

**THE EASTERN CARIBBEAN SUPREME COURT
ANGUILLA CIRCUIT**

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

Claim Number: AXAHCV2016/0051

BETWEEN:

Satay Limited et al

Claimants/Respondents

and

**Martin Dinning
Hudson Carr
Shawn Williams
Robert Miller
Eastern Caribbean Central Bank**

**First Named Defendant/Applicant
Second Named Defendant/Applicant
Third Named Defendant/Applicant
Fourth Named Defendant
Fifth Named Defendant/Applicant**

Claim Number: AXAHCV2019/0035

BETWEEN:

Christopher Liss et al

Claimants/Respondents

and

**Martin Dinning
Hudson Carr
Shawn Williams
Robert Miller
Eastern Caribbean Central Bank**

**First Named Defendant/Applicant
Second Named Defendant/Applicant
Third Named Defendant/Applicant
Fourth Named Defendant
Fifth Named Defendant/Applicant**

Claim Number: AXAHCV2019/0039

BETWEEN:

Ian Hope-Ross

Claimant/Respondent

and

**Martin Dinning
Hudson Carr
Shawn Williams
Robert Miller
Eastern Caribbean Central Bank**

**First Named Defendant/Applicant
Second Named Defendant/Applicant
Third Named Defendant/Applicant
Fourth Named Defendant
Fifth Named Defendant/Applicant**

Appearances:

Mr. Paul Dennis, Q.C., with him Mrs. Nadine Whyte Liang and Ms. Navine Fleming for Defendants/
Applicants instructed by Libran Chambers
Mr. John Carrington, Q.C., with him Ms. Rayana Dowden for the Claimants/Respondents instructed
by Webster LP
Mr. Harry Wiggin present

2019: November 18th;
2020: March 20th.

DECISION

Burnett, M. (Ag):

- [1] This is an application filed by the first, second, third and fifth defendants for the following reliefs:
1. The statement of claim filed by the claimant be struck out pursuant to CPR 26.3 (1) (b) and/or
 2. Summary Judgment to be granted for the defendants/applicants pursuant to CPR 15.2 (a) and
 3. The costs of the application and of the claim be borne by the respondents/claimants to be assessed if not agreed.
- [2] The grounds of the application are that:
- a) The first to fifty-first claimants/respondents are said to be depositors of the National Bank of Anguilla (Private Bank & Trust) Limited ("PBT").
 - b) The forty-ninth to sixty-fifth claimants/respondents are said to be depositors of Caribbean Commercial Investment Bank Limited ("CCIB").
 - c) The relationship between the claimants/respondents on the one hand, and PBT and CCIB on the other, was contractual and was that of debtor and creditor.
 - d) The funds deposited with PBT and CCIB by the claimants/respondents were not therefore held in trust by PBT and CCIB on behalf of the claimants.

- e) There was no trust relationship between PBT and CCIB on the one hand and the claimants/respondents on the other.
 - f) The defendants/applicants could not therefore have been in breach of trust.
 - g) The directors of a company have a duty to consider the interest of the creditors when the company is insolvent or when there is a real risk of insolvency.
 - h) That duty of care is owed to the company and not to its creditors.
 - i) The conservators, whether as directors or de facto directors owed no fiduciary duty of care to the claimants as creditors of PBT and CCIB.
- [3] Based on the grounds herein before mentioned the defendants/applicants submit that the Statement of Claim ought to be struck out as it discloses no reasonable grounds for bringing the Claim. Alternatively, the claimants have no reasonable prospect of succeeding on this Claim.

INTRODUCTION

- [4] The claimants are depositors of National Bank of Anguilla (Private Bank & Trust) Limited ("PBT") and/or Caribbean Commercial Investment Bank Limited ("CCIB").
- [5] PBT and CCIB are companies incorporated pursuant to the Laws of Anguilla. They were licensed to carry on offshore banking business and were regulated by the Anguilla Financial Services Commission.
- [6] PBT is solely owned by the National Bank of Anguilla Limited (now in receivership) and CCIB is solely owned by Caribbean Commercial Bank (Anguilla) Limited (now in receivership).
- [7] The Eastern Caribbean Central Bank (hereinafter referred to as the "E.C.C.B") was established by the Eastern Caribbean Central Bank Agreement made on 5th July, 1983 ("the Agreement"). Pursuant to the Agreement, the Eastern Caribbean Central Bank is the regulator of the banking system of Eastern Caribbean Countries which are signatories of the Agreement including Anguilla. The Eastern Caribbean Central Bank was the regulator of National Bank of Anguilla (hereinafter referred to as "N.B.A") and Caribbean Commercial Investment Bank Limited (hereinafter referred to as "C.C.B").
- [8] All defendants were appointed conservators of the National Bank of Anguilla and Caribbean Commercial Bank Limited during the period 12 August, 2013 to 22 April, 2016.

BACKGROUND

- [9] On the 12 August, 2013 the Eastern Caribbean Central Bank acting pursuant to article 5B of the Agreement intervened in National Bank of Anguilla and Caribbean Commercial Bank and placed them in conservatorship. The Conservators were appointed to assist with the management of National Bank of Anguilla and Caribbean Commercial Bank on behalf of the Eastern Caribbean Central Bank, qua regulator in accordance with the powers set out in article 5B(1) of the Agreement.
- [10] Article 5B of the said Agreement allows the Eastern Caribbean Central Bank to take control qua regulator, over the property and undertaking of a financial institution which, in the case of NBA and CCB, included the right attached to their shareholding in PBT and CCIB of which they were sole shareholders, respectively.
- [11] The first and second named defendants took control of PBT and CCIB having been appointed as directors of these entities by their respective sole shareholders, NBA and CCB respectively, which were then under the control of ECCB.
- [12] The conservators continued the management of the day to day operations of PBT and CCIB in accordance with the management agreement while a resolution plan was being formulated and funding was being sourced for the resolution.
- [13] On 22 February, 2016 Mr. William Tacon was appointed as Administrator of PBT and CCIB and took control of the entities.
- [14] On 22 April, 2016, the ECCB relinquished control of NBA and CCB and on that date NBA and CCB were placed in receivership.

THE CLAIMANTS CLAIM IN CLAIM AXAHCV 2016/0051

- [15] On 28 June, 2016 the claimants commenced proceedings against the defendants claiming the sum of US \$13,028,906.17 for breach of fiduciary duty, breach of trust and negligence for monies owed to the claimants as creditors of PBT and CCIB. The claimants contend that the defendants/applicants are liable to repay the sum as a result of the following:
 - a) During the period of 12 August, 2013 to 24 March, 2016, the defendants had no authority to take control of PBT and CCIB and interfere with their property.
 - b) In providing oversight and management of PBT and CCIB, the defendants/applicants acted as de facto directors of PBT and CCIB and owed a fiduciary duty of care to the claimants/respondents as creditors, to act in good faith and with due diligence when they took custody and administration of the property of PBT and CCIB, including deposits the claimants made since 2005.

- c) The duty of care to consider the interest of the claimants as creditors was paramount as the defendants/applicants were aware or ought to have known that PBT, CCIB, NBA and CCB were insolvent, on the brink of insolvency, at risk of insolvency or doubtful solvency.
- d) The claimant acted negligently in their management of PBT and CCIB and in breach of trust, which has resulted in loss to the claimants/respondents.

IN CLAIM AXAHCV 2019/0035

- [16] The claimants claim the sum of US\$17,328,419.81, GBP £25,681.25 and Euro €42,990.89.
- [17] Interest in accordance with the terms of the account for the period August, 2013 to present.

IN CLAIM AXAHCV 2019/0039

- [18] The claimant claims the sum of US\$472,743.83 plus interest in accordance with the term of the accounts for the period August, 2013 to present.

THE APPLICATION BY THE DEFENDANTS/APPLICANTS

- [19] Mr. Paul Dennis Q.C. for the defendants/applicants submitted that the hearing bundle comprises pleadings for claims number AXAHCV 2016/0051, AXAHCV 2019/0035 and AXAHCV 2019/0039.
- [20] Mr. Dennis Q.C. stated that in relation to claim 2016/0051 pleadings have closed while in the other two (2) claims (35 and 39/2019), the cases are identical to that of claim 2016/0051 as they arose out of the same circumstances and same factual matrices. He submitted that one set of submissions covers all three (3) sets of claims and that these matters were being dealt with on a consolidated basis.
- [21] The defendants/applicants contended that the claimants/respondents who were depositors of the offshore banks issued these proceedings against the Eastern Caribbean Central Bank, and persons appointed as conservators on the basis that in providing oversight and management of these offshore banks they acted as de facto directors of those banks and acted in circumstances where they owed a fiduciary due of care to the creditors.
- [22] Mr. Dennis Q.C. contended that the claimants/respondents case was that the Eastern Caribbean Central Bank in taking over the affairs of the Banks, and the conservator who were handling the day to day management of the affairs of NBA, including the subsidiaries, that by virtue of that, owed a fiduciary duty of care to the claimants, that is to say the depositors.

- [23] The defendants/applicants owed a duty to act in good faith and with due diligence where they look over the custody and administration of the property of PBT and CCIB including the depositors which the claimants/respondents had made in those banks.
- [24] Mr. Dennis Q.C posited that the claimants/respondents continued to base their claim on the premise that the duty of care to consider the interest of claimants as creditors was paramount.
- [25] Additionally, that the defendants/applicants were aware or ought to have known that those Offshore Banks were insolvent or on the brink of insolvency or doubtful solvency. On that basis; the claimants were saying that Eastern Caribbean Central Bank as the conservators owed this duty of care to the depositors.

DO THE CLAIMANTS/RESPONDENTS HAVE A REAL PROSPECT OF SUCCESS ON THEIR CLAIM FOR BREACH OF TRUST

- [26] Mr. Dennis Q.C. submitted that:
The claimants/respondents are said to be depositors of PBT and CCIB. The relationship between the claimants on one hand and PBT and CCIB on the other hand, was contractual and that of creditors and debtors.
- [27] Mr. Dennis Q.C further contended that the claimants are referred to as creditors of PBT and CCIB throughout the Statement of Claim and that the funds which were deposited with PBT and CCIB by the claimants were held in trust by PBT and CCIB on behalf of the claimants.
- [28] He proffered that no trust relationship existed between PBT and CCIB on the one hand and the claimants on the other hand. There is no allegation, that the claimants' funds were transferred from PBT and CCIB to the defendants, the defendants/applicants, Mr. Dennis Q.C asserts.
- [29] Consequently, the defendants could not therefore have been in breach. In the premises the claimants can have no viable claim against the defendants for breach of trust.
- [30] Mr. John Carrington Q.C., Learned Counsel for the claimants/respondents asserted that the defendants failed to establish a policy which ensured the safety of the deposit; he further asserted that the defendants/applicants failed to procure and ensure that all property of PBT was secure and under their control.
- [31] Mr. Carrington Q.C opined that applicants/defendants failed to take reasonable steps to recoup any property or asset or deposits which were placed with NBA and CCB prior to their involvement in PBT and CCIB respectively.
- [32] Mr. Carrington Q.C concluded that the defendants knew or ought to have known that NBA and CCB were not financially sound as the Eastern Caribbean Central Bank had taken control of these entities with a view to establishing financial stability.

- [33] He also concluded that the defendants failed to insure the deposits received by PBT and CCIB respectively.
- [34] The claimants/respondents asserted that despite the precarious financial state of NBA & CCB, the defendants/applicants allowed or were reckless to the fact that the claimants' monies were placed in those financial institutions by PBT and CCIB respectively, without due regard to NBA and CCB's ability to repay those deposits upon demand.
- [35] Mr. Dennis Q.C. submitted that on the claimants' own case what the ECCB took control of, put its conservators in control of, was the custody and property of PBT and CCIB, property of the Offshore Bank into which the claimants made deposits. They did not take control of any property belonging to the depositors.
- [36] Mr. Dennis Q.C. posited that the Court should bear this in mind since the claimants' case rest throughout on the erroneous premise and a legal fallacy that the defendants took control of the property belonging to the depositors.
- [37] Mr. Dennis Q.C. reasoned that the depositors put their money into the bank which created a relationship of debtor and creditor, with the Offshore Bank being the debtors and the depositors being the creditors.
- [38] In the premises, the ECCB and the conservators could not have taken control of any property belonging to the depositors. What the ECCB took control of was property of the Offshore Bank which it intervened to administer pursuant to its powers under the ECCB agreement.
- [39] Counsel contended further that the claimants/respondents claim on breach of trust fiduciary duty is premise on a proposition that the de facto directors of Offshore Bank/conservators owed a fiduciary duty of care to the creditors. He submitted, that legal proposition cannot stand because the fiduciary duty which is owed by the directors is to consider the interest of creditors, is not a duty owed to depositors, but to the company.
- [40] Mr. Dennis Q.C. further submitted that the creditors have no power of action against the directors of a company on the basis that the directors failed to take their interest into account. It is a duty owed to the company and not to the creditors.

BREACH OF TRUST AND NEGLIGENCE

- [41] The claimants allege that the defendants/applicants acted negligently in their management of PBT and CCIB and in breach of trust which resulted in loss to the claimants.
- [42] Mr. Dennis Q.C. submitted that the claimants/respondents are assuming that the Central Bank and conservators acted negligently in their management of PBT and CCIB, upon assumption of their control and management of their daily affairs.

- [43] However, he posited that the duty they owe in the circumstances, is to the entity (the companies) whose affairs and whose property they took over.
- [44] He submitted that the property and the affairs that ECCB took over and placed in conservation was that of the Offshore Bank PBT and CCIB and as a result, if there were any breach of duty on the part of the Central Bank or Conservators, the party who would have a legal basis for claiming against them in negligence would be those entities themselves whose affairs and whose properties were taken over by PBT and CCIB. The depositors are said to be strangers to the Central Bank and Conservators.

THE CLAIMANTS/RESPONDENTS RESPONSE

- [45] Learned Counsel, Mr. John Carrington Q.C. submitted that the test for Summary Judgment is set out in the case of **St. Lucia Motors & General Insurance Co. Ltd. v Modeste**¹ at paragraph 21 where the Court of Appeal stated the test under CPR 15.2. thus: "Summary judgment should only be granted in case where it is clear that a defence on its face cannot be sustained or in some other ways is an abuse of the process of the Court".
- [46] Mr. Carrington referred to the case of **Doncaster Pharmaceutical Group Ltd and other v Bolton Pharmaceutical Co 100 Ltd**² at paragraphs 10-12, 17-18, where the Court of Appeal states:
- "[10] Everyone would agree that the summary disposal of rubbishy defences is in the interest of justice. The Court has to be alert to the defendant who seeks to avoid Summary Judgment by making a case look more complicated or difficult than it really is.
- [11] The Court has to guard against the cocky claimant, who having decided to go for Summary Judgment, confidently present the factual and legal issues as simpler and easier than they really are and urges the Court to be efficient i.e. produce a rapid result in the claimant favors.
- [12] In handling all application for Summary Judgment the Court's duty is to keep consideration of procedural justice in proper perspective. Appropriate procedure must be used for the disposal of cases' Otherwise there is a serious risk of injustice.
- [17] It is well settled by the authorities that the Court should exercise caution in granting Summary Judgment in certain kinds of cases. The classic instance is where there are conflict of fact on relevant issues, which have to be resolved before a judgment can be given. A mini-trial on the facts conducted under Part 24 without having gone through normal pre-trial proceedings must be avoided as it runs a real risk/producing summary injustice.

¹ SLCHCVAP2009/0008

² [2006] EWCA 661 Civil

[18] In my judgment, the Court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to alter the evidence available to a trial judge and so affect the outcome of the case.”

[47] He submitted that this onus lies on the defendants/applicants to prove on a balance of probabilities that the claim is rubbishy. Counsel relies on **Celador Productions v Melville**³ where the Court stated the following propositions:

- a) “It is for the applicant for Summary Judgment to demonstrate that the respondent has no real prospect of success in his claim or defence as the case may be.
- b) A ‘real’ prospect of success is one which is more than fanciful or merely arguable.
- c) If it is clear beyond question that the respondent will not be able at trial to establish the facts on which he relies, then his prospects of success are not real but.
- d) The Court is not entitled on an application for Summary Judgment to conduct a trial on documents without disclosure or cross-examinations.”

[48] Mr. Carrington Q.C. posited that the test for striking out was considered in the case of **Didier v Royal Caribbean Cruise Ltd**⁴ in that case the Court of Appeal stated that the test for strike out as “whether” the claim is plainly just bad in law”. The Court continued “... if a claim or defence is properly constituted and the legal test for Summary Judgment can properly be applied to it, then necessarily it will not be a claim or defence which is suitable to be considered for the strike out procedure.”

[49] Mr. Carrington Q.C. posited that the strike out application should be considered before the Summary Judgment.

[50] He further submitted that the defendants did not deny the claimants’ pleadings or evidence that the defendant conservators gave written assurance to the claimants during their tenure as the persons in control of the management of PBT and CCIB.

[51] He asserted that the giving of such assurances as exemplified in the correspondence exhibited to the affidavit of Henry Wiggin, in response to the application, gives rise to a case with a real prospect of success that the defendants had placed themselves in the position of fiduciaries towards the claimants.

[52] Mr. Carrington Q.C. posited that this is a matter that requires exploration.

STRIKING OUT – THE LAW

[53] Part 26.3 of the CPR confers a discretion on the Court to strike out a claim in any of the following circumstances:

³ [2004] EWHC(ch) at paragraph 7

⁴ SLUHCVP2014/0024

- a) Failure to comply with a rule or practice direction order or direction given by the Court in the proceedings.
- b) Failing to disclose any reasonable grounds for bringing or defending a claim.
- c) Abuse of process of the Court or likely to obstruct the just disposal of the proceedings.
- d) If it is a prolix or does not comply with the requirement of paragraph 8 or 10.

[54] There has been a wealth of guidance from the Court of Appeal in this jurisdiction on the factors which a Court ought to consider in exercising its discretion to strike out a claim. I will just refer to two which, in my view, captures the essence of the guidance. In **Citago Global Custody v Y2K Finance**⁵ Edwards JA stated: "... the following circumstances are identified as providing reason for not striking out; where the argument involves a substantive point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully developed. It is also well settled that the jurisdiction to strike out ought to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial and the ability to strengthen its case through the process of disclosure and other court procedures such as request for information; and the examination and cross-examination often change the complexion of the case. Also, before using CPR 26.3 (1) to dispose of 'side issues', one should be taken to ensure "that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in any application must be exercised in accordance with the overriding objective of dealing with cases justly."

[55] Mitchell JA in **Tawney Assets Limited v East Pine Management Limited and Ors**⁶ echoed similar sentiments on the approach the Court must adopt as:

"The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The Court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the Statement of Case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. The proper approach to be taken in striking out a statement of case as disclosing no facts upon which the Court can proceed has been described by Pereira CJ [Ag.], in her judgment in the interlocutory appeal in **Ian Peters v George Spencer**⁷ as a serious live issue of fact which can only be determined by hearing oral evidence."

[56] At paragraph 23 in **Tawney Assets Limited**, Mitchell JA drew an analogy with the approach under the CPR with the old rules when he said:

⁵ BVICVA No. 22/2008

⁶ Civ Appeal HCVAP2012/0007 at paragraph 22

⁷ Antigua nad Barbuda High Court Civil Appeal No. 16 of 2009 (delivered 22nd December 2009 unreported following Citco Global NV Y2K Finance Inc Territory of the Virgin Island High Court Civil Appeal No. 22 of 2008 (delivered 19th October 2009 unreported)

“Even under our old rules, the striking out of a claim was a jurisdiction which was to be exercised sparingly. In the words of Sir Dennis Byron in **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al**:

‘The summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the Court.’

There is no reason to believe that this is not still good guidance under the new CPR.”

SHOULD THE CLAIM FORM AND STATEMENT OF CLAIM BE STRUCK OUT FOR DISCLOSING NO REASONABLE GROUND FOR BRINGING THE CLAIM

- [57] The claimants’ case is grounded in breach of fiduciary duty, breach of trust and negligence owed by the defendants to the claimants.
- [58] Mr. Dennis Q.C. contended that the Court must assume that the fact alleged in the statement of claim case are true. **Citco Global Custody N.V v Y2K Finance Inc**⁸. They contend that if the statement of case disclose no sustainable cause of action against the Bank, the Court may strike them out.
- [59] **David Penn v Attorney General**⁹ the Court cited the following formulation from **Letang v Cooper**¹⁰ as to what contribute a viable claim:
“A person who wishes to move the Court must state a case that is known to, or created by law. The case as stated must disclosed sufficient facts that are material to issues to render the claim viable and which would permit the person who has to answer the case to know what case he has to meet; it must disclose a reasonable cause of action.”
- [60] Blackstone’s Civil Practice 2004 at paragraph 33.7 states that “applications to strike out a claim under CPR may be made on the basis that the statement of case fails to disclose a claim which is sustainable as a matter of law.”
- [61] A cause of action that is unknown to the law will be struck out.

LAW AND PLEADINGS

- [62] In view of the foregoing, the Court having reviewed all of the pleadings the Court accepts the submission of Learned Counsel, Mr. Paul Dennis Q.C. for the defendants/applicants.
- [63] The test for determining whether a duty of care exist is derived from the case of **Carparo Industries PLV v Dickman and Others**¹¹. In that case the Court sets out three (3) principles which must be found in order for the Court of negligence to exist:

⁸ BV1 Court of Appeal No HCVAP2008/0022 at paragraph 13

⁹ BVI High Court Claim No 2012/0335 (unreported) at paragraph 4 and 5

¹⁰ [1965] 1 QB 232 at p 242

1. The relationship between the parties must be one of sufficient proximity.
2. It must be reasonably foreseeable that the actions of the defendant will cause harm or loss to the claimant.
3. The Court must consider it to be far just and reasonable to impose a duty of care on the defendant.

[64] Against that background, the Court must seek to determine what relationship if any exists between the defendant and the claimant. In the case at bar, the claimants have sued the defendants on the basis that they are directors of the bank responsible for the management of the bank.

[65] The case of **Foley v Hill and Other** provides some guidance on the subject. In 1948, the House of Lord stated:

‘Money, when paid into a bank, ceases altogether to be the money of the principal; it is by then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into a banker’s is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker’s money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customers, the banker is not an agent or factor, but he is a debtor.”

[66] From this case it seems that two (2) contractual relationships may exist, one with the bank and the defendants as directors on the one hand and the bank and the claimants as customers on the other hand.

[67] Mr. Dennis Q.C. posited that there exist no real prospect of success on the claimants/respondents claim for breach of fiduciary duties since the directors of a company have a duty to consider the interest of the creditors when the company is insolvent or when there is a real risk of insolvency. However, that duty is owed to the company and not to its creditors.

[68] He relied on the case of **BTI 2014 LLC v Sequana SA and Others, BAT industries plc and Others v Sequana SA ...**

¹¹ II LDAB 563

- [69] In **BTI 2014 LLC v Sequanna SA and others; BAT Industries plc and other v Sequanna SA**, the Court of Appeal considered the duty of directors to have regard to creditors' interest. In that case, a company ("AWA") made two dividends payments to Sequana SA, its shareholder and parent company. The dividends were paid at a time when AWA had ceased to trade and had material liability. AWA subsequently brought claims against its directors who had authorized the payments and against Sequana as a constructive trustee on the basis (among others) that the dividends were paid in breach of the duty of the directors of AWA to have regard to the interests of its creditors pursuant to section 172 (3) of the UK Companies Act, 2006. AWA subsequently assigned the claim to BTI 2014 LLC.
- [70] The claim was issued pursuant to section 172 (3) of the UK Companies Act, 2006. However, it was accepted by all parties in the BTI case that that section simply preserves the common law principle which recognizes that consideration of the interests of creditors could in certain circumstances be an element in the duty a director owes to the company, that is, that a director owes a duty to consider creditors interests in certain circumstances.
- [71] In the BTI case, the Court accepted that the following principles have been established and settled by case law:
1. The creditors interest duty arises when a company is insolvent, the rationale being that the assets of an insolvent company are, in a practical sense, the assets of the creditors, pending liquidation or return to solvency.
 2. The shareholders of an insolvent company cannot ratify the acts of a director taken in disregard of the interests of the creditors in these circumstances.
 3. This duty is owed to the company and not to the creditors.
 4. Once it is established that directors are, in certain circumstances under a duty to have regard to the interests of creditors, a breach of that duty will entitle the company to recover compensation for loss caused to the company.
- [72] He further submitted that the thrust of the claimants' case was their status as depositors and customers of the bank to seek to ground their claim on breach of trust. Counsel posited that the deposit of money give rise to the relationship of debtors and creditors.
- [73] I adopt the position of the applicants. I am fortified by the guidance in **Halsbury's Laws of England Trust and Powers Volume 98 (2013)**. It states:
- "The deposit of money with a bank normally gives rise to a loan (a debtor – creditor relationship) and not to a trust. This remains the case where a bank that is a trustee holding trust money, banks the money with itself pursuant to an authority in that behalf in the trust instrument, so that the money can be used as normal in the bank's business (for example lending money). If the bank becomes insolvent the beneficiaries, merely having a taking in action against the bank, mark only as unsecured creditors."

CONCLUSION

The Court orders that:

1. The claimants/respondents' claim forms and statements of claim are struck out.
2. The claimants/respondents are to pay the defendants/applicants cost of this application to be assessed in default of agreement.

**Rickie Burnett
MASTER (Ag.)**

By the Court

Registrar