

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

CLAIM NO. AXAHCV 2017/0017

BETWEEN:

**NATIONAL BANK OF ANGUILLA (PRIVATE BANKING AND TRUST)
LIMITED (In Administration)**

1st Intended Claimant

**CARIBBEAN COMMERCIAL INVESTMENT BANK LIMITED
(In Administration)**

2nd Intended Claimant

and

CHIEF MINISTER OF ANGUILLA

1st Intended Defendant

ATTORNEY GENERAL OF ANGUILLA

2nd Intended Defendant

**GARY MOVING (IN HIS CAPACITY AS RECEIVER OF NATIONAL
BANK OF ANGUILLA (In Receivership) and CARIBBEAN
COMMERCIAL BANK (ANGUILLA) LIMITED (In Receivership)**

3rd Intended Defendant

EASTERN CARIBBEAN CENTRAL BANK

4th Intended Defendant

Appearances:

Mr. Ronald Scipio, QC., with him Mrs. Eustella Fontaine and Ms. Yanique Stewart,
instructed by Fontaine & Associates of Counsel for the Intended Claimants

Dr. Francis Alexis, QC., with him Mrs. Nakishma Rogers Hull, Senior Crown
Counsel, Attorney General's Chambers, of Counsel for the 1st and 2nd Intended
Defendants

Ms. Navine Fleming, instructed by Libran Chambers of Counsel for the 3rd and 4th
Intended Defendants

2019: December 12;
2020: February 3.

Judicial Review – Application for leave – Part 56 Civil Procedure Rules – Offshore Banking entities maintaining deposits at local parent banks – Appointment of Administrator by High Court pursuant to sections 35 and 37 of the Financial Services Commission Act to Offshore banking entities – Trust Companies and Offshore Banking Act – Banking Resolution Action – Purchase Assumption Agreement – Trust Deed – Sections 142, 152, 174, 1847 Banking Act, 2015 – Sections 2,3,4,5 and 7 Bank Resolution Obligations Act, 2016 – Receiver appointed pursuant to section 137 Banking Act – Purchase and Assumption Agreement – Depositor Protection Trust – Banking Business Vesting Order – Whether Attorney General and Chief Minister necessary and proper parties to the proceedings – Crown Proceedings Act – Whether claim for judicial review premature – Threshold test on application for leave – Whether arguable case with a reasonable prospect of success established – Interim relief by way of disclosure – Whether making of disclosure order fair and just

JUDGMENT

- [1] **INNOCENT, J:** The application for leave to apply for judicial review (the 'Leave Application') arises within the context of the financial crisis in the domestic banking sector from on or about the year 2013 and further on; and the Government of Anguilla's (the 'GOA') response to this crisis by the devise of a suite of legislative enactments and protective measures designed to mitigate against the fallout likely to occur as a result.

Introduction

- [2] The first applicant, National Bank of Anguilla (Private Banking and Trust) Limited ('PBT') and the second respondent, Caribbean Commercial Investment Bank Limited ('CCIB'), are both offshore companies regulated under the Trust Companies and Offshore Banking Act and are subsidiaries and depositors of the parent banks, National Bank of Anguilla Limited ('NBA') and Caribbean Commercial Bank (Anguilla) Limited ('CCB') and were engaged in the operation and conduct of NBA's and CCB's offshore banking business.
- [3] As a result of the deteriorating financial position of the indigenous banks in Anguilla; and given the substantial market share of NBA and CCB 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 NBA and CCB under conservatorship by Notice of Intervention dated 12th August 2013. As a result, ECCB assumed control and carried on the functions of NBA and CCB.

- [4] These measures were undertaken under the auspices of the Monetary Council established by section 7 of the Eastern Caribbean Central Bank Agreement to which Anguilla is a signatory and which has the force of law in Anguilla by virtue of the Eastern Caribbean Central Bank Agreement Act.
- [5] On or about 2016, the ECCB in conjunction with the GOA, with technical support provided by World Bank, the International Monetary Fund ('IMF') and the Caribbean Development Bank ('CDB') finalized a Bank Resolution Plan (the 'Resolution Plan') for Anguilla.
- [6] The Resolution Plan entailed the enactment of a scheme of legislative measures that included the Banking Act 2015 (the 'Banking Act') and the Bank Resolution Obligations Act 2016 (the 'BROA'). These legislative enactments were assented to by the British Government.
- [7] In a press conference held on 22nd April 2016, the Chief Minister and Minister of Finance announced the Resolution Plan to the Anguillian public. The Resolution plan was commended as a policy devised to protect the holders of domestic bank deposits against loss of their deposits held with NBA and CCB. The Resolution Plan was intended to transfer viable assets and matching deposit liabilities up to a threshold of EC\$2.8 million (the 'Threshold Amount') from both NBA and CCB, each a transferor financial institution, to be transferred to the newly formed National Commercial Bank of Anguilla Limited ('NCBA') the transferee financial institution.
- [8] It was also intended that deposit liabilities over the Threshold Amount would be transferred to a Depositor Protection Trust ('DPT'), one such trust each for NBA and CCB. This aspect of the Resolution Plan was provided for under the BROA.

- [9] The NBA and CCB, 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 third-named respondent as receiver (the 'Receiver') of both entities. By virtue of the appointment of the Receiver, the ECCB's control and conservatorship over NBA and CCB ceased, Notice of Relinquishment of Control having been issued by the ECCB.
- [10] The transfer of assets and liabilities from NBA and CCB 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 NBA and CCB as not passing to NCBA, so that assets passing under each PAA may be adjusted to the satisfaction of both the Receiver and NCBA.
- [11] The transfer of assets and liabilities from NBA and CCB 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 GOA 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 BROA.

The Leave Application

- [12] The Leave Application is not opposed by the Receiver and the ECCB. Therefore, the court will only consider the Leave Application as it relates to the Attorney General and the Chief Minister at this stage. For the avoidance of doubt, the court's judgment will also canvass applicants' case in relation to the Receiver and ECCB after dealing with the preliminary procedural points raised by the Attorney General and the Chief Minister.

- [13] The applicants' complaints are primarily focused on what they claim to be the decision of the Chief Minister that resulted in their exclusion from the DPT. The applicants contend that they have, by virtue of the decision of the Chief Minister, been excluded from the DPT in relation to certain deposits held by depositors in NCBA protected under the DPT and a Banking Business Vesting Order.
- [14] The applicants further contend that they have been excluded from the DPT because the Trustees have determined that the deposits held by the applicants in NCBA are not deposits protected by the DPT and parent bank's resolution obligations, but are instead offshore deposits regulated under the Offshore Banking and Trust Act; and which said offshore deposits are not protected under the DPT and the enabling legislation, the BROA.

Opposition to Leave Application

- [15] The Attorney General and the Chief Minister have raised two specific and distinct preliminary points as their grounds of objection to the Leave Application. Firstly, they contend that the Attorney General is not properly joined as a party to the proceedings on the basis that there is no decision or action on the part of the Attorney General which is capable of being the subject of review in light of the nature and substance of the subject matter of the present proceedings. Secondly, in relation to the Chief Minister, they say that there is no decision or action by the Chief Minister that is susceptible to judicial review, and therefore, the Chief Minister ought to be struck out as a party to the present proceedings. It appears that in the event that these two preliminary points are decided in favour of the Attorney General and the Chief Minister that that is the end of the matter as it relates to them.
- [16] However, the court is still required to consider whether the claim for judicial review can still succeed notwithstanding the misjoinder of a party, bearing in mind the provisions of rule 8.5, CPR 2000. In this regard, the court must consider whether

some other party can be properly joined pursuant to the court's powers pursuant to rule 19.2, CPR 2000.

- [17] Notwithstanding the preliminary points raised by the Attorney General and the Chief Minister, they also take the following objections in relation to the Leave Application. Firstly, that the applicants have failed to satisfy the threshold test of a good arguable case with a reasonable prospect of success in order to succeed on the Leave Application. Secondly, they say that the Leave Application is premature for the reason that there exist no decision or action by the Chief Minister capable of being challenge by judicial review. It is for all of the aforementioned reasons that the first and second named respondents argue that the Leave Application be dismissed as it relates to them.

Whether Misjoinder of Attorney General

- [18] It appears that the Attorney General played no part in the alleged decision making process that forms the basis of the applicants' Leave Application. There is no indication in the applicants' Leave Application as to how the liability of the Attorney General arises or the necessity of the Attorney General being named as a respondent to the present proceedings.
- [19] The court is of the view that the Attorney General is not a necessary and proper party to the Leave Application and is therefore improperly joined as a party. The Leave Application, having been brought pursuant to Part 56 CPR 2000, makes it prerogative or 'crown-side' proceedings which are dissimilar to proceedings brought pursuant to the Crown Proceedings Act¹. The court is fortified in this view by the decision of the Court of Appeal of the Eastern Caribbean Supreme Court (the 'Court of Appeal') in **Quorum Island (BVI) Limited v Virgin Island Environmental Council and Another**² where it was held that:

¹ R.S.A. c. C160

² [2011] ECSCJ No 182

“Prerogative or “Crown side” proceedings are not civil proceedings under the laws of the Virgin Islands. There is no provision in the laws of the Virgin Islands that requires the Attorney General to be a necessary or proper defendant in prerogative type proceedings. However, the Attorney General may be a necessary and proper party in civil proceedings against the Crown, by virtue of section 13 of the Crown Proceedings Act. The proper defendant in prerogative proceedings is the person or authority whose decision is challenged ...”

- [20] The court is fortified in its view by sections 1 and 13 of the Crown Proceedings Act. Section 13 of the Crown Proceedings Act provides: -

“(1) Civil proceedings by the Crown may be instituted by the Attorney General but, where in any Act passed before 30th June, 1956 it is provided that any debt due to the Crown shall be sued for and recovered by a particular officer of the Crown, civil proceedings by the Crown for the recovery of such debt may be instituted by that officer.

(2) Civil proceedings against the Crown shall be instituted against the Attorney General.”

In addition, “civil proceedings” is defined in section 1 of the Crown Proceedings Act where it is provided that: -

“civil proceedings” include proceedings in the High Court or the Magistrate’s Court for the recovery of fines and penalties.”

- [21] Clearly, the applicants have not shown any proper basis upon which the Attorney General has been made a party to the Leave Application. It is indiscernible from the Leave Application that the applicants contemplated joining the Attorney General on the basis of the provisions of section 13 (2) of the Crown Proceedings Act. If that was within their contemplation, then this intention was flawed. On the proper interpretation of the provision of sections 1 and 13 of the Crown Proceedings Act, a claim for judicial review does not fall within the species of civil claims and remedies covered by the Crown Proceedings Act.

Whether EXCO can be substituted as a party in place of the Attorney General

- [22] Not surprisingly, the applicants have sought to apply to have EXCO substituted as a party to the Leave Application in place of the Attorney General. It appears that this amounts to a concession by the applicants that the Attorney General is improperly joined.
- [23] This application was opposed by the Attorney General and the Chief Minister who argued that this application was also misconceived. The Attorney General and the Chief Minister contended that EXCO is neither a party to either of the DPT's nor a trustee thereunder, and, therefore, is not responsible for determining eligibility for distribution from the DPT's. The court finds merit in this submission. Therefore, the court is constrained to find that EXCO is not a necessary and proper party to the present proceedings. The only role that EXCO played in the implementation of the Resolution Plan was with respect to the enactment of the Banking Act and the Banking Resolution Obligations Act. Notably, the applicants have not pointed out any specific decision made by EXCO that can be made the subject of judicial review by the court.

Whether Misjoinder of Chief Minister

- [24] The resolution of this issue is slightly more complex than the question of the joinder of the Attorney General as a party to the Leave Application. It appears that the applicants have joined the Chief Minister in his capacity as Minister of Finance. Therefore, the question that arises is whether there is any discernible decision or action by the Chief Minister made in his capacity as Minister of Finance that is capable of being challenged by way of judicial review.
- [25] It was submitted on behalf of the Chief Minister that there exist no decision or action on the part of the Chief Minister that is challenged or is capable of being challenged by the applicants.

- [26] The applicants, on the other hand, rely on the averments made by the Chief Minister in his press conference on 22nd April 2016, wherein he announced the Resolution Plan to buttress their argument that a decision had in fact been made by the Chief Minister.
- [27] The applicants challenge what they say is, firstly, the Chief Minister's decision to grant the Vesting Order that gave effect to the transfer of certain of the parent banks' assets and liabilities to NCBA, which said transfer excluded liability for the deposits of PBT and CCIB; and secondly, the decision that PBT's and CCIB's deposits were ineligible for protection under the DPT.
- [28] According to the applicants, the Chief Minister's decision is ultra vires since the Chief Minister did not have the power to make a Banking Business Vesting Order, the effect of which was to implement the PAA; transactions which they say were ultra vires the Receiver's and ECCB's statutory remit under section 142 of the Banking Act.
- [29] In addition, the applicants argue that the Chief Minister's decision to effect the Banking Business Vesting Order which in effect excluded the applicants' deposits from transfer to NCBA under the PAA, which by implication excluded the applicants from protection under the DPT was essentially ultra vires the Banking Act.
- [30] Further, they rely on the principle of proportionality as a ground for judicial review to the extent that they say the Chief Minister's vesting decision to exclude the applicants from protection under the DPT was in contravention of the principle of what they termed administrative consistency, and by implication has resulted in the disproportionate treatment of the applicants, which said treatment they say amounts to the unjustifiable and unfavourable treatment of the applicants compared to the treatment of other qualifying depositors of NBA and CCB.

- [31] In the premises, they contend that the decision to exclude the applicants' deposits from the DPT and the decision to vest made by the Chief Minister differentiated unfairly between the applicants and other depositors of the parent banks to the extent that it excluded PBT's and CCIB's deposits from protection under the DPT and thereby contravened the principle of consistency in administrative action.
- [32] The applicants also rely on the doctrine of legitimate expectation as a ground for judicial review on the basis that by certain statements made by the Chief Minister on or about 22nd April 2016, the Chief Minister made a promise to the depositors of the parent banks that the GOA would protect their deposits in full under the Resolution Plan. Therefore, on this basis, PBT and CCIB held the legitimate expectation that their deposits would be fully protected under the DPT.
- [33] Relying on the abovementioned grounds for judicial review, the applicants seek to obtain leave to apply for judicial review in order to obtain the following relief:
- (a) An order of certiorari to quash the vesting decision of the Chief Minister.
 - (b) A Declaration that in making the vesting decision the Chief Minister had acted unlawfully.
 - (c) A Declaration that the Chief Minister is bound to treat the Chief Minister's promise and the legitimate expectation engendered by it as not discharged until it approves a vesting order under which liability for the applicants' deposits in the sum of EC\$2.8M per deposit is transferred to NCBA.
 - (d) A Declaration that in deciding to exclude the applicants from the DPT the Chief Minister acted unlawfully.
 - (e) A Declaration that the applicants' deposits held by CCB and NBA and the applicants are entitled to be treated as beneficiaries under the DPT in respect of their deposits.

- [34] The Chief Minister denies the existence of what the applicants assert as a decision made by the Chief Minister to grant a Vesting Order with a Vesting Decision excluding them from eligibility for distribution of funds from the DPT. The Chief Minister denies making any Vesting Order in the manner alleged by the applicants or at all.
- [35] It was quite rightly contended on behalf of the Chief Minister that the Chief Minister is not a party to either of the two DPT; nor is he a trustee under either of the two DPT. Therefore, it was argued that the Chief Minister is not responsible for determining any party's eligibility for distribution under the DPT.
- [36] It appears that the resolution of this issue lies within the context of the obligations of the Chief Minister in his capacity as Minister of Finance under the Banking Act and the Banking Resolution Obligations Act. The question that presents itself is whether the Minister of Finance made any decision or performed any act that was outside his statutory remit under the legislative regime that would substantiate a claim for judicial review. If the answer to this question is in the negative, then clearly, there can exist no ground for judicial review in the case of the Chief Minister in his portfolio as Minister of Finance. The clear result being that the applicants' Leave Application is premature.
- [37] A proper reading of the relevant provisions of the Banking Act and the Bank Resolution Obligations Act places the role of the Minister of Finance in its proper context and highlights the operative scheme of the legislative regime. The tenor and wording of the legislative scheme supports the view that the conduct of the Receiver is subject to the direction and general oversight of the ECCB and not the Minister of Finance. The Minister of Finance is not authorized under either the Banking Act or the Bank Resolution Obligations Act to direct the Receiver or to make any decision touching and concerning the DPT.

- [38] The Receiver was appointed by the ECCB pursuant to section 137 of the Banking Act. The powers and duties of the receiver so appointed is regulated by the ECCB pursuant to sections 140 and 182 of the Banking Act³.
- [39] The powers of the Receiver in relation to PAAs are set out in section 142 of the Banking Act⁴. Clearly, the provisions of section 142 do not impose any obligation or confer any powers on the Minister of Finance in relation to the decision to enter into a PAA or the making of decisions in relation to the same. The power to enter into a PAA is the sole province of the Receiver, subject to the direction, control and oversight of the ECCB.
- [40] The two DPTs were established and executed pursuant to the Bank Resolution Obligations Act for the purpose of protecting as beneficiaries, the large depositors of the NBA and CCB. The resolution plan involved the resolution of NBA and CCB to be implemented by the ECCB, GOA and the Eastern Caribbean Asset Management Corporation ('ECAMC') in accordance with the Banking Act.
- [41] The extent of the GOA's obligations under the Resolution Plan was limited to payments to the DPT in support of the resolution of NBA and CCB out of the

³ **140.** (1) The receiver shall act in accordance with Regulations made pursuant to section 182, directions, and prudential standards issued by the Central Bank at any time in the course of the liquidation, and shall be accountable only to the Central Bank for the performance of its duties and its exercise of its powers as receiver.

⁴ **142.** (1) The receiver may, transfer any asset or liability of the licensed financial institution or licensed financial holding company without obtaining any approval, assignment, or consent with respect to the transfer and assumption.

(2) The receiver may, upon the prior written approval of the Central Bank and according to its directions, pursue the following activities –

- (a) dispose of any part or all of the licensed financial institution's or licensed financial holding company's assets and liabilities through a purchase and assumption transaction with an acquiring financial institution or licensed financial holding company;
- (b) transfer part or all of a licensed financial institution's or licensed financial holding company's assets and liabilities to a bridge financial institution by one or more Participating Governments.

Consolidated Fund⁵. Based on the provisions contained in the Bank Resolution Obligations Act, no power is conferred on the Minister of Finance to actively or in any other way exercise control over or participate in the administration of the DPT.

[42] Furthermore, the statutory regime implemented by the Banking Act and the Bank Resolution Obligations Act did not confer any rights, duties or obligations on the Chief Minister in his capacity as Minister of Finance to enter into or direct the terms and conditions of the PAA pertaining to either deposits of PBT or CCIB held in NBA or CCB. All that the GOA was concerned with was the establishment of the bridge financial institution, namely, NCBA.

[43] The court has great difficulty accepting that there was any decision on the part of the Chief Minister to exclude the deposits of PBT and CCIB in the Resolution Plan executed via the medium of the PAA and the DPT. It appears that this was entirely a matter for the Receiver and the ECCB.

[44] The first and second respondents rely on the contents of the 1st Affidavit ('Harrigan 1') of Mr. Aidan Harrigan ('Mr. Harrigan'), Permanent Secretary in the Ministry of Finance which sets out at paragraph 14 thereof the structure and mechanics of the PAA, the DPT and the Banking Vesting Order. Paragraph 14 of Harrigan 1 states:

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"No Banking Vesting Order has been made by the Chief Minister transferring assets and liabilities of either NBA or CCB to NCBA. Nor may such Banking Vesting Order be made by the Chief Minister unless and until the "put-back" is finalized ..."

[45] According to Harrigan 1, the DPT Deeds in relation to CCB, NBA and NCBA was executed on 30th June 2017 pursuant to the Bank Resolution Obligations Act. Harrigan 1 states, in effect, that the Chief Minister was neither a party to either of the DPT, nor a trustee thereunder, nor is the Chief Minister responsible for determining eligibility for distribution under either of the DPT.

⁵ Sections 2 and 5 Bank Resolution Obligations Act, 2016

[46] Mr. Harrigan says at paragraph 19 of Harrigan 1 that: -

“Whether monies placed with NBA or CCB are or are not deposits eligible for protection under the Trust (the DPTs) has never been determined by the Chief Minister.”

[47] The court is aware that PBT and CCIB were both offshore subsidiaries of NBA and CCB and were put into administration by the High Court (Anguilla Circuit) upon application made by the Financial Services Commission (‘FSC’) under the Trust Companies and Offshore Banking Act and the Financial Services Commission Act on 22nd February 2016, that is, prior to the execution of the PAA and the DPT.

[48] Therefore, it is clear that the offshore deposits of PBT and CCIB held at NBA and CCB could not possibly be eligible for protection under the respective DPT. This is the case for the simple reason that the court ordered administration at the behest of the FSC conferred jurisdiction and control over these deposits on the administrator so appointed. In the premises, the Receiver, having been appointed by the ECCB under the Banking Act, which Banking Act is primarily concerned with the regulation of domestic banking business and not offshore banking business⁶, had no authority to deal with these deposits under the Resolution Plan. Therefore, it is to the FSC and the Administrator that the applicants ought to address their concerns.

[49] Section 2 (2) of the Trust Companies and Offshore Banking Act exempts a domestic bank that holds an offshore banking license from the provisions of the Banking Act in respect of offshore banking business and is only subject to the provisions of the Banking Act in respect of banking business other than offshore banking business.

⁶ Section 1 of the Trust Companies and Offshore Banking Act defines “offshore banking business” thus: “offshore banking business” means banking business carried on in or from Anguilla in a currency other than Eastern Caribbean dollars with a non-resident of Anguilla.

- [50] Section 1 of the Financial Services Enactments Regulations provides that the Trust Companies and Offshore Banking Act shall be prescribed as “Financial Services Enactments” for the purposes of the Financial Services Commission Act.
- [51] The Financial Services Commission Act empowers the FSC to take enforcement action against a licensee⁷, if in the opinion of the FSC, the licensee has contravened the Financial Services Commission Act or a financial services enactment⁸, is carrying on, or is likely to carry on, business in a manner detrimental to the public interest of any of its customers or creditors⁹, is likely to become insolvent¹⁰ or where the FSC is of the opinion that the FSC is entitled to take enforcement under a provision in a financial services enactment.
- [52] The FSC has a myriad of enforcement options available to it under the Financial Services Commission Act¹¹. Where the FSC is entitled to take enforcement action under section 35 (1), one of the powers that it may exercise included the application to the court for a protection order pursuant to section 37 of the Financial Services Commission Act.
- [53] The FSC may apply to the court for a protection order to protect or preserve the business or property or the interest of the person’s customers, creditors or the public¹² which includes an order appointing an administrator to take over and manage the person’s business, or any other part of that business¹³.
- [54] Therefore, the court is of the considered view, that in the absence of any evidence of a PAA being made between the Receiver, NCBA and any other necessary and proper party in relation to those deposits of PBT and CCIB held at NBA and CCB, it cannot be assumed in a vacuum the mere existence of such a PAA involving the

⁷ Section 35 (1)

⁸ Section 35 (1) (i)

⁹ Section 35 (1) (iii)

¹⁰ Section 35 (1) (iv)

¹¹ Section 35 (2)

¹² Section 37 (2)

¹³ Section 37 (2) (b)

transfer of those assets and liabilities of NBA and CCB that are the subject of the present proceedings to the holding or bridging bank (NCBA) without more. No evidence of such a transfer has been presented by the applicants. In the circumstances, the court is constrained to hold that the deposits of PBT and CCIB held with NBA and CCB were not part of the Resolution Plan, and therefore did not fall to be transferred pursuant to section 142 of the Banking Act, and consequently could not have been transferred to NCBA under any PAA.

[55] In the circumstances, by operation of law and not by virtue of any readily discernible decision by the Chief Minister, the Receiver or ECCB, were the deposits of PBT and CCIB held with NBA and CCB excluded from the DPT. They simply did not qualify in light of the existing statutory framework. Therefore, it would elude and preclude good reason and common sense to infer that the offshore deposits of PBT and CCIB were excluded from the DPT by any active decision on the part of the Chief Minister, the Receiver or the ECCB.

[56] In determining the question of whether the Chief Minister had the power to determine eligibility for distribution of any depositor under the DPT the court is also guided by the provisions of section 152 of the Banking Act. This statutory provision clearly shows that eligibility for distribution is the sole province of the ECCB and the Receiver.

Whether claim for judicial review premature

[57] The applicants' Leave Application is also premature with respect to the Receiver and the ECCB. Notwithstanding that the 'no opposition' position adopted by counsel appearing for the Receiver and ECCB, the court is still mandated to determine whether leave ought to be granted on the basis of the applicants having established that there exist a good arguable case with a reasonable prospect of success.

- [58] The argument advanced by the Chief Minister is that the Leave Application is premature since the provisions of section 7 of the Bank Resolution Obligations Act and section 174 of the Banking Act have not crystalized. In these circumstances, they say that there can be and there is not in existence any Banking Business Vesting Order made by the Minister of Finance which is capable of being the subject of judicial review.
- [59] A proper construction of the relevant provisions of the Banking Act confirms the prematurity of the Leave Application. Section 174 of the Banking Act sets out the mechanism that operates when an agreement has been entered into for the acquisition by a licensed financial institution or licensed financial holding company ('transferee financial institution') of the undertaking of a transferor financial institution to which the Banking Act applies.
- [60] It appears that a transfer contemplated by section 174 of the Banking Act occurs under the supervision and general oversight of the ECCB¹⁴. After undertaking its due diligence, the ECCB may, in its discretion, make a recommendation to the Minister of Finance to make a Banking Business Vesting Order transferring to and vesting in the transferee financial institution the undertaking of the transferor financial institution.
- [61] In the present case, no PAA has been executed and Banking Business Vesting Order made in respect of the deposits held by PBT and CCIB in NBA and CCB. The applicants complain that the 'decision' or the failure to execute PAAs and Banking Business Vesting Orders in respect of their offshore deposits held at NBA and CCB deprived these deposits from protection under the DPT. The court finds this argument to be untenable insofar as it attempts to place liability for this failure on the Chief Minister. Based on the above cited legislative provisions, the Chief Minister clearly has no part to play in deciding whether a PAA is executed or a Banking Business Vesting Order is made. This appears to be entirely a matter for

¹⁴ Section 174 (2)

the Receiver and the ECCB. It is only after a recommendation is made by the ECCB can the Minister of Finance make a Banking Business Vesting Order.

- [62] In the premises, the court is constrained to hold that there has been no decision on the part of the Chief Minister in his capacity as Minister of Finance to either transfer deposits of PBT and CCIB to NCBA by a PAA, and by implication the making of a Banking Business Vesting Order in relation thereto.

Whether Arguable Case with Reasonable Prospect of Success

- [63] Based on the court's findings in relation to the Attorney General and the Chief Minister, there is no need to consider the question of whether the threshold test for the grant of leave to apply for judicial review has been met in relation to them.
- [64] However, notwithstanding the Receiver's and the ECCB's posture towards the Leave Application, the court must of necessity consider the question of whether the threshold for the grant of leave to apply for judicial review has been met by the applicants in relation to the Receiver and the ECCB.
- [65] The Leave Application was heard *inter partes*, the court having ordered a hearing in open court. The court was minded to order a hearing at the leave stage because it appeared that a hearing was desirable in the interest of justice and also in light of the interim orders sought by the applicants in relation to disclosure.
- [66] In arriving at the conclusion that the court should ultimately decide whether leave should be granted, notwithstanding that the Receiver and the ECCB did not oppose the application for leave, the court is guided by the Supreme Court of Jamaica in **Regina v Industrial Disputes Tribunal ex parte J. Wray and Nephew Limited**¹⁵. In that case, the Attorney General did not object to the grant of leave. The Attorney General held the view, and submitted to the court, that the threshold for leave was very low, and that this implied that given this non-

¹⁵ Claim No 2009 HCV 04789 (Supreme Court of Jamaica)

objection, then leave should be granted as a matter of course. Sykes J. in delivering the judgment of the court said:

“Respectfully, I must say that whether the Attorney General chooses to oppose or remain neutral on the application cannot be taken into account because Part 56 places the duty on the court to decide whether leave should be granted.”¹⁶

[67] The threshold test for the grant of leave is that the application must present an arguable case with a realistic prospect of success¹⁷. After examining the development of the law on judicial review and explaining what is now the threshold test to be satisfied if leave is to be granted, Sykes J. in **ex parte J. Wray and Nephew Limited** made the following observations¹⁸:

“The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone... The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in light of the now stated approach. Thus the practice ..., of not opposing applications for leave ... cannot be the legal standard applied by the courts. It also means that an application **cannot simply dressed up in** the correct formulation and hope to get by. An applicant cannot cast about expressions such as “ultra vires”, “null and void”, “erroneous in law”, “wrong in law”, “unreasonable”, without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions.”

[68] In deciding whether an arguable case with a reasonable prospect of success has been established, the court is not required to conduct a hearing or arrive at a decision in the substantive matter. The court must examine and assess the material before it before arriving at the conclusion that the complaints made in the affidavit in support of the leave application discloses no reasonable basis upon which the court can competently grant leave.

¹⁶ At para. 49

¹⁷ Sharma Browne-Antoine and others [2006] UKPC 57; [2007] 1 WLR 780

¹⁸ At paras. 58 et seq.

[69] In the present case, the affidavit relied on by the applicant merely states the allegations of fact upon which the applicant relies in support of the grounds upon which leave is sought. The Leave Application goes no further in presenting evidence to support these facts or the evidence in support of the grounds upon which they rely. To a large extent, Leave Application seems to point to mere conjecture.

[70] There are two other matters that has captured the court's attention when determining whether the applicants had met the required threshold for the grant of leave. Firstly, one of the interim reliefs sought by the applicants on the Leave Application were orders for disclosure of various documents which the applicants say is relevant to their claim for an administrative remedy and likely to buttress their case on the substantive claim. Secondly, the court has considered the provisions of section 184¹⁹ of the Banking Act which sets out the manner in which the court's powers should be exercised in legal claims against the ECCB and a Receiver appointed under the provisions of the Banking Act in respect of actions taken by them under the relevant provisions of the Banking Act. The court will deal with the latter consideration first.

Immunity

[71] The court, having considered the provisions of section 184 of the Banking Act, is of the view that even if the applicants were to succeed on a claim for judicial

¹⁹ 184. (1) In any court proceedings under this Act, the Court shall take into consideration the public interest.
(2) In considering the public interest, the Court shall have regard to—
(a) the critical importance of financial stability to the public interest;
(b) the importance of permitting the Central Bank to discharge its functions in an expeditious and efficient manner in the interest of maintaining financial stability.
(3) Any action under this Act by the Central Bank, official administrator or receiver that is the subject of any court proceedings shall be allowed to continue unrestricted notwithstanding the challenge or review before the Court.
(4) Where the Court is satisfied in any proceedings under this Act that—
(a) a remedy in damages is available to the person who seeks relief; and
(b) it would be just in all the circumstances, having regard to the public interest, to limit relief to an award of damages, the Court shall limit relief in such proceedings to an award of damages.

review the court would be constrained to apply the provisions of section 184 of the Banking Act. Any declaratory relief or prerogative writ granted by the court would inevitably be a pyrrhic victory for the applicants.

[72] In determining whether to grant leave, the court also considered the provisions of section 187 of the Banking Act²⁰ which appears to grant immunity to the Receiver appointed under Part 10 of the Banking Act with respect to acts performed or omissions made by them in their official capacities in good faith except in the case of fraud, gross negligence or willful recklessness. Therefore, the immunity enjoyed by the Receiver is not absolute and is circumscribed by the Banking Act.

[73] The Leave Application does not rely on any of the matters contained in section 187 of the Banking Act in support of any claim against the Receiver. In fact, it could not. Any such claim would have had to be founded on the basis of a private law remedy, namely, one for the recovery of damages. The Leave Application is premised on public law remedies.

Proportionality

[74] In any event, the applicants, in setting out their grounds for judicial review, have alluded tangentially to the suggestion that the ECCB and the Receiver have acted in a discriminatory manner and/or in bad faith by effectually excluding PBT's and CCIB's deposits from protection under the DBT. The court is of the view that these allegations are not supported by the material presented before the court on the Leave Application. Also, the applicants have not attacked the provisions of section 184 and 187 of the Banking Act on the basis that they are unconstitutional or that the alleged actions of the Receiver and the ECCB in keeping with their statutory

²⁰ 187. The official administrator appointed under Part 9 of this Act and the receiver appointed under Part 10 shall be immune from legal process with respect to acts performed or omissions made by them in their official capacity in good faith except where such acts or omissions are as a consequence of fraud, gross negligence or willful recklessness on the part of the official administrator and the receiver.

remit operates in a manner that is discriminatory or results in unequal treatment to the extent that a constitutional challenge to their actions is merited.²¹

Disclosure

- [75] The applicants' claim for interim relief in the form of disclosure was denied. There is no doubt that the court must consider the question of disclosure where it appears necessary to resolve the matter in dispute fairly and justly. However, in the present case, the Chief Minister has already denied that he made or executed a Banking Business Vesting Order as alleged by the applicants.
- [76] The applicants themselves have not provided any material to prove the existence of such a Banking Business Vesting Order. It appears that the applicants are inviting the Chief Minister to disclose what clearly does not exist and cannot exist in light of the procedure set out under section 174 of the Banking Act and the explanation given in Mr. Harrigan's Affidavit in relation to the PAA and the Banking Business Vesting Orders made thereunder. The court echoes the sentiments of Dr. Alexis QC when he remarked that essentially the disclosure request made by the applicants and the disclosure order sought seeks to call on the Chief Minister to prove a negative which is highly intolerable.
- [77] The applicants' disclosure request and interim disclosure order fortifies the point that the Leave Application clearly does not point to any discernible decision that was made by the Chief Minister with respect to the PAA and the Banking Business Vesting Order. The disclosure request and the interim relief sought by the applications on the Leave Application, in the court's view, amounts to nothing more than a fishing expedition.
- [78] Having considered the applicants' case, it is the court's respectful view that the issues raised by the applicants are merely argumentative and do not necessarily

²¹ See: *Stone Capital Limited v Attorney General of Trinidad and Tobago* CV 2012 – 04383 (28 November 2013)

present a good arguable case with a reasonable prospect of success. The grant of leave and a substantive hearing of the issues raised herein by the applicants may very well result in an exercise in futility for the reasons already stated in this judgment. The court is of the considered view that the issues raised by the applicants may more conveniently be disposed of at the leave stage rather than on a substantive hearing. In the circumstances, the application for leave is refused.

Order

[79] In the circumstances, the court's order is as follows: -

1. The Honourable Chief Minister and the Honourable Attorney General are struck out as parties to these proceedings.
2. The applicants' claim for leave to apply for judicial review is refused.
3. Costs to the respondents to be assessed in accordance with **CPR Part 65.11** and **65.12** within 21 days of this order unless otherwise agreed.

Shawn Innocent
High Court Judge

By the Court

Registrar