in some cases as unnecessary. Unless there is some good reason to the contrary, claims against such companies should be pursued by means of a proof of debt claim. As The effect of provisions such as section 143(c) is to require the claimant to adopt the course of lodging a proof of debt unless he can demonstrate that there is some good reason why a departure from that procedure is justified in the case of the claim in dispute. An assessment of the strength and viability of the case the applicant for leave wishes to pursue, plays a part in the decision whether to allow such a departure.

[24] In the present case, the Applicant's claim against the Bank is not of a proprietary nature. This is not a claim where the Applicant says, in effect, that certain property and rights ostensibly owned by Bank are in truth owned by her. Proprietary claims go beyond the money-based concepts relevant to proof of debts in a winding up. They entail an inquiry into the asset base available to the receiver. In addition, the Court also finds that the Applicant's claim is not a proprietary claim, in which there

are features which take the case outside the province of the proof of debt system which would support the grant of leave.

- [25] In the Court's view, the question of whether leave ought to be granted is reduced to one of choosing between two alternative forms of procedure, namely filing a proof of debt or commencement of legal proceedings. The effect of section 143(c) is that the Applicant should be required to lodge a proof of debt unless she can demonstrate that there is a good reason for departure from that procedure.
- [26] In the present case, the Applicant has not demonstrated that there is good reason for departing from the proof of debt procedure under section 152(2) of the Banking Act. Bearing in mind, that one of the purposes of section 143(c) is to prevent the Bank's assets being dissipated by unnecessary litigation; an applicant for leave will therefore be required to show why it should not be left to prove its debt in the winding up.
- [27] The Court, in seeking to give effect to the statutory purpose of the receivership, had to conduct a balancing exercise of the legitimate interests of the Applicant and the legitimate interests of other creditors of the Bank. The Court should compare the financial loss suffered or likely to be suffered by the Applicant, if permission to commence proceedings was refused and she was temporarily denied the relief sought, with the loss suffered by the other creditors, if permission to issue proceedings were granted.
- [28] The court in conducting the balancing exercise, has given consideration to the personal interests of the Applicant, who should not be prejudiced by the way in which the receivership is being conducted, save to the extent that that might be unavoidable, and even then, that would usually be acceptable only to a limited extent. In carrying out the balancing exercise, the court has also considered the question of whether the Applicant has shown that it would be inequitable to prevent her from commencing the proceedings.

- [29] In addition, the Court must keep in mind a complete picture of the circumstances of the receivership derived from relevant evidence. In so doing, the Court must ensure that the purpose of the receivership would not be impeded by the commencement of the proceedings. The Court accepts that one of the functions of the receiver is the continuation of the collection of the book debts for the benefit of the creditors of the Bank.
- [30] The receivership arose as a response to the financial crisis in the domestic banking sector from on or about the year 2013 and further on. The Government of Anguilla's response to this banking crisis was the enactment of legislation, notably the Banking Act, and other protective measures designed to curb the fallout likely to occur as a result.
- [31] In light of the deteriorating financial position of the indigenous banks in Anguilla; and given the substantial market share of the Bank and its subsidiaries in the domestic banking sector; and in order to prevent a crisis in the banking sector, in particular and generally, Anguilla's economy, the Eastern Caribbean Central Bank ('ECCB') placed the Bank and its subsidiaries under conservatorship. As a result, ECCB assumed control and carried on the functions of the Bank and its subsidiaries. The Bank along with its subsidiaries, privately owned commercial banks, were placed in receivership by the ECCB pursuant to section 137(1)(a) of the Banking Act which saw the appointment of the receiver (the 'Receiver') as receiver of both entities.
- [32] By virtue of the appointment of the Receiver, the ECCB's control and conservatorship over the Bank ceased; Notice of Relinquishment of Control having been issued by the ECCB.
- [33] The transfer of assets and liabilities from the Bank to NCBA was effected through the medium of Purchase and Assumption Agreements ('PAA') made between the Receiver and NCBA on 22nd April 2016. Each PAA specifically provided for NCBA to 'put back' to the Receiver such assets and liabilities of the Bank as not passing to NCBA, so that assets passing under each PAA may be adjusted to the satisfaction of both the Receiver and NCBA.

- [34] The transfer of assets and liabilities from the Bank to NCBA, was facilitated by the establishment of a Depositor Protection Trust ('DPT') created by Depositor Protection Trust Deed (the 'Trust Deed') made between the Government of Anguilla represented by the Permanent Secretary in the Ministry of Finance pursuant to the instructions of the Executive Council ('EXCO'), the Trustees and the Receiver and executed on 30th June 2017. The DPT was established pursuant to the Banking Resolution Order Act.
- [35] In the circumstances, the basic intent of the receivership, brought into play by legislative intervention, was to ensure depositor protection and to safeguard Anguilla's economy, particularly the banking sector.
- [36] The preceding matters are made evident and are supported by the Receiver's affidavit filed in opposition to the Applicant's application. According to the Receiver, he was appointed Receiver due to the Respondent's insolvency and its lack of viability owing to the impairment of its capital. In his affidavit in opposition he averred that he is charged with the duty of liquidating the Bank and winding up its affairs in an orderly manner that minimises the risk to financial stability, minimises disruption to depositors, and consistent with these preceding objectives, maximises the value of the assets of the Bank pursuant to section 137(2) of the Banking Act.⁶
- [37] The Receiver expressed his concern that, assuming the Court grants permission to lift the statutory stay, there exist the foreseeable likelihood of a deleterious effect on the winding up process since the Bank is already burdened financially with significant expenses and its commitment to NCBA in respect of unpaid expenses. In addition, the Receiver contended, that the Bank is indebted to the Government of Anguilla in respect of Social Security Deposits which the Government of Anguilla had taken responsibility for under the Banking Resolution Plan.⁷

⁶ At para. 3

⁷ At para. 6

- [38] It appeared that the Receiver also expressed fear and anxiety over the fact that assuming the statutory stay is lifted, the expense likely to be incurred in defending the Applicant's claim was likely to exacerbate the difficulties already being experienced by the Respondent in collecting on outstanding loans in an economy already suffering the debilitating effects of the economic fallout from a hurricane in September 2017 and a global pandemic. The Receiver expressed the view, that any additional expense incurred in defending the Applicant's claim was likely to deplete the Respondent's scarce financial resources.⁸
- [39] In summary, the posture adopted by the Receiver was one where he apprehended the likelihood of the risk to the Respondent's financial resources which would have the concomitant effect of endangering the financial viability of NCBA, the lone domestic bank, the Social Security Board and the Government of Anguilla which would result in dire consequences for Anguilla's economy.
- [40] In the circumstances, it is imperative that in exercising its discretion, the Court ought to give consideration not only to the legislative scheme and object of the Banking Act,⁹ but also, the broader micro-economic policy which underscores its existence, together with the entire Banking Resolution scheme. Therefore, the Court has formed the view, that to permit the lifting of the statutory stay given the legislative intent of the Banking Act, would serve no less a purpose than to defeat the intention of the legislature when the Banking Act was enacted. To hold otherwise would defeat the entire purpose for granting protection to the Bank, its creditors and depositors in the course of the receivership process.
- [41] In light of the Court's preceding pronouncements, it does not appear that it would be in the public interest to grant leave to the Applicant to lift the statutory stay. Section 184 of the Banking Act provides that in any court proceedings under the Act, the Court shall take into consideration the public interest. In considering the

⁸ At para. 7

⁹ *Althea Maynard and another v Eastern Caribbean Asset Management Corporation (as receiver of ABI Bank Ltd)* [2020] ECSCJ No. 35 at para. 37

public interest, the Court shall have regard to the critical importance of financial stability to the public interest; and the importance of permitting the Central Bank to discharge its functions in an expeditious and efficient manner in the interest of maintaining financial stability.

[42] Without attempting to determine any substantive issue likely to arise in the course of the proceedings before the Labour Tribunal (the 'Tribunal'), the Court as part of its balancing exercise, makes the following observations in relation to the nature of the Applicant's claim before the Tribunal. It appears that the Applicant has erroneously adopted the position that she is a secured creditor. This is evident on the Applicant's reliance on the provisions of the Labour Relations Act, 2018 ('LRA') in her Amended Claim. In her Amended Claim, at paragraph c, under the rubric "Overview of Claim, the Applicant claimed "damages, costs and such further relief as the Tribunal deems just against the Respondent in accordance with the Fair Labour Standards Act¹⁰ which was the prevailing legislation at the material time and or such other applicable laws (Labour Relations Act, 2018) as the Tribunal deems relevant in the fair and just disposal of the matter".

[43] It appeared, based on the abovementioned pleading, that the Applicant may very well have laboured under the misapprehension that the provisions of section 71 of the LRA placed her in the position of a secured creditor which entitled her to a proprietary claim against property held by the Respondent. Assuming that this was the basis upon which the Applicant held the belief that she had a proprietary claim which could not be dealt with in the winding up process, then clearly, the Applicant has fallen into grave error.

[44] Section 71 of the LRA provides that notwithstanding any provision in any other enactment, amounts owed to employees by reason of non-payment of wages and other remuneration shall constitute priority debt and shall have prior claims over all other debts in respect of the property of the employer. The dictionary to the LRA

¹⁰ R.S.A. c. F15

defines “remuneration” as “the wage and any additional benefits, service charge, redundancy (severance) pay ...”

- [45] The events giving rise to the proceedings before the Tribunal arose in 2013. The LRA came into force on 3rd June 2019. It is the Court’s considered view, that the provisions of section 71 of the LRA were not intended to and do not operate retrospectively. Assuming that section 71 of the LRA did in fact operate retrospectively, this fact still would not have availed the Applicant since by no stretch of imagination could her claim amount to a proprietary claim; it would have simply meant that her claim could have been dealt with in the winding up process as ranking in priority to other claims.¹¹
- [46] Therefore, it appears that the underlying basis of the Applicant’s application to lift the statutory stay has been eroded to a vanishing point. As the Court pointed out earlier in its ruling, the Applicant’s claim to a proprietary interest has no solid foundation and does not give rise to a serious dispute in relation to that issue, so that a serious question to be tried in that respect has not been established, that would support the grant of leave.
- [47] The result of refusing to lift the statutory stay is that the Applicant would not be able to pursue the proceedings before the Tribunal against the Respondent. The circumstances of the present case are indeed unfortunate. However, the Court must apply the law as it presently stands.
- [48] In conducting the balancing exercise, the Court has formed the view that lifting the statutory stay is militated against by the countervailing factors which the court has described in its ruling. For all intents and purposes, it appears that the Applicant’s interest in proceeding with claim against the Respondent is outweighed by the countervailing factors militating against the grant of leave.

¹¹ Section 152(1) Banking Act

[49] In the circumstances, the Applicant's application to lift the statutory stay is dismissed. Costs is awarded to the Respondent to be assessed in accordance with CPR 65.12 if not agreed within 21 days of the Court's ruling.

Shawn Innocent
High Court Judge

By the Court

Registrar