

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2020/0001

BETWEEN:

**[1] NATIONAL BANK OF ANGUILLA (PRIVATE BANKING
AND TRUST) LIMITED (in administration)**

**[2] CARIBBEAN COMMERCIAL INVESTMENT BANK
LIMITED (in administration)**

Appellants

and

[1] CHIEF MINISTER OF ANGUILLA

**[2] ATTORNEY GENERAL OF ANGUILLA (Sued as the legal
representative of the Government of Anguilla/Executive Council)**

**[3] GARY MOVING AS RECEIVER OF NATIONAL BANK OF ANGUILLA
LIMITED (in receivership) and CARIBBEAN COMMERCIAL BANK
(ANGUILLA) LIMITED (in receivership)**

[4] EASTERN CARIBBEAN CENTRAL BANK

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE

The Hon. Mr. Gerard St. C. Farara

The Hon. Mde. Esco L. Henry

Chief Justice

Justice of Appeal [Ag.]

Justice of Appeal [Ag.]

Appearances:

Mr. Ronald Scipio, QC with him, Mrs. Eustella Fontaine and Ms. Yanique Stewart
for the appellants

Dr. Francis Alexis, QC and Mrs. Nakishma Rogers-Hull for the 1st and 2nd
respondents

Mr. Paul Dennis, QC with him, Mrs. Nadine White-Laing and Ms. Navine Fleming
for the 3rd and 4th respondents

2021: January 26;
July 30.

Civil appeal – Judicial review – Application by appellants for leave to seek judicial review – Rule 56.3 of the Civil Procedure Rules 2000 – Threshold test for leave to apply for judicial review – Dismissal of application by learned judge – Whether learned judge erred in dismissing application for leave to seek judicial review against third and fourth respondents – Whether learned judge wrongly considered threshold test despite non-appearance of third

and fourth respondents – Whether learned judge erred in striking out the Attorney General and Chief Minister as parties to the proceedings – Whether Attorney General and Chief Minister made any decision which can be subject to judicial review and are thereby necessary and proper parties to the judicial review application – Whether the Executive Council of Anguilla made any decision subject to judicial review and should therefore be substituted in place of the Attorney General – Whether learned judge erred in dismissing disclosure application – Costs – Rule 56.13(6) of the CPR – Whether appellants acted unreasonably in making application or in their conduct of the application to justify departure from general rule – Appellate court's approach to interference with lower court's exercise of discretion

The appellants, National Bank of Anguilla (Private Banking and Trust) Limited (in administration) ("PBT") and Caribbean Commercial Investment Bank (in administration) ("CCIB") (referred to collectively as "the subsidiary banks") are both licensed under the Trust Companies and Offshore Banking Act ("TCOBA") to conduct offshore banking business and are, respectively, the subsidiaries of National Bank of Anguilla ("NBA") and Caribbean Commercial Bank (Anguilla) Limited ("CCB") (collectively "the parent banks"). As a result of the financial crisis threatening Anguilla's banking sector, the Eastern Caribbean Central Bank ("ECCB") placed the parent banks under conservatorship, in accordance with their powers under the relevant legislation.

To protect customers' deposits and provide a solution to the financial threats, the Government of Anguilla ("GOA") and the ECCB finalised a resolution plan for Anguilla ("the Resolution Plan"). The Resolution Plan essentially entailed: (i) the transfer of assets and liabilities of each parent bank up to a maximum of EC\$2.8 million ("the threshold sum") to a new domestic bank, the National Commercial Bank of Anguilla ("NCBA"); and (ii) the creation of two Depositor Protection Trusts ("DPTs"), one for each parent bank. The DPTs were funded partly by the GOA, proceeds from non-performing loans and deposit liabilities over the threshold sum being transferred from each parent bank to its own dedicated DPT.

The public was informed of the Resolution Plan by the first respondent, the Chief Minister of Anguilla ("the Chief Minister") who commended it as a policy designed to protect the holders of deposits at the parent banks from losses. Following the announcement of the Resolution Plan, the ECCB relinquished control and conservatorship of the parent banks and appointed the third respondent, Mr. Gary Moving ("Mr. Moving" or "the receiver") as the receiver of both entities.

Mr. Moving then executed a separate Purchase and Assumption Agreements ("PAAs") with NCBA to effect transfer to it, of the assets and liabilities of the parent banks. Two DPTs were executed on 30th June 2017 among the GOA through Mr. Aidan Harrigan as Permanent Secretary in the Ministry of Finance as authorised by the Executive Council of Anguilla ("EXCO"), the trustees and the receiver in respect of the transfer of assets from NBA and CCB to NCBA.

It is only after a recommendation is made by the ECCB for the Minister of Finance to make a Banking Business Vesting Order ("BBVO") by virtue of section 174 of the Banking Act.

The appellants, being dissatisfied with aspects of implementation of the Resolution Plan, filed an application for judicial review of decisions purportedly made by the GOA and bank regulatory officials which they claimed deprived them of certain protections. Essentially, they complained that though they were large depositors of the parent banks and contrary to the legitimate expectation held out to them by the ECCB and Chief Minister, their deposits had been wrongfully and unlawfully excluded from transfer to NCBA and to the DPTs and from protection under the Resolution Plan, by the unlawful decisions of the Chief Minister, the receiver and the ECCB. They argued that they were accorded different treatment from other large depositors by the Chief Minister, the receiver and the ECCB and accordingly sought leave to seek judicial review of these decisions. They also applied for disclosure of certain documentation including the PAAs, DPTs, the relevant BBVO and the identity of the trustees. The Attorney General and Chief Minister were named as respondents to the application.

The learned judge dismissed the application for leave to seek judicial review, ordered costs to the respondents to be assessed in accordance with rules 65.11 and 65.12 of the Civil Procedure Rules 2000 ("CPR") within 21 days unless otherwise agreed and struck out the Chief Minister and Attorney General as parties to the proceedings. The learned judge held that the subsidiary banks attributed no specific decision to EXCO and therefore denied their application to substitute EXCO as a respondent in the Attorney General's place. The learned judge also dismissed the disclosure application on the basis that it was merely a fishing expedition.

The appellants have appealed to this Court advancing fifteen main grounds of appeal. The issues which arose for this Court's determination may be helpfully crystallised as follows: (i) whether the learned judge erred in striking out the Attorney General and the Chief Minister as parties to the proceedings; (ii) whether the learned judge erred in refusing to substitute the Attorney General with EXCO; (iii) whether the learned judge erred in refusing leave to apply for judicial review; (iv) whether the learned judge erred in dismissing the disclosure application; and (v) whether the judge erred in awarding costs to the respondents.

Held: dismissing the appeal; affirming the orders of the learned judge save and except that the costs awarded to the respondents is set aside; and making the orders set out in paragraph 206 of the judgment, that:

1. The issue before the learned judge, namely the consideration of an application for leave to seek judicial review, required him to exercise a judicial discretion. It is well-settled that an appellate court will interfere with a judge's discretion only if satisfied that the judge erred in principle by failing to take into account or giving too little or too much weight to relevant factors, or by having regard to irrelevant factors; and by reason of such error in principle, the learned judge's decision exceeded the generous ambit within which reasonable disagreement is possible and is therefore plainly wrong.

Dufour and Others v Helenair Corporation and Others (1996) 52 WIR 188 followed.

2. The correct defendant in judicial review proceedings is the person or authority who made the impugned decision. Accordingly, the Attorney General should only be named if he made the decision for which judicial review is being sought. In this case, the appellants have failed to establish that the Attorney General made any decision, took any action or refrained from taking a relevant decision or any action in relation to the exclusion, transfer, deposits or BBVO decisions about which they complained. It follows that in the circumstances where the learned judge has applied the correct legal principles and gave deliberate consideration to the relevant factors, there is no basis for this Court to interfere with his decision to strike out the Attorney General as a party to the proceedings.

Elmoalis Ltd v The Attorney General of Anguilla AXAHCVP2019/0002 (delivered 21st May 2021, unreported) followed; **Quorum Island (BVI) Limited v Virgin Island Environment Council and Another** [2011] ECSCJ No. 182 (delivered 12th August 2011) followed; **Bahamas Hotel Maintenance and Allied Workers Union v Bahamas Hotel Catering and Allied Workers Union and Others** [2011] UKPC 4 applied; **Minister of Foreign Affairs v Vehicles and Supplied Limited** [1991] 1 WLR 550 applied; **Dufour and Others v Helenair Corporation and Others** (1996) 52 WIR 188 followed.

3. The law and the evidence led in the court below point to the reasonable conclusion that no BBVO or exclusion decision had been made by the Chief Minister. In relation to the BBVO, this is due to the fact there was no evidence that the receiver made any application to the ECCB for the approval of a BBVO; or of an investigation by the ECCB arising from such application; or of any recommendation by the ECCB to the Minister of Finance to grant a BBVO, as contemplated by section 174 of the Banking Act. Regarding an exclusion decision by the Chief Minister, the learned judge properly considered the provisions of the TCOBA, the FSC Act, the appointment of the Administrator by court order and recognised that in light of the appointment of the administrator, he or his designee would be a necessary party to any PAA with NCBA. He correctly concluded that such a PAA could not be achieved between the receiver and NCBA without the administrator's imprimatur, and in the circumstances the appellants' deposits did not fall to be transferred by the receiver under section 142 of the Banking Act under either of the two PAAs he executed with NCBA; and it was therefore by operation of law and not by reason of any exclusion decision made by the Chief Minister that the deposits were excluded from the DPTs. Accordingly, the learned judge's determination that the Chief Minister made no judicially reviewable exclusion decision and that the leave application is premature in respect of the BBVO, cannot be faulted.

Section 174 of the **Banking Act**, Cap. B11 Revised Statutes of Anguilla as amended by Act No. 6 of 2015 considered; Section 7 of the **Bank Resolution Obligations Act**, Act No. 4 of 2016, Statutes of Anguilla considered.

4. The obligation to make disclosure of information and materials within one's own possession or knowledge will only be granted to the extent necessary to fairly and justly dispose of the issues. The learned judge acknowledged that it was incumbent

on the court to consider whether disclosure was necessary to resolve the issues fairly and justly. Although he did not express it in so many words, the disposition of the application by the learned judge suggests that he considered it unnecessary for the fair and just disposal of the application to order disclosure by the Attorney General, the Chief Minister, the receiver or the ECCB. In the premises, the learned judge did not err in dismissing the application for disclosure.

Belize Alliance of Conservation v Department of Environment et al [2004] UKPC 6 applied; **Joshua Francis v The Chief Magistrate et al** DOMHCV2016/0017 (delivered on 24th June 2016, unreported) considered; **R (al Sweady & Others) v Secretary of State for Defence** [2009] EWHC 2387 (Admin) considered; **SOF 82 Anguilla Holdings v The Attorney General** [2019] ECSCJ No. 102 (delivered 27th March 2019) considered; **Tweed v Parades Commission for Northern Ireland** [2006] UKHL 53 applied; **Marshall v Deputy Governor of Bermuda** (2010) 77 WIR 182 applied; **R v Lancashire CC, Ex P Huddleston** [1986] 2 All ER 941 considered.

5. The appellants' complaint that the judge failed to appreciate the entirety of their case in that their application was not limited to a positive decision being made by the Chief Minister, is without merit. A comprehensive review of the judgment makes it pellucid that the learned judge fully understood that the multi-faceted nature of the claim encompassed the exclusion of their deposits from transfer to the NCBA and from the DPTs.

Manning v Sharma [2009] UKPC 37 applied.

6. The learned judge's reference to the appellants as 'offshore companies' and 'offshore subsidiaries' and their deposits as 'offshore deposits' are indeed - mischaracterisations and consequently raised the question of whether in so describing them, he made a finding of fact or law that they were 'offshore companies' or 'offshore subsidiaries'. However, an analysis of the judgment demonstrates that the judge made no findings of fact that the subsidiary banks are such offshore entities in the sense that they were incorporated in another country or incorporated in Anguilla as international business companies, foreign companies or foreign subsidiary companies. The terms were merely descriptive and used in the narrative of the background. Similarly, his reference to the deposits as 'offshore deposits' was not indicative of a finding that the subsidiary banks (as non-residents) made deposits to the parent banks in a currency other than Eastern Caribbean dollars. For this reason, the learned judge correctly concluded, (having considered the relevant legislative framework in relation to who was authorised to deal with the subsidiary banks, their deposits and assets generally), that the exclusion of those deposits from the DPT was not brought about by any decision of the Chief Minister, the receiver or the ECCB but rather by operation of law.

Sections 1, 4, 5 and 6 of the **Trust Companies and Offshore Banking Act**, Cap. T60, Revised Statutes of Anguilla considered; **Financial Services Commission Act** Cap. F28, Revised Statutes of Anguilla considered.

7. Implicit in the appellants' argument is that by directing Mr. Harrigan to execute the DPTs, EXCO selected the primary beneficiaries or made some decision with respect to their eligibility or selection. However, save and except for their insistence that EXCO played a role in implementing the Resolution Plan, the appellants made no assertion in their application that EXCO had made any specific decision that could be made the subject of judicial review nor is such a contention supported by the evidence. It follows that as with the case with the Attorney General and the Chief Minister, absent a decision by EXCO, the case for its substitution in place of the Attorney General has not been established. Therefore, the judge's refusal to substitute EXCO cannot be faulted on the ground that he erred in principle and consequently made a decision which was manifestly wrong.

Elmoalis Ltd v The Attorney General of Anguilla AXAHCVP2019/0002 (delivered 21st May 2021, unreported) followed; **Quorum Island (BVI) Limited v Virgin Island Environment Council and Another** [2011] ECSCJ No. 182 (delivered 12th August 2011) followed; **Bahamas Hotel Maintenance and Allied Workers Union v Bahamas Hotel Catering and Allied Workers Union and Others** [2011] UKPC 4 applied; **Minister of Foreign Affairs v Vehicles and Supplied Limited** [1991] 1 WLR 550 applied.

8. The threshold test for the grant of leave to apply for judicial review is whether the applicant has a good arguable case with a realistic prospect of success. In the instant case, notwithstanding the non-appearance or non-objection by the ECCB or the receiver, the judge was still required to exercise his discretion and assess whether the threshold for leave as against these parties was met. Having correctly concluded that there was no evidence that the receiver and the ECCB made any decision which excluded the appellants' deposits from the PAA and the DPTs, the learned judge did not err in denying the leave application in relation to them. Additionally, the appellants' contention that they had not been afforded an opportunity to address the court on **R v Industrial Disputes Tribunal (ex parte J. Wray and Nephew Limited)** in so far as it concerns the threshold test and that this amounted to a breach of natural justice, is unjustified and unreasonable. The record reveals that the appellants were presented with this authority almost a month before they filed submissions in response and therefore had an opportunity to make counter submissions either orally or in writing had they wished to do so. It is not the function of the judge to direct counsel's attention to authorities proffered by another party and invite response line by line. That would be both onerous and run counter to the overriding objective of the CPR.

Sharma v Brown-Antoine and Others [2006] UKPC 57 applied; **R v Industrial Disputes Tribunal (ex parte J. Wray and Nephew Limited)** Claim No. 2009 HCV 04798 Supreme Court of Jamaica (delivered 23rd October 2009, unreported) considered.

9. The court may award costs against an unsuccessful applicant for judicial review only where it is satisfied that the applicant acted unreasonably in making the application or in the conduct of the application. A critical and objective assessment of the appellants' claims demonstrates that they advanced weighty factual and legal assertions and did not engage in frivolous or vexatious excursions. Their submissions before the court delved into substantive areas of the law which required a comprehensive analysis of the averred factual underpinnings and relevant law. The application to commence judicial review proceedings by them and their conduct of such proceedings cannot be justifiably characterised as being unreasonable. Nothing has been urged on the court to warrant a departure from the general rule. In the circumstances, there is no basis in law for doing so and the judge's order must be set aside.

Rule 56.13(6) of the **Civil Procedure Rules 2000** applied.

JUDGMENT

INTRODUCTION

- [1] **HENRY JA [AG.]:** This is an appeal by two banks who were placed under administration by a court order. The banks, National Bank of Anguilla (Private Banking and Trust) Limited (in administration) ("PBT") and Caribbean Commercial Investment Bank (in administration) ("CCIB"), applied to the High Court for leave to seek judicial review of decisions purportedly made by government and bank regulatory officials which they claim deprived them of certain protections. They complained that the authorities excluded them from protection under a resolution plan designed and implemented to safeguard customers' bank deposits at National Bank of Anguilla ("NBA") and Caribbean Commercial Bank (Anguilla) Limited ("CCB"). PBT and CCIB claimed that at all material times they held deposits with NBA and CCB respectively, that should have been protected. They were denied leave to apply for judicial review. They have appealed against the learned judge's decision.
- [2] PBT and CCIB are both licensed under the **Trust Companies and Offshore Banking Act** ("TCOBA")¹ to conduct offshore banking business. They are wholly

¹ Chapter T60, Revised Statutes of Anguilla.

owned by NBA and CCB and as such are their subsidiaries. For convenience, they will be referred to interchangeably as the ‘subsidiary banks’ or the ‘appellants’.

Background

- [3] Around 2013 and for a few years after, the British Overseas Territory of Anguilla was gripped in a financial crisis which threatened its banking system. Two of its domestic banks - NBA and CCB - held a sizeable market share of roughly 76% of total assets of the island’s banking sector. They were therefore caught in the crosshairs of the impending catastrophic shocks to the system. In a bid to mitigate against potential irremediable losses in the banking system and generally in the economy, the Eastern Caribbean Central Bank (“ECCB”) appointed conservators over NBA and CCB (“the parent banks”) in accordance with its powers of intervention under the Schedule to the **Eastern Caribbean Central Bank Agreement Act** (“ECCB Act”)² and the **Banking Act, 2015** (“Banking Act”).³ The appointments were made on 12th August 2013 by Notices of Intervention.
- [4] The Government of Anguilla (“the GOA”) and the ECCB eventually finalised a Bank Resolution Plan for Anguilla (“the Resolution Plan”) with technical support from the World Bank, the International Monetary Fund (“IMF”) and the Caribbean Development Bank (“CDB”). It was designed to provide a solution to the looming financial threats to the banking system and economy and to protect customers’ deposits. The Resolution Plan had a legislative element that required the enactment of a **Bank Resolution Obligations Act** (“BROA”),⁴ the **Eastern Caribbean Asset Management Corporation Act** (“ECAMC Act”)⁵ and amendments to the **Banking Act**, and the ECCB Act.⁶ Those laws would specify how aspects of the Resolution Plan would be operationalised.

² Chapter E5, Revised Statutes of Anguilla.

³ Chapter B11, Revised Statutes of Anguilla, which has since been amended by Act No. 6 of 2015.

⁴ Act No. 4 of 2016, Statutes of Anguilla.

⁵ Act No. 5 of 2016, Statutes of Anguilla.

⁶ They were passed between 2015 and 2016 and brought into force by assent of the Governor General.

- [5] Another component of the Resolution Plan was for viable assets and liabilities of each parent bank, up to a specific threshold of EC\$2.8 million ('threshold sum') to be transferred to a new domestic bank - National Commercial Bank of Anguilla Limited ("NCBA"). The new bank was formed by the GOA, as sole shareholder. The Resolution Plan also entailed the creation of two Deposit Protection Trusts ("DPTs") under the BROA. The DPTs were to be funded partly by deposit liabilities over the threshold sum being transferred from each parent bank to its own dedicated DPT,⁷ a payment from the GOA⁸ and the proceeds from non-performing loans. The non-performing loans at the parent banks were to be transferred to another new entity⁹ as part of the Resolution Plan.
- [6] On 22nd April 2016, information about the Resolution Plan was disseminated to the public by the Honourable Chief Minister of Anguilla ("the Chief Minister") through a press conference. On the same day, the ECCB Governor informed the public through, press releases. The Chief Minister commended the Resolution Plan as a policy which was designed to protect from losses, holders of deposits at the parent banks. Implementation commenced immediately with the ECCB's simultaneous relinquishing of control and conservatorship of the parent banks and the appointment of a receiver for both, in the person of Mr. Gary Moving ("Mr. Moving").
- [7] On the same day, Mr. Moving in his role as receiver executed separate Purchase and Assumption Agreements ("PAAs") with NCBA to effect the transfer to it of the parent banks' viable assets and liabilities. The two DPTs were made on 30th June 2017 among the GOA as settlor, the trustees and the receiver. On instruction from the Executive Council of Anguilla ("EXCO"), the Permanent Secretary in the Ministry of Finance, Mr. Aidan Harrigan executed the DPTs on behalf of the GOA.
- [8] On 10th March 2017, the subsidiary banks signaled their dissatisfaction with the implementation of the Resolution Plan. They filed a notice of application for judicial

⁷ Also referred to as 'the Trust Deed'.

⁸ In the amount of EC\$52 million as specified under the BROA.

⁹ The Eastern Caribbean Asset Management Corporation.

review in which they claimed to be depositors of the parent banks. They complained that by the unlawful decisions of the Chief Minister, the receiver and the ECCB, their deposits had been wrongfully and unlawfully excluded from transfer to NCBA and to the DPTs and from protection under the Resolution Plan.

- [9] In the court below, they claimed that they held qualifying deposits with the parent banks. They claimed further that contrary to the assurances of the Chief Minister at the press conference and the promises of the ECCB's Governor in the press release, their deposits were not protected by transfer to NCBA under the PAAs or through the DPTs. They accused the Chief Minister, the receiver and the ECCB of thereby, according to them, treatment that was different from other similarly placed depositors whose deposits had been transferred to NCBA and were protected by the DPTs.
- [10] They alleged that the impugned decisions were unlawful, unfair, administratively inconsistent and effected contrary to legitimate expectations which were held out to them by the Chief Minister and the ECCB. They sought leave to seek judicial review of decisions that they attributed to the Chief Minister, the receiver and the ECCB (referred to collectively as "the respondents") in the implementation of the Resolution Plan. They also applied for disclosure of certain documentation. The Honourable Attorney General ("the Attorney General") was named as a respondent. The receiver and the ECCB did not oppose the application.
- [11] The hearing was held on 12th December 2019. The learned judge ruled¹⁰ that the Chief Minister and Attorney General had made no decisions which were reviewable, accordingly he struck them out as respondents to the proceedings. He held that the subsidiary banks had attributed no specific decision to EXCO, and he denied their application to substitute EXCO as respondent in place of the Attorney General. He refused them leave to apply for judicial review as against the receiver and the ECCB. He awarded costs to the respondents.

¹⁰ Judgment delivered on 3rd February 2020.

- [12] The subsidiary banks have appealed the decision. They contend that the learned judge made factual and legal errors in arriving at his determination and that his determination is blatantly wrong. They seek an order setting aside the judgment in its entirety and costs. The appeal was rigorously contested. It is allowed in part, in respect of the costs issue for the reasons outlined in this judgment.

Issues

- [13] The issues arising in this appeal are whether the learned judge erred in:
- 1 (a) striking out the Attorney General and the Chief Minister as parties to the claim ('the striking out issue'); and
 - (b) refusing to substitute the Attorney General with EXCO ('the substitution issue');
 2. refusing leave to the subsidiary banks to apply for judicial review of the impugned decisions of the ECCB and the receiver, by reason that the application was premature ('the leave issue');
 3. dismissing the application for disclosure ('the disclosure issue'); or
 4. awarding costs to the respondents ('the costs issue').
- [14] The conduct about which the subsidiary banks have complained, took place within the setting of certain corporate and regulatory relationships which are governed by different legislative and regulatory regimes. Full appreciation of the associated interplay would not be possible without an understanding of those laws. A more comprehensive contextual background is also essential. Therefore, I propose to summarise aspects of those laws and reproduce some of the provisions to set the stage for exploration of the appellants' appeal.

The Legislative Framework

- [15] The ECCB has exclusive responsibility for the licensing of local financial institutions that conduct domestic banking business. The **Banking Act** contains provisions to

govern the licensing and receivership of domestic financial institutions, and matters relating to the transfer of an undertaking from one to another. The sections which are relevant to these proceedings are 1, 137 (1)(a), 140, 142, 152, 174 -175,184 and 187.

[16] 'Banking business' is defined under section 1 of the **Banking Act** to mean: -

“...the business of receiving funds through ---

(a) the acceptance of monetary deposits which are repayable on demand or after notice or any similar operation,

(b) the sale or placement of bonds, certificate, notes or other securities,

and the use of such funds, either in whole or in part, for loans or investment and includes any other activity recognised by the Central Bank as constituting customary banking practice and which a financial institution may additionally be authorised to do”.

[17] 'Foreign financial institution' and 'local financial institution' are defined respectively as, 'a financial institution formed under the laws of a country other than Anguilla which carries on banking business in Anguilla;' and 'a financial institution formed under the laws of Anguilla'.

[18] Section 137 of the **Banking Act** authorises the ECCB to appoint a receiver for a licensed financial institution in a number of circumstances. The ECCB is mandated to publish notice of such appointment in the Gazette and at least one local newspaper, for the benefit of the public and particularly depositors, creditors and stakeholders.¹¹ On appointment, the receiver becomes the sole legal representative of the licensed financial institution in receivership.¹² However, he is obligated to act during the liquidation in accordance with Regulations made under section 182 of the **Banking Act** and any directions and prudential standards issued by the ECCB.¹³

¹¹ See section 139 of the Banking Act.

¹² See section 141 of the Banking Act.

¹³ See section 140 (1) of the Banking Act.

The ECCB also plays a role¹⁴ in directing the payment of secured and unsecured claims during liquidation of a licensed financial institution.

[19] The receiver is given wide powers to dispose of the assets and liabilities of the licensed financial institution in receivership, but only with the ECCB's prior written approval.¹⁵ Those powers include entering into a PAA with another financial institution. In this regard, the **Banking Act** provides: ¹⁶

“142. (1) The receiver may transfer any asset or liability of the licensed financial institution...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 part or all of the licensed financial institution's ... assets and liabilities through a purchase and assumption transaction with an acquiring financial institution...; or

(b) transfer part or all of a licensed financial institution's ... assets and liabilities to a bridge financial institution by one or more Participating Governments.' (underlining supplied)”

[20] The **Banking Act** contemplates that the transfer by the receiver of assets and liabilities from one to the other licensed financial institution is consummated with the making of a Banking Business Vesting Order ('BBVO') by the Minister of Finance, on receipt by him of a recommendation from the ECCB that he may make such a BBVO. The process for the grant of a BBVO is initiated by the transferor licensed financial institution making an application to the ECCB. The application is made only after an agreement has been entered into for sale by the transferor licensed financial institution of its undertaking to the transferee licensed financial institution. On receipt of the application, the ECCB must carry out an investigation

¹⁴ Pursuant to section 152 of the Banking Act.

¹⁵ See section 142 of the Banking Act.

to ascertain, among other things, whether the transferee satisfies the prudential and other legal obligations attendant on the transfer.

[21] The entire procedure is described in section 174 of the **Banking Act** in the following terms:

“174. (1) Where an agreement has been entered into for the acquisition by a licensed financial institution ... (herein referred to as the “transferee financial institution”) of the undertaking of another financial institution ..., whether or not a financial institution ... to which the provisions of this Act apply (herein referred to as the “transferor financial institution”) the transferor financial institution may, for the purpose of effecting the transfer to, and the vesting in, the transferee financial institution of the undertaking, make a written application to the Central Bank, notice of which shall be published in the *Gazette* in any case where the Central Bank so directs.

(2) Upon the making of an application under subsection (1), the Central Bank shall investigate the application including in particular the circumstances leading to the proposed transfer, the ability of the transferee to discharge its obligations under the transfer and the effect, which the transfer is likely to have on the banking services available to the public.

(3) On completion of the investigation, the Central Bank may, if it thinks fit, make a recommendation to the Minister to make a Banking Business Vesting Order transferring to and vesting in the transferee financial institution the undertaking, as from the date specified therein, and on the making of such an order, all such existing property, rights, liabilities and obligations as are intended by the agreement to be transferred and vested shall, by virtue of this Act, and without further assurance be transferred to, and shall vest in, the transferee financial institution to the intent that the licensed financial institution shall succeed to the whole or such part of the undertaking of the transferor financial institution as is contemplated by the agreement.” (underlining supplied)

[22] Section 175 (1) and (3) of the Banking Act provides that the effect of the BBVO is to vest in the transferee financial institution, with effect from the date of transfer, all property or rights of the transferor which is the subject of the PAA between them. The transfer and vesting also conveys to the transferee financial institution any

powers, provisions, liabilities and obligations which are attached to the transferred property.

- [23] Parliament has bestowed certain powers and authority on the ECCB under the Banking Act. This is congruent with the ECCB's regulatory function under the ECCB Act. In this regard, the ECCB is constituted under the ECCB Act as the exclusive monetary authority of financial institutions licensed to conduct domestic banking business in Anguilla and 7 other states and territories that have formalised treaty obligations for joint supervision and regulation of domestic banks. The treaty has the force of law in Anguilla¹⁶ and is included as the Schedule to the ECCB Act.
- [24] The ECCB was established as a corporate body to, among other things, regulate the availability of money and credit and promote and maintain monetary stability within the Eastern Caribbean Currency Union ("ECCU").¹⁷ The ECCB is empowered to take such steps as it considers necessary 'to protect the interests and preserve the rights of depositors and creditors' of any licensed financial institution in the ECCU in general and in Anguilla, if in the ECCB's opinion, the interests of the depositors and creditors are threatened.¹⁸
- [25] The highest decision-making authority of the ECCB is the Monetary Council which consists of one Minister of each of the 8 Participating Governments.¹⁹ The decisions of the Monetary Council are made collectively and represent the policy directive of the ECCB, not the individual members.²⁰ At all relevant times, Anguilla's representative was the Minister of Finance who happens to be the Chief Minister.
- [26] By Notices of Intervention under hand of the ECCB's Governor on 12th August 2013, the ECCB signified that it was of the opinion that the current situation at the

¹⁶ Section 2 of the ECCB Act.

¹⁷ Articles 3 and 4 of the Schedule to the ECCB Act.

¹⁸ Article 5B of the Schedule to the ECCB Act.

¹⁹ Article 7 of the Schedule to the ECCB Act.

²⁰ Articles 7(2) and 4 of the Schedule to the ECCB Act.

parent banks has 'threatened the interests of depositors and creditors of the Bank; that the Bank was likely to become unable to meet its obligations should the situation persist; and the financial situation in Anguilla is in danger of disruption, substantial damage, injury or impairment as a result of the prevailing circumstances.'²¹ The ECCB assumed control of the parent banks and appointed conservators to manage them. This continued until 22nd April 2016, when the ECCB relinquished control of the parent banks, by respective Notices of Relinquishment of its Governor.²²

[27] On a parallel legislative track to that for the domestic banking system, the Parliament of Anguilla made provision for licensing of persons to conduct offshore banking business in that country. Responsibility for licensing, supervision and regulation of such banks is vested exclusively in the Financial Services Commission ('FSC') pursuant to the **Financial Services Commission Act** ("FSC Act")²³ and the TCOBA.²⁴ The latter provides that the holder of an offshore banking license is exempt from the provisions of the Banking Act, in relation to any offshore banking business conducted by that person. This emphasises that the **Banking Act's** applicability to an offshore banking licensee is limited to domestic banking business carried out by that licensee. Furthermore, the TCOBA defines 'domestic bank' to mean 'a person holding a license under the Banking Act'.

[28] The TCOBA defines 'offshore banking business' to mean 'banking business carried on in or from within Anguilla in a currency other than Eastern Caribbean Dollars with a non-resident of Anguilla'.²⁵ There is common ground among the parties that the subsidiary banks were licensed under the TCOBA to carry on offshore banking business²⁶ and that they were not licensed to conduct domestic banking business

²¹ See Notices of Intervention exhibited as 'WT4' to the affidavit of William Tacon filed on 10th March 2017.

²² Under Article 5E(2)(b) of the Schedule to the ECCB Act. See copies exhibited to the affidavit of William Tacon filed on 10th March 2017.

²³ Chapter F28, Revised Statutes of Anguilla, see section 3.

²⁴ Sections 4, 5 and 6.

²⁵ Section 1 (1).

²⁶ Tacon 2, paras. 6 and 7.

under the **Banking Act**. It follows that they are not subject to regulation or supervision by the ECCB under the provisions of the **Banking Act**, but only to supervision by the FSC Commissioner under the TCOBA and the FSC Act.

[29] The FSC is authorised to take any necessary enforcement action in relation to an offshore banking licensee. It may apply to the court for a protection order to protect or preserve such a licensee's business or property or the interests of its customers, creditors or the public.²⁷ A protection order may provide for the appointment of an administrator to take over and manage such a licensee's business or any part of that business.²⁸ The subsidiary banks were placed into administration under those provisions. I turn next to highlight the laws enacted to facilitate implementation of the Resolution Plan.

[30] The BROA establishes the procedure by which the DPTs were to be funded. Sections 2 and 5 of the BROA provide respectively:

"2. The Government of Anguilla shall pay to the Social Security Board and the Depositor Protection Trusts the sums specified in Schedules 1 and 2 on the terms set out therein in support of the resolution of NBA and CCB.

...

5. (1) **The Minister shall –**

(a) **appropriate out of the Consolidated Fund the sums necessary** to make the payments in accordance with section 2; and

(b) **ensure that the Accountant General makes the necessary payments** on the specified due dates.

(2) Notwithstanding subsection (1) a payment shall not be deemed to be outstanding because the –

(a) payment has not been made because the instruction to pay was not given; or

(b) requisite instruction for payment has not been given.”
(emphasis mine)

²⁷ Section 37 of the FSC Act.

²⁸ Section 37(2)(b) of the FSC Act.

- [31] Section 2 directs the GOA to pay to the respective DPTs the monies specified in the Schedule, as envisaged by the Resolution Plan. The Minister of Finance is empowered under section 5 to appropriate those sums from the Consolidated Fund and to ensure that the payments are made by the Accountant General on the due dates. In passing, I note that the mechanism outlined here necessarily mirrors the procedure by which sums are appropriated from the Consolidated Fund under the **Finance Administration and Audit Act**.²⁹ It is also important to emphasise that under the **Banking Act** and the BROA the relevant functionary is the Minister of Finance. Therefore, when the Chief Minister exercises any statutory authority under those laws, he does so not as Chief Minister but in his capacity as Minister of Finance.
- [32] **The Eastern Caribbean Asset Management Corporation Agreement Act** ("ECAMCA Act") provides for non-performing loans of the parent banks to be transferred to the Eastern Caribbean Asset Management Corporation ("ECAMC"), a newly created entity. Some of the proceeds realised from the non-performing loans were earmarked to fund the DPTs.
- [33] The referenced provisions embody the legislative and regulatory environment within which the subsidiary and parent banks conducted their particular type of banking business. They also highlight the functions of the Minister of Finance and the receiver within the overall banking system. Lastly, they detail the statutory framework which was enacted specifically to govern the implementation of the Resolution Plan.
- [34] The subsidiary banks were represented in these proceedings by Mr. William Tacon - their court appointed administrator. By order dated 22nd February 2016, the High Court constituted him administrator for both subsidiary banks 'pursuant to section 31(2)(b)'³⁰ of the FSC Act. The court order arose out of a Notice of

²⁹ Chapter F27, Revised Statutes of Anguilla, see sections 22, 23 and 24.

³⁰ The reference to 'section 31' is obviously a typographical error. The correct provision is section 37(2)(b).

Application ('NOA') and Fixed Date Claim Form ('FDCF') filed by the FSC against (PBT) and CCB, referred to in the order collectively as 'the Offshore Banks'. The court order recited that they and the ECCB had been served with the NOA and FDCF.

[35] Among other things, the order vested the Offshore Banks exclusively in the administrator's control and gave him complete control of their management. The administrator was empowered to assume control of all of the assets of the offshore banks wherever located, secure them and provide an interim report to the court within 28 days and a further report within 60 days of the order, as to actions he considered appropriate for the protection of the assets and depositors.

[36] Paragraphs 13 (h) and (i) of the order are very specific. They are representative of the powers and duties conferred on an administrator under the FSC Act. They state respectively:

"The administrator in discharging his obligations shall be empowered to perform all functions of management including but not limited to the following powers:

...

(h) to take all actions necessary to see, review, secure, take possession of any books, papers, writings, documents and records relating to the Offshore Banks that are located in the offices of its auditors or any other person both in this jurisdiction and in any other jurisdiction and to bring the same under his control and further, where appropriate, bring the same into the jurisdiction of this Honourable Court and, for this purpose, to seek the assistance of the Courts of the various jurisdictions in which the assets of Offshore Banks are located;

(i) to take all actions necessary to see, review, secure, take possession of the claims and financial records of the Offshore Banks that are located in the offices of Offshore Banks or any company affiliated with Offshore Banks, with the Conservator appointed by the Eastern Caribbean Central Bank or any other person and to bring the same under his control and further, where appropriate, bring the same into the jurisdiction of this Honourable Court and, for this purpose, to seek the assistance of the Courts of the various jurisdictions in which assets of Offshore Banks are located; ...

- (k) to do all such things as may be necessary or expedient for the protection of the Offshore Banks' property or assets;" (underlining supplied)

[37] Significantly, paragraph 19 of the order stipulated that the FSC must serve the court order on the offshore banks and the ECCB as soon as possible and within 7 days of the date it was made. A penal notice is inscribed on the order, cautioning that disobedience of its terms would render the defaulting person liable to contempt of court proceedings and sanction by way of imprisonment, fines or seizure of assets.

[38] On 25th April 2016, the FSC made another application to the court in those proceedings. By order made on 5th May 2016,³¹ the court varied the administrator's powers to include those of a liquidator. Mr. Tacon was thereby authorised to retain lawyers and to bring or defend any legal action on behalf of the subsidiary banks and to conduct an orderly liquidation of both. The reporting obligations were re-stated.

The Evidence

[39] Mr. Tacon supplied affidavit testimony in support of the application for leave to apply for judicial review in these proceedings. He swore two affidavits – one on 10th March 2017 ('Tacon 1') and the second on 25th November 2019 ('Tacon 2') - to which were exhibited pertinent records. Mr. Aidan Harrigan was the only other affiant. His affidavits³² outlined the Chief Minister's position and contained details about the GOA's involvement in the conceptualisation and implementation of the resolution plan.

[40] The ECCB's conservatorship of the parent banks was from the period of 12th August 2012 to 22nd April 2016. Mr. Tacon averred that during that time, the subsidiary banks' affairs were conducted in accordance with the Conservators'

³¹ Entered on 19th May 2016.

³² Filed respectively on 30th October 2019 ('Harrigan 1') and 10th December 2019 ('Harrigan 2').

instructions and the ECCB's directions. The Notice of Application for Leave mentioned that the legal basis for the ECCB's and the Conservator Directors' assumption of control of the 'offshore banks' remains unclear.³³ Mr. Tacon alluded to this in his affidavit and noted that the subsidiary banks 'were at all material times separate legal entities from the parents and were separately regulated by the Anguilla FSC.'³⁴

[41] The subsidiary banks listed six decisions which were the subject of their application. They charged that the Chief Minister, the receiver and the ECCB each made two decisions. In relation to the ECCB, they claimed that it made the:

"1. 'direction decision' to direct the receiver to dispose of the parent banks' assets and liabilities by entering into the PAAs with NCBA, on terms which excluded them from that transfer; and

2. 'recommendation decision' to approve any application by the receiver for a vesting order, which gave effect to the transfer of those assets and liabilities, on terms excluding them from such transfer."

[42] As to the Chief Minister, they claimed that he took the decisions:

1. to grant the BBVO that effected the transfers of the referenced assets and liabilities to NCBA; ('vesting decision'); and
2. that (a) their deposits are not deposits and are therefore ineligible for protection under the DPTs; and/or (b) not to agree with their analysis that each of their deposits with the parent banks is in excess of EC\$4 million and is therefore eligible for protection under the DPTs ('exclusion decision').

[43] With respect to the receiver, the subsidiary banks contended that he:

1. disposed of the parent banks' assets and liabilities by entry into the PAAs with NCBA for the transfer of the referenced assets and liabilities ('transfer decision'); and

³³ Para. 7 of the notice of application for leave.

³⁴ Para. 15 of Tacon 1.

2. took the decision that:

(a) their deposits are not qualifying deposits and are ineligible for protection under the DPTs; and/or

(b) did not agree with their analysis that each of their deposits exceeded EC\$4 million and was eligible for such protection ('deposits decision').

[44] The subsidiary banks claimed that the decisions were unlawful in a number of respects. They contended that the ECCB, the receiver and the Chief Minister acted contrary to the Banking Act in relation to the decisions attributed to them. Furthermore, they claimed that they were administratively inconsistent for two reasons. Firstly, they complained that they were accorded treatment which was different from other similarly placed depositors. Secondly, they alleged that the decisions went against the legitimate expectations that their deposits would be protected, allegedly held out to them by the Chief Minister and to their depositors, the administrator and them by the ECCB.

[45] They claimed that the PAAs, were *ultra vires* the powers of the ECCB and the receiver under section 142 of the Banking Act and therefore the Chief Minister did not have the power to make a BBVO which effectively implemented those illegal PAAs. They criticised the impugned vesting decision of the Chief Minister as having been contaminated by the unlawfulness of ECCB's and the receiver's decisions. They contended that consequently the BBVO made by the Chief Minister was also *ultra vires* the Banking Act.

[46] They complained that the Chief Minister and the receiver considered irrelevant factors and ignored relevant ones when making the exclusion and deposits decisions; and that the decisions were irrational. They contended that the Chief Minister and the receiver erred in law by not accepting their analysis that they held qualifying deposits at the parent banks. They contended further that the receiver's deposits' decision was characterised by substantive unfairness.

- [47] The subsidiary banks telescoped that they ultimately hoped to obtain orders quashing the various decisions; declarations that they were unlawfully made; a declaration that the monies held at the parent banks are deposits which qualify for protection under the DPTs and a declaration that the alleged promises, assurances and legitimate expectation are not discharged until liability for their deposits are transferred respectively to the NCBA and DPTs.
- [48] In addition to an order for leave to apply for judicial review of those decisions, the subsidiary banks applied for disclosure of the PAAs, any document setting out the Resolution Plan, any formal recommendation made by the ECCB to the Chief Minister as Minister of Finance in respect of the Vesting Order; and any documents which provide evidence of the direction from the ECCB to the receiver to enter the PAAs.
- [49] At the hearing before the learned judge, the Chief Minister and the Attorney General made two preliminary objections. They submitted that the Attorney General is not a proper party to the proceedings because he made no decision and took no action which is capable of being judicially reviewed. They submitted further that the Chief Minister should be struck out as a party because it was not alleged that he made any decision which is susceptible to judicial review. The learned judge agreed with those submissions. He struck out the Chief Minister and the Attorney General as respondents.
- [50] In this appeal, the subsidiary banks challenged certain findings of fact and law of the learned judge's decision. They advanced fifteen main grounds of appeal, some of which contained several sub-heads. They contend that the learned judge misdirected himself and erred in law and fact in relation to the impugned decisions of the Chief Minister, the receiver and the ECCB. They contend further that he considered irrelevant factors and failed to have regard to relevant ones.

Threshold test for leave to apply for judicial review

- [51] The issues which confronted the learned judge in the court below required him to exercise a judicial discretion in resolving them. In determining whether to grant leave to the subsidiary banks to apply for judicial review of the impugned decisions, he had to consider the threshold test for such grant. The authorities have established that the applicable test is whether the applicant seeking leave has set out an arguable ground for judicial review of the impugned decision, that has a realistic prospect of success. A leading decision in which this principle is enunciated is **Sharma v Brown-Antoine and others**.³⁵ It was cited by all parties.
- [52] The Attorney General and the Chief Minister referred to the decisions in **Edgecombe v The Premier of Montserrat et al**³⁶ and **R. v Industrial Disputes, ex p. J. Wray & Nephew Ltd**³⁷ which are to like effect. Judicial review is a process whereby the court evaluates the decision of a tribunal or public authority to assess whether it was arrived at unlawfully, by procedural impropriety or in a manifestly unreasonable manner.³⁸ The court considering an application for leave to apply for judicial review is required to assess the materials presented to see whether the applicant has put forward an arguable case that has a real chance of success.
- [53] The appellants have, by their appeal, invited this Court to interfere with the learned judge's exercise of his discretion to deny the application for leave. It is trite that an appellate court will interfere with a judge's discretion only if satisfied that the judge erred in principle by failing to take into account or giving too little or too much weight to relevant factors, or by having regard to irrelevant factors; and by reason of such error in principle, the learned judge's decision exceeded the generous ambit within which reasonable disagreement is possible and is therefore plainly wrong. This principle was eloquently enunciated by Floissac CJ in **Dufour**

³⁵ [2006] UKPC 57.

³⁶ MNIHCVAP2013/0003 (delivered 27th October 2014, unreported).

³⁷ Claim No. 2009 HCV04798 Supreme Court of Jamaica (delivered 23rd October 2009, unreported).

³⁸ See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, [1984] 3 ALL ER 935 at 950-951, HL, per Lord Diplock. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229, [1947] 2 ALL ER 680 at 682-683, CA, per Lord Greene MR.

and others v Helenair Corporation and others³⁹ and has been applied consistently in other cases.⁴⁰ The foregoing legal principles will guide this Court in the determination of this appeal.

The striking out issue

- [54] The grounds of appeal cover 8 pages comprising 15 main grounds with 20 distinct sections. I do not propose to set them out verbatim as I am satisfied that no injustice would be caused if they are condensed. The striking out issue involves different considerations with respect to the Attorney General and the Chief Minister. They are best addressed separately. I shall start with the Attorney General.

(a) Joinder of the Attorney General

- [55] There are eight grounds of appeal in relation to the Attorney General and the Chief Minister. They are set out in grounds of appeal 3 (a) – (h). Of those, three relate equally to the Attorney General and the Chief Minister.
- [56] The subsidiary banks' primary ground of appeal against the learned judge's determination to strike out the Attorney General as a party, is essentially that he erred by finding that the GOA took no relevant decision in implementing the Resolution Plan. They contended that a relevant decision which justifies the joinder of the Attorney General must have been taken by the GOA, acting through the Chief Minister or EXCO. That is the import of their ground of appeal 3 (a). At grounds of appeal 3 (d) (v) and (vi), they charged that the learned judge erred by failing to take into account the duty of candour owed to the court by the Attorney General and the Chief Minister as public authorities and as repositories of information relevant to implementation of the Resolution Plan.

³⁹ (1996) 52 WIR 188.

⁴⁰ See also *Throne Capable Investment Limited v Agile Star Group Limited* [2021] ECSCJ No. 433, (delivered 14th January 2021); and *Ian Hope-Ross v Martin Dinning et al* [2021] ECSCJ No. 540 (delivered 30th April 2021).

[57] The subsidiary banks submitted that the learned judge erred in law and made a wrong decision in refusing leave against the Attorney General. They submitted further in relation to their ground 3(a) that he erroneously concluded that the Resolution Plan was implemented without any relevant decision having been taken by the GOA either through the Chief Minister as Minister of Finance or EXCO. They submitted that this position was hopeless because implementation of the Resolution Plan necessarily involved decisions being taken by the Chief Minister or the GOA. They implied that such decisions were taken by the GOA in implementation of the Resolution Plan and that the GOA acted through EXCO, the Chief Minister or other unnamed functionaries when making them.

[58] The Attorney General countered that the subsidiary banks have failed to identify any decision made by him. He submitted that no decision, action, omission or inaction of his has been challenged. He contended that on the title to the claim he was 'sued as the legal representative of the GOA/EXCO' and was named in Mr. Tacon's affidavit⁴¹ as 'properly a party to proceedings in respect of the Chief Minister'. He submitted that the Attorney General may not be sued in judicial review proceedings as is done in general civil proceedings under the **Crown Proceedings Act**. He relied on **Quorum Island (BVI) Limited v Virgin Islands Environmental Council and Another**.⁴² He submitted further that the subsidiary banks conceded this point indirectly when they applied to substitute EXCO in his place.

[59] The subsidiary banks denied that their application amounted to a concession. They contended that the possibility of naming the Attorney General as a decision maker is confirmed in the **Quorum Island** case. They submitted that in the absence of a clear and intelligible account of the government's decision-making after due pre-action correspondence, it is arguable that the Attorney General may be a perfectly proper person to be named as the government's representative,

⁴¹ At para. 8(2) of Tacon 1.

⁴² [2011] ECSCJ No. 182 (delivered 12th August 2011).

where it is clear that the government has decided something which affects the applicant's interests.

[60] They submitted further that during November to December 2016, the Attorney General entered the fray by personally writing letters to them on the GOA's behalf. They contended that in those letters he denied that the Chief Minister made a decision and provided no candid response about what decisions the GOA made, who made them or their reasons for so doing.

[61] The language of ground of appeal 3(a) while identifying the ECCB, the GOA and the receiver as decision makers in the implementation of the Resolution Plan, stop short of making a link between them and the Attorney General as an actor in the Resolution Plan. The application for leave does not make that connection. Mr. Tacon explained why the Attorney General was made a party.⁴²

[62] In ruling that the Attorney General was improperly joined as a party to the application, the learned judge reasoned that the subsidiary banks did not indicate how his liability arose or why it was necessary to join him as a party. He concluded that it was unnecessary to join the Attorney General in the claim as it was made pursuant to part 56 of the **Civil Procedure Rules 2000** ("CPR") in prerogative or 'crown side' proceedings. He struck out the claim against the Attorney General for this reason. In doing so, he relied on the decision in the **Quorum Island** case in which this Court ruled, '[t]he proper defendant in prerogative proceedings is the person or authority whose decision is challenged...'.⁴³

[63] A careful review of the case advanced by the subsidiary banks reveals that nowhere in their application or evidence do they allege that the Attorney General made any decision, took any action or refrained from taking a relevant decision or any action in relation to the exclusion, transfer, deposits, or BBVO decisions about which they have complained. Neither before the learned judge nor in this Court did they point to any such decision or omission. In fact, in their written submissions

before the learned judge⁴³ and in this Court, they noted that the heading of the claim refers to the Attorney General as being 'sued as the legal representative of the Government of Anguilla/Executive Council.' They submitted that the comprehensive nature of the rubric in relation to the 1st and 2nd respondents, was intended to cover all bases, in the context of a complete lack of candour. This sheds light on the thinking behind the joinder of the Attorney General as a respondent.

[64] In their grounds of appeal, they challenged no findings of fact made by the learned judge when he concluded that the Attorney General was wrongly joined as a party. They highlighted no relevant factors which the learned judge ignored in arriving at his decision and they articulated no irrelevant matters which informed his determination.

[65] The Court's pronouncement in the **Quorum Island** case regarding the joinder of the Attorney General in crown side proceedings has been followed recently in **Elmoalis Ltd. v The Attorney General of Anguilla**.⁴⁴ This Court reiterated that the Attorney General is not a proper or necessary party to crown side or prerogative proceedings, in the same way that he would be made a defendant in civil proceedings against the Crown. The Court stressed that the correct defendant is the official who made the impugned decision. It pointed out that similar pronouncements have been made by the Board in **Bahamas Hotel Maintenance and Allied Workers Union v Bahamas Hotel Catering and Allied Workers Union and Others**⁴⁵ and **Minister of Foreign Affairs v Vehicles and Supplies Limited**⁴⁶ and ruled that the Attorney General is not a proper respondent in these matters. From a factual and legal perspective, this case is no different.

⁴³ Filed on 25th November 2019, at para. 20.

⁴⁴ AXAHCVP2019/0002 (delivered on 21st May 2021, unreported).

⁴⁵ [2011] UKPC 4.

⁴⁶ [1991] 1 WLR 550.

[66] The instant case involves Crown side or prerogative proceedings in which no decision by or conduct of the Attorney General is impugned. The subsidiary banks' failure and obvious inability to point to any decision made by the Attorney General left the learned judge with no option but to find that there was no basis for joining the Attorney General and to remove him as a party. The learned judge succinctly explained why he struck out the Attorney General as a defendant. It is clear that he applied the correct legal principles, applied his mind to the relevant factors and considered no extraneous matters. His determination on the law cannot be faulted. The subsidiary banks' arguments afford no basis in fact or law on which to overturn his ruling. Their appeal against the learned judge's determination on this ground of appeal [3(a)] to remove the Attorney General as a party is therefore not sustainable. I would therefore dismiss it.

[67] There was no dispute between the parties about whether a public authority owes a duty of candour to the court in judicial review proceedings and that this duty applies equally at the leave stage of judicial review proceedings. The subsidiary banks submitted that the learned judge wholly failed to take this duty into account in striking out the Attorney General as a party. They contended further that the learned judge took no account of his duty to state who took the relevant decisions and was manifestly wrong to reject their application for disclosure of who took the exclusion, transfer and deposits decisions. They cited **Belize Alliance of Conservation Non-Governmental Organisations v Department of Environment et al**,⁴⁷ **Joshua Francis v The Chief Magistrate et al**,⁴⁸ **R (al Sweady & Others) v Secretary of State for Defence**,⁴⁹ **SOF 82 Anguilla Holdings v The Attorney General**,⁵⁰ **Tweed v Parades Commission for Northern Ireland**⁵¹ and **Treasury Solicitors Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings**.

⁴⁷ [2004] UKPC 6.

⁴⁸ DOMHCV2016/0017 (delivered on 24th June 2016, unreported).

⁴⁹ [2009] EWHC 2387 (Admin).

⁵⁰ [2019] ECSCJ No. 102 (delivered 27th March 2019).

⁵¹ [2006] UKHL 53, see para. 3 per Lord Bingham.

[68] They argued that in **Belize Alliance**, Lord Walker of Gestinghope, at paragraph 86 made the point that:

“...It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings.”

[69] They submitted further that ‘the test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.’ They contended that the case at bar is one in which disclosure is necessary for the fair and just resolution of the issues.

[70] The Attorney General placed reliance on the decision of **Marshall v Deputy Governor of Bermuda**.⁵² He submitted that the duty of candour is owed by a public entity who is a party or who is about to be party to an application for leave for judicial review. He submitted that the public authority is thereby obliged to make disclosure to an opposite party of information and materials in his possession or within his knowledge. At paragraph 29, Lord Phillips commenting on Master of the Rolls Sir John Donaldson’s pronouncement⁵³ on the duty of candour, opined:

“Each of the cases in which Lord Donaldson made these statements involved a decision taken by a public authority that related to and adversely affected an individual. ... Furthermore those statements apply to the situation where it is not possible for the court to assess the merits of an issue that has been raised unless the public authority against whom the claim is brought furnishes the court with information which it alone is in a position to provide. They should not be relied upon to transfer to the respondent the onus of proving matters which a claimant is under a duty and in a position to prove.” (underlining supplied)

[71] The learned judge acknowledged that it was incumbent on the court to consider whether disclosure was necessary to resolve the issues fairly and justly.⁵⁴ He

⁵² (2010) 77 WIR 182, paras. 28 – 29.

⁵³ In R v Lancashire CC, Ex P Huddleston [1986] 2 ALL ER 941 at p. 045.

⁵⁴ See para. 75 of the judgment below.

noted that the Chief Minister has denied making a BBVO and that the subsidiary banks had not produced any evidence to prove that such a BBVO existed. He reasoned that in such circumstances, and in view of Mr. Harrigan's testimony about the PAAs and the BBVO, as well as the procedure in section 174 of the **Banking Act**, the subsidiary banks were inviting the Chief Minister to disclose a BBVO which did not and could not exist. He concluded that the disclosure application was nothing more than a fishing expedition. He made no explicit pronouncement as to whether the Attorney General owed such duty of candour.

[72] The *dicta* emerging from the authorities cited by the parties imply that the duty is owed by a party and not a non-party and that disclosure will be granted only to the extent necessary to fairly and justly dispose of the issues. It follows that the Attorney General owed that duty of candour at least up to the time that he was removed as a party and thereafter only to the extent necessary to fairly and justly dispose of the issues. In the court below, the subsidiary banks sought disclosure of 7 items namely; (a) the DPTs; (b) the identity of the trustees; (c) any formal recommendation by ECCB to the Minister of Finance in respect of a BBVO; (d) documents evidencing the directive from ECCB to the receiver to enter the PAAs; (e) the BBVO; (f) the PAAs and (g) any document setting out the Resolution Plan. They have added an eighth at this level – i.e., the information sought in their letter dated 6th November 2019 to the Attorney General – ground of appeal (h) (iii).

[73] It is a matter of record that by the hearing date in the court below, they had received items (a) and (b) and would have had access to the enabling legislation governing the implementation of the Resolution Plan. It is not clear what other documentation is captured in item (g). The learned judge was satisfied that items (c) and (e) did not exist. The subsidiary banks could not reasonably expect to obtain item (d) from the Attorney General since he was neither the receiver nor a functionary or agent of the ECCB. Logically, any duty of disclosure that could conceivably be attached to the Attorney General would be limited to items (f) and (g).

[74] Although he did not express it in so many words, the disposition of the application by the learned judge suggests that he considered it unnecessary for the fair and just disposal of the leave application to order disclosure of the PAAs - item (f) and unspecified data as to the resolution plan – item (g). The finding that the Attorney General was not properly joined as a party removed him from the arena. From that point, the duty to disclose the remaining items would therefore fall to the public official who reportedly made the impugned decisions. That is unless the Attorney General happened to be the custodian or person in possession of the items for which disclosure was being sought. On this point, Mr. Harrigan testified⁵⁵ that he had copies of the PAAs in his possession.

[75] He explained that he had not attached copies to his affidavit because in another suit⁵⁶ the court had made an order that unless the court's permission was obtained, redacted versions of the PAAs were not to be disclosed to any third party or be used for any purpose other than those proceedings. Mr. Harrigan exhibited a copy of the order and averred that he was content to attend court with the PAAs to facilitate the court issuing directions as to their use. As the mouthpiece for the Chief Minister, Mr. Harrigan represented to the court that he maintained possession and custody of the PAAs. In the premises, the record reveals that at the leave stage, the Attorney General had neither custody of nor was he in possession of the PAAs.

[76] This evidence about the identity of the person with custody and possession of the PAAs coupled with the subsequent removal of the Attorney General as a party to the claim render redundant any complaints about duty of candour owed by him to the subsidiary banks in respect of the PAAs. The appellants' belated application for disclosure of the identities of the persons who took the relevant decisions was not before the learned judge. The criticism that he failed to take

⁵⁵ Paragraphs 12 – 13 of Harrigan 1.

⁵⁶ See AXAHCV2016/0032.

the duty of candour into account in relation thereto is unfair and unmerited. Similarly, the appellants' complaints that the learned judge wholly failed to have regard to the duty of candour is baseless. His decision to dismiss the application for disclosure as against the Attorney General is not manifestly wrong and is supported by the evidence and the law. Grounds of the appeal ((3 (d) (v) and (vi) and (h) (iii)) as against the Attorney General are without merit and I would dismiss them.

(b) Joinder of the Chief Minister

[77] In addition to the foregoing grounds, the subsidiary banks' set out 18 further grounds of appeal in relation to the Chief Minister. Under ground of appeal 3(b) the appellants charged that the learned judge erred by making certain factual errors in the absence of evidence to support his findings. They charged that in the absence of supporting evidence the learned judge erred by:

- (1) Characterising them as 'offshore companies' or 'offshore subsidiaries'; and their deposits with the parent banks as 'offshore deposits'.
- (2) Not making a finding that they were domestic companies and their deposits with the parent banks were domestic deposits; or alternatively reserving the issue of whether they were deposits for after the leave stage of the proceeding.
- (3) Concluding that they held deposits in NCBA.⁵⁷

[78] Another ground of appeal⁵⁸ is that the learned judge erred in law by considering the provisions of the **FSC Act** and the **Financial Services Enactments Regulations**; and by:

- a. treating them as relevant to the issues;

⁵⁷ Ground of appeal 3 (b) (i) - (iv).

⁵⁸ 3 (c) (i) – (iii).

- b. wholly misconstruing the provisions of those legislation which led him to erroneously conclude that the parent banks' liabilities to the appellants did not fall within the purview of the parent banks' insolvency regime; and
- c. erroneously concluding that the receiver was not authorised under those laws to deal with the deposits they held at the parent banks; that those deposits could not fall within the resolution plan; and that the exclusion of their deposits from the resolution plan arose by operation of law and not as a result of any decision by the Chief Minister, the receiver or ECCB.

[79] A further ground of appeal⁵⁹ is that the learned judge did not take account of relevant factors in arriving at his decision. Those relevant factors were itemised as being:

- a. The entirety of their case. They contended that he wrongly stated that their complaints were 'primarily focused' on their exclusion from the DPTs; when in reality they had 2 primary complaints, namely the exclusion of their deposits from the transfer to NCBA and from the DPTs.
- b. His failure to remain mindful that the GOA was NCBA's sole shareholder; that the Chief Minister represented the GOA on the Monetary Council; that NCBA was to be established principally through the PAAs; and that the vesting provisions in the **Banking Act** were critical to legitimising and completing the transfer of assets to NCBA.
- c. His failure to take into account that the essential criterion for eligibility to benefit from the DPTs was the list of primary beneficiaries in the Schedule of each DPT; and the question of who determined the list of primary beneficiaries; which led him to conclude that EXCO and by

⁵⁹ 3 (d) (i) – (iv).

implication the Chief Minister did not determine their eligibility to benefit under the DPTs.

[80] In a succeeding ground of appeal,⁶⁰ the subsidiary banks outlined other factors that they contend the learned judge failed to consider which he should have, and others that he took into account which they submit were irrelevant to his determination. They charged that he failed to take into account that even if the Chief Minister had made no BBVO, he must have decided to dispense with making one, since the NCBA had operated for over 3 years as if the transfer of the parent banks' undertaking to it had been completed. They contended further that the learned judge erred by taking into consideration that under the PAAs there was a provision for 'put-back' of assets by NCBA and that no BBVO could be made unless the 'put back' arrangements were agreed by the parties.

[81] In relation to the Chief Minister, the final ground of appeal⁶¹ deals with the learned judge's findings that he had made no reviewable decision relative to implementation of the resolution plan. It states in part:

“(h) Further, or in the alternative, ... the Learned Judge's decision to refuse leave to commence Judicial Review as against the Respondents was manifestly wrong:

[1] ... necessarily involved the conclusion that the Resolution Plan was devised and implemented without any relevant decision having been taken by the Chief Minister, the Minister of Finance, the GOA or EXCO.

[2] It is wholly incredible, unsupported by any evidence, and accordingly manifestly wrong to conclude that the resolution of the banking crisis affecting Anguilla between 2013 and 2016 was addressed and resolved without any decision in relation to that resolution having been taken by those persons.

⁶⁰ 3 (g)(i) and (ii).

⁶¹ 3 (h)(i) - (iii).

[3] The Learned Judge compounded his erroneous conclusion by refusing the Applicant's requests to disclose the identity of the persons who had taken those decisions."

[82] Grounds 3 (b) (iv) and (d) (i) are conveniently addressed at the same time. It is helpful to rehearse them. They state respectively:

"(b) The Learned Judge erred in fact, further or alternatively drew conclusions of fact on no evidence or contrary to the evidence, in that the Learned Judge:

...
[4] Wrongly concluded that the Applicants held deposits in NCBA. There was simply no evidence that they did. A primary limb of the Applicants Application for Leave and evidence was that (as a result of the Respondents' decisions to exclude them from the Resolution Plan) they did not hold deposits with NCBA, and the Respondents' evidence did not assert that they did hold such deposits.

...
(d) The learned judge wrongly failed to take into account as relevant to this decision matters which were relevant and which he should have taken into account, namely:

(i) The Learned Judge at the outset failed fully to appreciate the Applicants' case and accordingly did not take it properly or fully into account. He stated (wrongly) that their complaints were "primarily focused" on their exclusion from the DPTs. He failed to appreciate or understand that the Applicants had two primary complaints: (1) the exclusion, from the transfer of liabilities to NCBA, liabilities owed by NBA and CCB to the Applicants and (2) the exclusion of the Applicants from the class of beneficiaries under the DPTs."

[83] The appellants submitted that the learned judge displayed this misunderstanding of their case when he wrongly stated⁶² that their complaints were 'primarily focused' on their exclusion from the DPTs. They contended that this failure was compounded by his finding (at paragraphs 13 – 14 of the judgment) that they held deposits with NCBA.

⁶² At para. 14 of the decision.

[84] Those paragraphs state respectively:

“[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.’ (underlining supplied)

[85] It is to be noted that while the learned judge used the expression ‘primarily focused’ as highlighted by the appellants, he subsequently outlined in paragraphs 27 to 33 the other complaints made by the subsidiary banks. In those paragraphs, he addressed their challenge to the making of the BBVO by the Chief Minister on the basis of the receiver’s and the ECCB’s *ultra vires* transactions. He underscored in particular the accusation that the receiver and the ECCB by the PAAs unlawfully effected a transfer of the parent banks’ undertaking to NCBA, which excluded liabilities for the appellants’ deposits.

[86] He also highlighted their claim that the Chief Minister made the determination that their deposits were ineligible for transfer to the DPTs. Likewise, he summarised their assertions that the Chief Minister made those decisions in a manner which was administratively inconsistent and in breach of the legitimate expectation that he held out to them that their deposits would be protected under the transfer to NCBA and the DPTs. The learned judge also enumerated the

reliefs that the subsidiary banks were hoping to obtain from a judicial review hearing.

- [87] Those paragraphs demonstrate that the learned judge fully appreciated the case which was presented by the subsidiary banks. His use of the term 'primarily focused' appears to have been interpreted by the appellants to mean 'solely focused'. Their submissions suggest that they considered that paragraphs 13 and 14 are the only paragraphs in which the learned judge captured the gravamen of their claims. However, the judgment reflects that the learned judge was labouring under no misapprehension about the full nature of the claim.
- [88] His use of the term 'primarily focused' implied that it was their main concern. The reality is that the subsidiary banks are just as equally concerned about the exclusion of their deposits from the DPTs. The learned judge demonstrated that this was not lost on him. If regard is had solely to paragraphs 13 – 14 of the judgment, it might appear that the learned judge mis-judged the extent of their claim. However, on examination of the entire decision, it is pellucid that he analysed the several complaints targeted at the exclusion of the appellants' deposits from the NCBA and DPTs transfers. While ill-fitting to the context, the phrase 'primarily focused' did not prevent the learned judge from appreciating that on that issue two main complaints were made or from addressing them.
- [89] As to the contention that the learned judge was of the view that the subsidiary banks held deposits at NCBA, this is not what is expressed in the referenced paragraphs. In both paragraphs, the learned judge is seeking to set out the subsidiary banks' case. Apart from the use of the expression 'primarily focused' he accurately captured the essence of that part of the case. The appellants' criticism that he did not fully appreciate the substance of their case is ill-founded. I would therefore dismiss ground 3 (d)(i) of the appeal against the Chief Minister.

[90] The learned judge continued to lay out the subsidiary banks' contentions in paragraph 14. It is a matter of record that it is no part of the appellants' case that they held or had deposits at NCBA. Therefore, it is reasonable to infer that the reference to NCBA in line 2 of paragraph 14 is an obvious error. In any event, it is clear from the language of paragraph 14 that the learned judge did not make a determination that they held deposits at NCBA. In fact, he says so in paragraph 54 when he stated, '[n]o 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 ... could not have been transferred to NCBA under any PAA.' The submission that the learned judge formed such a view is baseless and predicated on a misreading of paragraphs 13 and 14. I would therefore dismiss grounds of appeal 3(b) (iv) and d (i). I turn now to consider the grounds of appeal in respect of the decisions attributed to the Chief Minister.

Vesting Decision

[91] The subsidiary banks claimed among other things that in the exercise of his statutory powers to exclude the parent banks' liabilities for their deposits from transfer to the NCBA, the Chief Minister made the vesting decision unlawfully. They contended that by making such a decision the Chief Minister was exercising a judicial or quasi-judicial function.

[92] In arriving at his determination that the Chief Minister was mis-joined in the proceedings, the learned judge considered the provisions of the Banking Act, BROA, the FSC Act and TCOBA. He opined that if the Chief Minister made no decision and performed no action outside of his statutory remit under those Acts, there can be no ground for judicial review against him in his capacity as Minister of Finance.

[93] Regarding the impugned vesting decision, he considered the uncontroverted testimony of Mr. Harrigan that no BBVO had been made by the Minister of

Finance under the Banking Act. He noted that Mr. Harrigan testified, '[n]o 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 finalised...'.⁶³

- [94] The learned judge found as a matter of law that the relevant provisions of the Banking Act had not been activated. He reasoned that the receiver had not applied to the ECCB for the issuance of a BBVO and accordingly the ECCB could not and had not made a recommendation to the Chief Minister *qua* Minister of Finance to grant the BBVO. He held that the Chief Minister had made no vesting decision and therefore the application to seek judicial review of such a decision was premature.
- [95] The learned judge also reasoned that the appointment of an administrator of the subsidiary banks effectively subjected their assets and liabilities to the exclusive control of the administrator and precluded the receiver or the ECCB from dealing with those assets and liabilities by transfer to the PAAs or DPTs. He concluded that the Chief Minister could not and did not in those circumstances make a vesting decision under the Banking Act or any such decision which is judicially reviewable.
- [96] The appellants attack of the learned judge's decision is multi-pronged. They contend that even if no BBVO had been made the parent banks and NCBA proceeded for more than 3 years on the basis that the transfers of the undertaking of the former to the latter were complete. They argued that in such circumstances, a decision must have been taken to dispense with the BBVO. They submitted further that the learned judge erred by mischaracterising them as 'offshore companies' and 'offshore subsidiaries' and their deposits with the

⁶³ Para. 15 of Harrigan 1, See quote at para. 44 of the judgment.

parent banks as 'offshore deposits'. They submitted further that he erred by not finding that they were domestic companies who held domestic deposits with the parent banks. Alternatively, they argued that the learned judge should have reserved consideration of this issue for after the leave stage.

[97] They argued that the learned judge erred in law by taking into account the provisions of the FSC Act and the **Financial Services Enactments Regulations** and treating them as relevant to the issues. They contend that he completely misconstrued those provisions. They argue that as a result he erroneously concluded that the parent banks' liabilities to them were not to be addressed under the Banking Act's insolvency regime; and that the receiver was not authorised under the Banking Act to deal with their deposits at the parent banks. They submitted that his error in construing those laws caused him to incorrectly hold that those deposits could not fall within the resolution plan; and that the exclusion of their deposits arose by operation of law and not as a result of any decision by the Chief Minister, the receiver or ECCB.

[98] The Chief Minister countered that whether the subsidiary banks are offshore banks is of no moment as this is not relevant to a proper disposition of the core issues. He submitted that the central issues are whether he made the decisions which the subsidiary banks allege that he made, and which are the subject of their application; namely the decisions to (a) exclude their deposits in the parent banks from protection by transfer to NCBA by a BBVO; and (b) exclude their deposits over the threshold sum from eligibility for protection under the DPTs.

[99] He submitted further that he made no such decision and that the appellants failed to produce any such BBVO. He argued that Mr. Harrigan gave testimony to this effect on his behalf as he is entitled to do by law. The Chief Minister contended that the testimony supplied by Mr. Harrigan as to the non-existence of the BBVO was properly given and satisfied the test that an affiant indicates the basis for his

information and belief. He relied on the test articulated in **Re LJ Young Manufacturing Co. Ltd.**⁶⁴

[100] He directed the Court's attention to a BBVO made by him on 26th June 2020, subsequent to the hearing in the court below and after the decision by the learned judge, by which the undertakings of the parent banks were transferred to NCBA. He submitted that he made the BBVO pursuant to section 174 of the **Banking Act** and on recommendation of the ECCB – the appropriate decision maker. He maintained that he had made no BBVO previously because the assets and liabilities passing to NCBA from the parent banks had not yet been satisfactorily adjusted under the 'put back' clauses in the PAAs; the receiver had as yet made no application to the ECCB for a vesting order to be approved and the ECCB had made no recommendation to him arising from such application.

[101] I have already mentioned the appellate court's reluctance to override the exercise of a trial judge's discretion unless it is determined that he has erred in principle and that such error led to a decision which is manifestly wrong. I must add that this Court has emphasised repeatedly that an appellate court will not lightly overturn a judge's exercise of discretion or his findings of fact and his evaluation of them including the weight to be attached to them, except where such findings are not supported by the evidence. The decisions in **Edy Gay Addari v Enzo Addari**,⁶⁵ **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited**⁶⁶ and **Jtrust Asia PTE Ltd. v Mitsuji Konoshita et al**⁶⁷ illustrate this principle. I bear them firmly in mind throughout.

[102] The appellants have not refuted that the Chief Minister made the BBVO under section 174 of the **Banking Act** on 26th June 2020, in his capacity as Minister of Finance, only after the learned judge had considered their application for leave

⁶⁴ [1900] 2 Ch. 753.

⁶⁵ [2005] ECSCJ No. 125 (delivered 27th June 2005).

⁶⁶ [2021] ECSCJ No. 529 (delivered 16th April 2021).

⁶⁷ BVIHMAP2020/0031 (delivered 31st May 2021, unreported).

to seek judicial review of that decision. They presented no evidence that he made an earlier BBVO in respect of the transfer of the banking business undertakings from the parent banks to NCBA. This belies their contention that the Chief Minister had made a BBVO when they made their application for leave. Moreover, it discredits their case that he unlawfully made a vesting decision which accorded them different treatment from other depositors; that was administratively inconsistent; and which was unfair and unlawful in light of the legitimate expectations which they assert were held out to them by the Chief Minister.

[103] The Court takes judicial notice of the BBVO made by the Chief Minister on 26th June 2020. It is appreciated that the learned judge did not have it or any other BBVO before him when he made his decision. He had to rely on the testimony of Mr. Tacon and Mr. Harrigan and the applicable legislation. On the one hand, the appellants averred that a BBVO existed or had been dispensed with.⁶⁸ The Chief Minister through Mr. Harrigan asserted that no such order had been made.

[104] The learned judge acted on Mr. Harrigan's averment⁶⁹ that no BBVO had been made or could be made until the 'put back' provisions of the PAAs had been finalised. He also had regard to the provisions of section 174 of the **Banking Act**, which established the referenced conditions precedent to the making of a BBVO by the Minister of Finance; and section 7 of the BROA.⁷⁰ He was entitled to consider and act on Mr. Harrigan's testimony that no BBVO had been made. Rule 30.3(2)(b) of the CPR codifies the procedure highlighted in **Re LJ Young Manufacturing Co. Ltd.**, by which an affiant may provide probative evidence on the basis of his belief and information.

[105] The learned judge reasoned that the transfer of a banking business undertaking under the Banking Act is supervised and managed by the ECCB pursuant to

⁶⁸ See paras. 58 and 61 of the decision.

⁶⁹ Para. 44 of the decision.

⁷⁰ Paras. 58, 60 – 61 of the decision.

section 174. He noted that the ECCB must first conduct its due diligence before making a recommendation to the Minister of Finance to grant a BBVO. He opined that the Minister of Finance can make a BBVO only after the ECCB has carried out those statutory functions and made a recommendation to him.

[106] The provisions of the Banking Act that were outlined earlier in this judgment supports this finding by the learned judge. In this regard, there was no evidence that the receiver made any application to the ECCB for the approval of a BBVO, or of an investigation by the ECCB arising from such application, or of any recommendation by the ECCB to the Minister of Finance to grant a BBVO, as contemplated by section 174 of the Banking Act. In view of the testimony, which was available to him, the learned judge was justified in making the finding that no BBVO had been made by the Chief Minister as Minister of Finance and that the legislative conditions precedent had not yet been finalised. Implicit in that finding is a rejection of the notion that the BBVO had been dispensed with. That inference was also reasonably and plainly open to the court on the evidence.

[107] The appellants' submission that the learned judge should not have factored the 'put-back' provisions into his determination is not without merit. They would have been placed at a disadvantage of not being aware of the substance and effect of those provisions having not had sight of the PAAs. Therefore, they could not reasonably have been expected to take instructions on or address them comprehensively. This was unfair as it created an unlevelled playing field as between them and the Chief Minister, which runs counter to principles of natural justice and the overriding objective of the CPR. Notwithstanding, the decision made by the learned judge ultimately, was open to him even without consideration of the 'put-back' provision referred to by Mr. Harrigan. His overall assessment of the issue demonstrated that he factored into his consideration other matters that, by themselves, justified his conclusion. In the circumstances, I am satisfied that his determination is not invalidated by such reference.

- [108] The learned judge's determination that the absence of a BBVO by the Chief Minister as Minister of Finance created a situation where the appellants had not presented a decision to the court, which was susceptible to judicial review, cannot be faulted. In fact and in law, that was the only reasonable conclusion open to him on that score. It is not open to this Court to reasonably disagree with that determination on the ground that the learned judge erred in principle and made a decision which was manifestly wrong. The subsidiary banks simply had not placed before the Court in respect of the alleged vesting decision, any determination by the Chief Minister which was capable of forming the basis of leave for judicial review against him in his capacity as Minister of Finance.
- [109] The law and the evidence point to a single reasonable outcome – that no vesting decision had been made. The evidence and the legislative framework for processing and issuance of a BBVO support the learned judge's finding that no BBVO was made by the Chief Minister and that on this issue, the application for leave was premature.
- [110] Similarly, the learned judge's reference to 'offshore companies', offshore subsidiaries' and 'offshore deposits', the FSC Act and related legislation would not have altered the outcome in respect of the vesting decision, because the proper basis existed for that decision without such reference. For those reasons I find that grounds of appeal 3 (g) (i) and (ii)) are baseless.

Exclusion decision

- [111] Regarding the purported exclusion decision by the Chief Minister, the appellants submitted that the learned judge apparently did not appreciate that their leave application was not limited to a positive decision being made by the Chief Minister that the deposits were not eligible for protection. They submitted that their application also covers an exclusion decision by which the Chief Minister or other governmental decision-makers, failed to decide or agree that their deposits were eligible for inclusion in the DPTs. They argued that at common law judicial

review can be brought against positive decisions to take action, failure to act, failure to make a decision, failure to explain what has been or is being done, an unreasonable delay in making a decision and failure to agree to a request. They cited as authority **Manning v Sharma**.⁷¹ This is an accurate statement of that legal principle. None of the respondents took issue with it.

[112] A review of the judgment demonstrates that the learned judge captured the essence of the subsidiary banks' assertions. He noted that they were alleging that the Chief Minister made the exclusion decisions by executing the BBVO which effected the exclusion of their deposits from transfer to NCBA. Likewise, he summarised their contentions that the exclusion decision in relation to the DPTs was effected when he decided that their deposits should be excluded from protection under the DPTs or by his failure to agree with their conclusions that those deposits were eligible for inclusion.

[113] As indicated earlier, the learned judge also noted that the appellants contended that the receiver and the ECCB had no authority under section 142 of the Banking Act to make the PAAs excluding liability for their deposits and therefore the PAAs were unlawful.⁷² He noted further that part of their case was that the BBVO by the Chief Minister having been tainted by the unlawfulness of the PAAs was impotent to effect transfer of the relevant deposits to NCBA.⁷⁴ The learned judge then linked those assertions to the legal contentions advanced by the subsidiary banks.

[114] At paragraphs 27 to 28 he stated:

“[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.

⁷¹ [2009] UKPC 37 at para. 14.

⁷² Para. 13, 27, 28 and 29 of the judgment.

[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."

[115] The learned judge took into consideration that the exclusion decisions were also being attacked for administrative inconsistency, lack of proportionality in treatment of like depositors and for contravention of the principle of legitimate expectation. He noted further that the subsidiary banks were seeking in relation to the exclusion decision a declaration that the Chief Minister acted unlawfully in deciding to exclude their deposits from the DPT and a declaration that in respect of their deposits with the parent banks they are entitled to be treated as beneficiaries under the respective DPTs. In this regard, it is clear that he fully understood the multi-faceted nature of the appellants' claim in respect of the exclusion decisions. The appellants' accusation to the contrary, is baseless.

[116] The subsidiary banks submitted that the Chief Minister is properly joined as a party to the proceedings because of the role he and the GOA played in respect of the DPTs. They contended that the GOA is a party to the DPTs and set up a process through the BROA whereby it pays money to the trustees from which qualifying depositors will receive contributions from the trust funds. They argued that notwithstanding, the GOA has failed to agree that they qualify for inclusion and has either not arranged for them to be included or has excluded them from the list of approved beneficiaries.

[117] The appellants argued that the learned judge had before him, evidence of the two exclusionary decisions in the form of a letter from NCBA to them⁷³ and the DPTs exhibited to Harrigan 1. They submitted further that the letter confirmed

⁷³ Dated 15th September 2016.

that the liabilities for their deposits with the parent banks were not transferred to NCBA; while the DPTs revealed that the subsidiary banks were not included in the list of Primary Beneficiaries. They contended that in light of those documents the learned judge erred in finding ‘as he must have’ that the GOA whether represented by the Chief Minister or the EXCO had taken no relevant decision.

[118] The subsidiary banks submitted further that the learned judge erred in fact or drew conclusions of fact in the absence of evidence or contrary to the evidence by erroneously characterising them as ‘offshore companies’ or ‘offshore subsidiaries’. They argued that they and not their customers are the depositors with the parent banks. They contended further that neither they nor the respondents characterised their deposits with the parent banks as ‘offshore deposits’ and therefore the learned judge erred in referring to them in that way.

[119] They submitted that commensurate with the unchallenged evidence, the learned judge should have found that they are domestic companies and their deposits with the parent banks are domestic deposits; or alternatively he should have deferred consideration of that issue for after the leave stage of the proceedings.

[120] The Chief Minister submitted that the learned judge’s references to ‘offshore banks’, ‘offshore companies’ and offshore deposits’ are not relevant to the central issue. Relying on **Superintendent of Prison v Hamilton**⁷⁴ and **HMB Holdings Ltd v Cabinet**,⁷⁵ he submitted that in the absence of a reviewable decision by the Chief Minister the subsidiary banks have not made out an arguable case for judicial review with a realistic prospect of success. He contended that they have failed to establish that he made a decision to exclude the appellants’ deposits from transfer to NCBA or in relation to their inclusion as beneficiaries under the respective DPTs. He argued that the learned judge was

⁷⁴ [2016] UKPC 23.

⁷⁵ [2007] UKPC 37.

correct to conclude that he made no such decision and that it was a matter for the ECCB's and the receiver's attention.

[121] It is important to note that the subsidiary banks have in their grounds of appeal and submissions conflated their complaints against the Chief Minister into one against the GOA, ostensibly acting through EXCO. An examination of their application for judicial review and supporting affidavits discloses that other than the case made against the Chief Minister they levelled no complaint at EXCO or other government functionaries. In application, three decision makers are identified - the Chief Minister, the receiver and the ECCB. Moreover, the decisions purportedly made by them are attributed to them in the notice of application and the affidavit testimony by Mr. Tacon. He averred:

“8. The Respondents are:

- 1) The Chief Minister of Anguilla and Minister of Finance, Mr. Victor Banks (the ‘Chief Minister’) who has acted at all material times in connection with this matter on behalf of the Government of Anguilla (the “GOA”);
- 2) The Attorney General of Anguilla, John McKendrick QC, who is properly a party to proceedings in respect of the Chief Minister...”.

[122] Mr. Tacon continued:

“20. First, the executive branch of the GOA (the Executive Council) approved a suite of legislation subsequently passed by the House of Assembly ...

21. Second, relying on the powers conferred by the 2015 Act, on or around 22 April 2016 the Receiver, (sic) the ECCB and the Chief Minister effected transfer of certain of the Parents’ liabilities, matched by assets of an approximately equivalent value, to a newly formed entitled the National Commercial Bank of Anguilla Limited (“NCBA”). ...

23. The Respondents were responsible for different aspects of the implementation of the Resolution Plan:

- 1) The Chief Minister, the ECCB and the Receiver were responsible ... for the transfer of certain of the Parents’ assets and liabilities to NCBA; and
- 2) The Chief Minister and/or the Receiver were responsible for determining eligibility for distributions from the two Depositor Protection Trusts.

...

59. Accordingly, the Chief Minister and/or the Receiver have now decided or should be deemed to have decided that the Applicants' Deposits are not "deposits" and/or "large deposits" and that they are ineligible for protection under the Trusts.

60. Alternatively, by their failure to adopt the Applicants' analysis ... the Chief Minister and the Receiver erred in law. Further, their continuing failure to adopt the Applicants' analysis in this regard constitutes a continuing error of law.

62. The Applicants now seek Judicial Review of the decisions taken by the Respondents set out below at paragraphs 63 to 65 ...".

[123] In view of the express words employed by the subsidiary banks in their application, the Chief Minister is the one whom they accused of making the exclusion decisions. Their several contentions in the notice of appeal that the learned judge held that the GOA made no reviewable decision does not have a corresponding finding in the judgment. Those contentions appear to be directed at the learned judge's finding that the Chief Minister and EXCO made no such decision. At this juncture, I will consider their submission about his references to offshore companies, subsidiaries and deposits.

FSC Legislation and References to Offshore Companies, Subsidiaries and Deposits

[124] The learned judge referred to the subsidiary banks as 'offshore companies' and 'offshore subsidiaries' and their deposits with the parent banks as 'offshore deposits'. This raises the question of whether by using those terms he made a finding of fact or law that the subsidiary banks were 'offshore banks' or 'offshore subsidiaries' and their deposits were 'offshore deposits'. If he did, a further consideration would be whether he erred in law or fact with the result that such finding was plainly wrong. It is necessary to examine the context and manner in which he used those words.

[125] The terms 'offshore companies' and 'offshore subsidiaries' are used once each in the judgment. In the introduction at paragraph 2 the learned judge wrote:

"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." (underlining supplied)

[126] At paragraph 47 he stated:

"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." (underlining supplied)

[127] The Court is required to take judicial notice of the laws in the country. In light of the statutory provisions outlined earlier in this judgment, the terms 'offshore companies' and 'offshore subsidiaries' connote one of two things. Either the company/subsidiary is incorporated outside of the jurisdiction of Anguilla, or it is prohibited from conducting business within Anguilla. The subsidiary banks fall into neither category. Their insistence that they are not offshore companies or offshore subsidiaries is correct. However, this is not the end of the matter. Under the TCOBA, the subsidiary banks were licensed to conduct offshore banking business in Anguilla. They did not become offshore banks by such license. Conceivably, the type of business they were licensed to conduct may attract that description.

[128] It is evident from the language used in the highlighted paragraphs that the learned judge was not expressing a finding that the subsidiary banks are offshore subsidiaries or offshore companies but was merely using a descriptive term. Even if his use of those terms signified that he had concluded that they were offshore subsidiaries or offshore companies, it is not contended that the learned judge relied on such finding to decide that the Chief Minister made no exclusion decision. In neither paragraph 2 nor 47 does the learned judge signal that he had

made such a determination. There is nothing which leads to such interpretation. I am satisfied that he did not. The subsidiary banks' attack on his use of those terms while understandable and valid does not advance their contention that he erred and was manifestly wrong in his determination.

[129] The expression 'offshore deposits' was used 5 times in the judgment – in paragraphs 14, 48, 55 and 61. I set them out for ease of reference:

“[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.

...

[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 business⁷⁶, 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.

...

[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.

...

[61] In the present case, no PAA has been executed and Banking Business Vesting Order made in respect of the deposits held by

⁷⁶ 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.

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 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." (underlining supplied)

[130] In paragraph 14, the learned judge clearly labelled the subsidiary banks' deposits as offshore deposits. He was there summarising the subsidiary banks' contentions regarding the trustees' exclusion of their deposits from the DPTs. On that point, the subsidiary banks claimed that based on the information available to them, 'eligibility to receive a distribution of the monies granted to the Trusts was ... to be determined by the Receiver and/or the Chief Minister'.⁷⁷ In their application and submissions, they did not attribute such decision to the trustees. In paragraph 14, the learned judge clearly mis-stated their position as to exclusion from the DPT. In doing so, he mis-characterised the subsidiary banks' description of the deposits. This constituted an error by him in appreciating what the subsidiary banks were advancing as their case or an error in appreciation of the nature of the deposits. He did not repeat this mistake elsewhere in the judgment.

[131] In fact, he subsequently corrected the error by accurately capturing the essence of the subsidiary banks' complaint as to who they accused of making the decision to exclude their deposits from the DPT. He did so at paragraphs 13, 27 and 29 – 32. In the circumstances, it is reasonable to conclude that the learned judge's misstatement of the contentions at paragraph 14 did not permeate or contaminate the rest of the decision or his reasons for the determination. In the premises, that error in paragraph 14 was not fatal to his determination.

⁷⁷ Para. 16 of the notice of application for Leave. See also paras. 26, 27, 30, 33, 34, 35, 50, 51, 54, 59 and 60.

- [132] The reference to 'offshore deposits' in paragraph 61 of the judgment is referable to the learned judge's determination that the Chief Minister had made no BBVO. I have already dealt with that issue. For completeness, it is worth noting that in paragraph 61, the expression is once again being used to capture the subsidiary banks' argument. It bears repeating that they did not use that term in their application or in their submissions. The learned judge's use of it is a misrepresentation of the terminology used by them. However, that error would not have invalidated his decision that no BBVO had been made. It follows that in relation to the two decisions attributed to the Chief Minister, the learned judge's reference to 'offshore deposits' in paragraph 61 of the judgment could not and did not result in him making a fatal error in his determination.
- [133] The learned judge's use of the term 'offshore deposits' in paragraphs 48 and 55 of the judgment arises from his consideration of whether the Chief Minister made the exclusion decision as alleged. It is necessary to examine whether he utilised that expression purely as a descriptor of the deposits, without any inherent judgment as to their character and nature; or whether his choice of words was intended to convey that he had concluded that the deposits were made to the parent banks by the subsidiary banks, in the course of offshore banking business between them, in contravention of the TCOBA. In the former case, such choice of words would not be objectionable; in the latter, it would be arguable that there exists no evidential basis for so concluding and in such case would bolster this ground of appeal. Those words were used by the learned judge within the context of the regulatory framework governing offshore banking business.
- [134] Before arriving at his decision in those paragraphs, the learned judge examined the evidence presented by the parties and took into account the legislative regulatory provisions within which the subsidiary banks functioned as offshore banking licensees. He accepted at face value, Mr. Harrigan's averment that he is familiar with both DPTs having executed them on behalf of the GOA. He

considered Mr. Harrigan's assertions⁷⁸ that the Chief Minister was not a party to or trustee under the DPT and had no responsibility for determining eligibility for distribution under either.

[135] Mr. Harrigan asserted, '[w]hether 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.'⁷⁹

[136] The learned judge proceeded to examine the status of the subsidiary banks. He described them as 'offshore subsidiaries of the parent banks' which had been put into administration by court order on 22nd February 2016, under the FSC Act and TCOBA, prior to the execution of the PAAs and DPTs. He then found that the 'offshore deposits' they held with the parent banks could not be eligible for protection under the respective DPTs because the court by that order had 'conferred jurisdiction and control over those deposits' to the administrator it had appointed.

[137] Essentially, the learned judge was there declaring that by virtue of the court order, only the administrator Mr. Tacon had authority to deal with those deposits. He added that the receiver's powers were limited to those conferred on him by the ECCB under the Banking Act. He emphasised that the Banking Act was concerned with the regulation of domestic banking business and not offshore banking business. He reasoned that the receiver had no authority under the Resolution Plan to deal with deposits over which the administrator had been granted exclusive control by court order. The learned judge concluded that for this reason the subsidiary banks ought to address their concerns to the FSC and the Administrator.

⁷⁸ Paras. 17 - 19 of Harrigan 1. See paras. 45 and 46 of the judgment.

⁷⁹ Para. 19 of Harrigan 1.

[138] By this trend of thought, the learned judge signaled that he had fully considered the court order appointing Mr. Tacon as administrator and further that he considered the terms of the order to be relevant to a resolution of the issues at hand. He did not outline the terms of the order. The main features were described earlier in this judgment and are distilled in his reasons for his decision. At the risk of oversimplifying his obvious line of reasoning, it is useful to explain the relevance and significance of the court order within the prevailing legislative and regulatory framework.

[139] It is trite that control of a corporate body that has been put into receivership, administration or liquidation vests respectively in the receiver, administrator or liquidator to the exclusion of everyone else including directors and shareholders. This legal concept is incorporated in the FSC Act. The other judge who made the order appointing Mr. Tacon as administrator and liquidator invoked the applicable provisions of the FSC Act and took care to direct that the known interested parties, including the ECCB, were put on notice of (a) the administrator's appointment and his authority, which included control of the subsidiary banks' assets and liabilities; as well as (b) the potential penalties for non-compliance with the order.

[140] It is significant that the order (like the FSC Act) details the powers vested in the administrator to conduct the management of the subsidiary banks including if necessary, subcontracting the daily management to Conservators appointed by the ECCB.⁸⁰ Importantly, the order directed that the administrator was authorised to ascertain the assets of the subsidiary banks and take all necessary steps to obtain possession of them.⁸¹

[141] Among other things, the order vested the 'Offshore Banks' and their management exclusively in the administrator's control. The administrator was

⁸⁰ Para. 4 of the order.

⁸¹ Para. 13 (b) of the order.

thereby empowered to assume control of all of the assets of the 'offshore banks' wherever located, secure them and provide an interim report to the court within 28 days and a further report within 60 days of the order, as to actions he considered appropriate for the protection of the assets and depositors. The inclusion of a penal notice removed any doubt that interference with the administrator in the performance of his duties, or with the assets of the subsidiary banks without direction from the administrator or the court, attracted serious sanctions. Throughout the order, the subsidiary banks were referred to as 'the offshore banks' suggesting that perhaps the use of the term 'offshore banks' is largely colloquial. It would not be surprising if that descriptor filtered into the present proceedings by association.

[142] In any event, it is against this backdrop that the learned judge concluded as he did at paragraph 48 that the 'offshore deposits' were not excluded from the DPTs by the receiver, but by virtue of the fact that the subsidiary banks had been placed under administration and their assets under the exclusive control of the administrator. Apart from his use of the term 'offshore deposits' he cannot be faulted for this reasoning. On the facts and the law and in face of the court ordered administration, it is unimpeachable. It follows that the learned judge had not made a determination that the deposits were made to the parent banks in a currency other than Eastern Caribbean dollars in contravention of the TCOBA, or that the subsidiary banks who made the deposits are non-residents of Anguilla. He was merely recognising that with effect from 22nd February 2016, the administrator was vested with exclusive responsibility for the subsidiary banks' assets.

[143] The learned judge proceeded to consider certain provisions of the TCOBA. He noted that a domestic bank that conducts offshore banking business is subject to the TCOBA in respect of that part of its operations. He summarised the powers of the FSC to take enforcement action to protect the public interest and the

interest of depositors, where a licensee is likely to become insolvent, or in other appropriate situations.

[144] He noted that no PAA had been made between the receiver, the NCBA and ‘any other necessary party’ to transfer the subsidiary banks’ assets and liabilities to NCBA. He reasoned that in the absence of such agreement, he was unable to find that the subsidiary banks’ deposits were part of the Resolution Plan. The foregoing formulation signaled that the learned judge recognised that in light of the appointment of the administrator, he or his designee would be a necessary party to any PAA with NCBA. He rightly concluded that this could not have been achieved between the receiver and NCBA without the administrator’s imprimatur, and in the circumstances those deposits did not fall to be transferred by the receiver under section 142 of the Banking Act under either of the two PAAs he executed with NCBA in April 2016.⁸²

[145] It was at this point that the learned judge concluded that it was not by reason of any decision by the Chief Minister, the receiver or the ECCB that the subsidiary banks’ deposits with the parent banks were excluded from the DPTs, but rather by operation of law. He pointed to the existing statutory framework and explained that those deposits simply did not qualify for inclusion in the DPTs. He once again used the expression ‘offshore deposits’ in his conclusion at paragraph 55. He reasoned that good reason and common sense would not permit an inference to be drawn that the ‘offshore deposits’ were excluded from the DPT by an active decision by the Chief Minister.

[146] The learned judge’s exposition of the relevant sections of the TCOBA and FSC Act and of how they impact the determination of eligibility of the deposits for inclusion in the DPTs preceded his last reference to ‘offshore deposits’. Nowhere in his explanation does he suggest or find that the subsidiary banks made

⁸² Para. 54 of the judgment.

deposits to the parent banks in currency other than Eastern Caribbean dollars or that their customers made any deposits to the parent banks.

[147] Rather, he sought to lay out the reasons why the receiver of the parent banks had no authority to deal with the subsidiary banks' deposits held with the parent banks. Implicit in his reasoning is the notion that the receiver could do so only on direction from the court or the administrator. He referred to the court order and the statutory underpinning from which the order flowed. He also highlighted the different regulatory framework which governed the operation of domestic banks and offshore banking licensees.

[148] A proper reading of the judgment demonstrates that the learned judge made no findings of fact that the subsidiary banks are offshore banks in the sense that they were incorporated in another country or incorporated in Anguilla as international business companies, foreign companies or foreign subsidiary companies. His use of the terms 'offshore companies' and 'offshore subsidiaries' were for all intents and purposes merely descriptive and used in the narrative of the background.

[149] In similar vein, his reference to the deposits as 'offshore deposits' was not indicative of a finding that the subsidiary banks (as non-residents) made deposits to the parent banks in a currency other than EC dollars. The learned judge's choice of descriptors in each case was mis-guided but did not amount to a finding of fact or law in any case. For this reason, I find that he did not err as alleged.

[150] The subsidiary banks' contention that the learned judge erred in not finding that they were domestic companies and their deposits with the parent banks were domestic deposits does not advance their case. The same principles to which the learned judge directed his attention in arriving at the conclusion that their deposits were excluded by operation of law would be just as apt, whether the appellants are domestic companies or foreign companies conducting offshore financial business.

[151] It follows from the foregoing analysis that the learned judge did not err in considering the provisions of the TCOBA and the FSC Act. An examination of those provisions was critical to understanding the extent of the powers reserved to the administrator by the law and outlined in the court order. These were highly relevant to a determination of who was authorised to deal with the subsidiary banks, their deposits and assets generally. They were equally as relevant to a determination of whether the Chief Minister, the receiver or ECCB had the authority to include them in the DPTs. The learned judge correctly concluded that their exclusion was not brought about by any decision of the Chief Minister, the receiver or the ECCB but rather by operation of law.

[152] His finding that the Chief Minister had made no exclusion decision as alleged is supported by the evidence and law and does not constitute a blatantly wrong error in principle. The subsidiary banks' contentions that the learned judge erred in ruling that that Chief Minister made no judicially reviewable decision to exclude their deposits from the deposits has no factual or legal basis. The appellants have failed to demonstrate that he erred in principle, took into account irrelevant factors, failed to have regard to pertinent matters in arriving at his decision and was consequently plainly wrong. In light of the foregoing, and the earlier pronouncements on the duty of candour, the appellants' contentions that the learned judge failed to have regard to the duty of candour owed to the court by the Chief Minister falls away.

[153] The appellants' related grounds of appeal and submissions on these points are baseless. Accordingly, in respect of the appeal against the Chief Minister, I would dismiss grounds of appeal 3(a), (b)(i)-(iv), (c)(i) - (iii), (d) (v) – (vi), (g) (i) - (ii) and (h) (i) – (ii).

EXCO

[154] The subsidiary banks were insistent that EXCO played a role in implementing the Resolution Plan. They pointed to Mr. Harrigan's testimony that on

instructions from EXCO he executed the DPTs on GOA's behalf. They argued that the learned judge failed to take this into account. This argument implies that EXCO played a role in determining eligibility of beneficiaries under the DPTs, from among depositors of the parent banks. The appellants contended that the learned judge was manifestly wrong to reject the application to substitute EXCO.

[155] Learned Queen's Counsel Dr. Francis Alexis submitted that like the Chief Minister, EXCO was not a party to the DPTs or a trustee under either of them and is therefore not responsible for determining eligibility for distribution under either.

[156] He submitted further that the subsidiary banks have not complained about any decision made by EXCO. He is correct. As articulated by the learned judge, the subsidiary banks made no assertion in their application that EXCO had made any specific decision that could be made the subject of judicial review. The foregoing extracts of the notice of application bear this out. The learned judge reasoned that EXCO is not a party to the DPTs nor a trustee thereunder and is therefore not responsible for determining eligibility.

[157] The appellants' argument seems designed to elicit a finding that by directing Mr. Harrigan to execute the DPTs, EXCO had thereby selected the primary beneficiaries or made some decision with respect to their eligibility and/or selection. Learned Queen's Counsel Dr. Alexis is correct that this was neither claimed nor is such contention supported by the evidence. Moreover, the decisions attributed to the Chief Minister if imputed to EXCO for the purposes of substituting it as a party, would fail for the same reasons they fail in respect of the Chief Minister.

[158] As is the case with the Attorney General and the Chief Minister, absent a decision by EXCO the case for its substitution in place of the Attorney General has not been made out by the appellants. The learned judge gave consideration

to the lack of evidence and the applicable legal principles in holding that EXCO made no judicially reviewable decision. His refusal to substitute EXCO in place of the Attorney General cannot be faulted on the ground that he erred in principle and as a result made a decision which was manifestly wrong. He made no error in law or fact by so ruling.

[159] Finally, on the matter of candour, as with the Attorney General and the Chief Minister, having concluded as he did, and properly so, there was no need for the learned judge to entertain the subsidiary banks' arguments about candour with respect to EXCO. Therefore, those grounds of appeal are baseless and I would dismiss grounds 3 (d) (iv)-(vi), (e), (f), (h)(i)-(ii) and the appeal against the judge's determination refusing the application to substitute EXCO as a party in place of the Attorney General.

The Leave Issue

[160] In the court below, the ECCB and the receiver did not oppose the leave application. They did not attend the hearing. The appellants contended that the learned judge made a number of fatal errors in principle which led him to arrive at a blatantly wrong conclusion in denying the leave application in relation to them. First, they contended that despite the non-appearance of and non-opposition by the ECCB and the receiver the learned judge wrongly considered the threshold test in relation to them.⁸³ They argued that in doing so he considered a legal authority in respect of which they were not given the opportunity to respond⁸⁵ and that was not referred to by the respondents.

[161] They submitted further that having found that the ECCB and the receiver were the only persons responsible for the PAAs the learned judge erred when he held that there was no reasonably arguable basis for judicial review against them.⁸⁴ In similar vein, they contend that having found that the parties thereto were the

⁸³ Ground of appeal 3 (i) sub-paragraphs (i) and (ii).

⁸⁴ Ground of appeal 3 (i) sub-paragraph (iii).

only ones responsible for the decisions as to eligibility to benefit from the DPTs, the learned judge erred by finding that there was no arguable case for judicial review against the receiver who was a party to the DPTs.⁸⁵ The appellants submitted that as a result of those errors the learned judge was manifestly wrong to refuse leave against the ECCB and the receiver.

[162] Secondly, the appellants contended that the learned judge misdirected himself and erred in law by finding that an arguable case had not been met in respect of the receiver and ECCB.⁸⁶ They submitted that he so misdirected himself by construing their application as mere conjecture in light of and contrary to the copious evidence before him; by construing section 184 of the Banking Act as only providing them a 'pyrrhic victory' if they were successful in a claim for judicial review; and by considering immunity for the receiver under section 187 of the Banking Act when immunity was not an issue or claimed by the receiver.⁸⁷ The third and fourth grounds of appeal are that the learned judge misdirected himself by failing to take into account the ECCB's and receiver's duty of candour or the fact that the execution of the DPTs necessitated and must have been preceded by a determination as to eligibility for inclusion in the list of primary beneficiaries.⁸⁸

[163] Even though there was no opposition to the application by the ECCB and the receiver, the learned judge nevertheless applied the threshold test for leave in relation to them. He opined that under CPR the court had a duty to do so. He considered and applied the guidance of the Supreme Court of Jamaica in the case of **Regina v Industrial Disputes Tribunal ex parte J. Wray and Nephew Limited**,⁸⁹ an authority presented by the Attorney General. In that case, no objections were made to leave being granted for judicial review. It was also

⁸⁵ Ground of appeal 3 (i) sub-paragraph (iv).

⁸⁶ Ground of appeal 3 (j).

⁸⁷ Ground of appeal 3 (i) sub-paragraphs (i), (ii) and (iii).

⁸⁸ Ground of appeal 3 (k) and (l).

⁸⁹ Claim No. 2009 HCV 04798 Supreme Court of Jamaica (October 14, 15 & 23, 2009) Sykes J.

submitted to the Court that leave should be granted as a matter of course. The learned judge of the Jamaica Supreme Court, did not agree.

[164] Two passages from that judgment found favour with the learned judge in the present proceedings. It is useful to set them out:

“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....⁹⁰The 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.”⁹¹

[165] The subsidiary banks submitted that the learned judge did not intimate that he intended to consider the threshold test in relation to the receiver and ECCB; they had not been afforded an opportunity to address the court on that case and that this constituted a breach of natural justice. They cited **R v Secretary of State for the Home Department and another ex parte Anufrijeva**⁹² and **Murphy v Wyatt**.⁹³

[166] In **Murphy v Wyatt** Lord Neuberger MR distilled what is recognisable as a keystone of natural justice. He declared, [i]t is simply unfair on a party if she loses a case because of a point thought up by the judge, which she or her representatives have not properly been able to address.⁹⁴

⁹⁰ At para. 49.

⁹¹ At para. 58 et seq.

⁹² [2003] UKHL 36.

⁹³ [2011] 1 WLR 2129.

⁹⁴ At para. 17.

- [167] The receiver submitted that the subsidiary banks' attack on the learned judge for considering and applying that authority is unfair and unfounded. He submitted that the case was relied on by the Chief Minister at the leave stage and included in his submissions. He directed the court's attention to the appeal record⁹⁵ where the case is mentioned in the submissions at the leave stage. He submitted further that the appellants cannot justifiably criticise the judge for referring to this case because the test as articulated in **Sharma v Browne-Antoine** on which they relied is to identical effect. They argued that the onus was on the subsidiary banks to satisfy the court that they had a good arguable case, irrespective of whether the respondents appeared or filed evidence. They noted that the CPR contemplates the *ex parte* determination of leave applications.
- [168] The subsidiary banks have invoked one of the pillars of natural justice i.e., that no one should be condemned unless he/she is afforded an opportunity to respond in defence. That concept is rendered in Latin by the phrase '*audi alteram partem*' which is declining in use. It is a non-negotiable natural justice imperative in all tribunals and courts aimed at ensuring procedural fairness. It entails the pre-requisites that a litigant be given reasonable notice and details of the case against him and be allowed a reasonable opportunity to present a response.
- [169] The record affirms that on 30th October 2019, written submissions were filed by counsel on behalf of the Chief Minister and the Attorney General. At paragraph 6.1(iii) the case of **Regina v Industrial Disputes Tribunal (ex parte J. Wray and Nephew Limited)** is one of 3 listed in support of the submission that the threshold test for leave to apply for judicial review is an arguable case or ground having a realistic prospect of success. The other cases mentioned were **Sharma v Browne-Antoine** and **Edgecombe v The Premier et al**. There is therefore no merit to the appellant's ground of appeal and submission that the authority was not presented to the learned judge.

⁹⁵ At the top of pg. 869 of the ELP bundle (pg. 5 of the submissions by the Chief Minister and the Attorney General to the application for leave filed on October 30th, 2019, at para. 6.1(iii)).

- [170] The subsidiary banks' written submissions in response were filed on 25th November 2019. They noted that the only argument by the Chief Minister in opposition is based on the threshold test in **Sharma v Browne-Antoine**. They did not address the other cases. They indicated that they did not intend to make extensive arguments regarding the other threshold requirements for leave and added that their application is not subject to a discretionary bar.
- [171] It must not go unremarked that in the passages highlighted from Sykes J.'s judgment he was emphasising that Part 56 of the CPR places a duty on the court to determine whether the threshold for leave has been met by an applicant and that this requires an assessment irrespective of whether or not leave is opposed. This cannot be gainsaid. This is the only basis for deciding whether the applicant has a good arguable case with a realistic prospect of success. A respondent's failure to appear or object to the application for leave is not the applicable test. Sykes J.'s observations neither mis-state nor enlarge the test. It did nothing more than examine the procedure articulated in the CPR.
- [172] As to the appellants' contention that the learned judge deviated from natural justice principles by applying the learning in **Regina v Industrial Disputes Tribunal ex parte J. Wray and Nephew Limited** without allowing them the opportunity to address him on it, this is not borne out by the record. The appellants were presented with that authority by the other side almost a month before they filed their written submissions in response. If they wished to make counter submissions in relation to the threshold test, they had a reasonable chance to do so in their written or oral submissions. It cannot be the function of a judge to direct counsel's attention to the authorities proffered by another party and invite their response 'line upon line'. That would be too onerous a responsibility, consume an inordinate amount of time and run counter to the overriding objective of the CPR. The appellants' attack on the learned judge on this point is unreasonable and unjustified. I would therefore dismiss grounds of appeal 3 (i) (i) and (ii).

[173] The learned judge was entitled as he did, to place reliance on **R v Industrial Disputes Tribunal ex parte J. Wray and Nephew Limited**, confined to the learning on the threshold test. He was also required to consider the material placed before him by the parties in arriving at his determination, even if the receiver and ECCB represented that they had no objections and did not appear at the hearing. For this reason, the appellants' grounds of appeal on this issue⁸⁵ [3 (i) and (j)] are without merit and I would dismiss them.

[174] The appellants submitted that the exhibited PAAs reveal that they were signed by the receiver. They contended that in view of the learned judge's repeated pronouncements that the only persons responsible for the PAAs and determination of eligibility under the DPTs were the ECCB and the receiver, he was manifestly wrong that there was no arguable case for judicial review against the receiver. They submitted further that the receiver and ECCB tendered no evidence and consequently, no denial that they had made the impugned decisions. They reasoned that the court had no way of knowing what their position would be on the issue of prematurity since it arises from someone asserting that they had not yet made a relevant decision.

[175] The subsidiary banks argued further that to refuse leave under such circumstances is illogical. They submitted that this section of the judgment is flawed and difficult to understand because it commences with the question of whether the claim is premature and concludes with whether the Minister of Finance had a part to play or made a relevant decision. They contended that it is implausible that the ECCB and the receiver had not yet made a decision about who qualifies as a depositor since evidence had been presented that their deposits had not been transferred to NCBA.

[176] The receiver and ECCB countered that this is a mischaracterisation of the learned judge's findings in relation to ECCB and the receiver. They argued that the learned trial judge made no finding that a specific decision had been made

by the ECCB or the receiver but rather that the decisions which were being placed at the feet of the Chief Minister and the Attorney General were matters for the ECCB or the receiver. They submitted that the learned judge made no finding that the receiver made any decision as to what is to be included in the DPT.

- [177] The subsidiary banks directed the court's attention to paragraphs 23, 35, 43 and 61 of the learned judge's decision as the basis for their submissions. Paragraph 61 has already been reproduced. At paragraph 43 the learned judge stated:

"[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." (underlining added)

In each case, the learned judge stopped short of deciding that the receiver or the ECCB made the impugned decisions. He prefaced his comment with 'it appears'. It is obvious that he made no such finding as contended by the subsidiary banks.

- [178] At paragraphs 23 and 35 he stated:

"[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.

...

- [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.” (emphasis and underlining supplied)

[179] In none of the foregoing paragraphs did the learned judge determine that the only persons responsible for the decisions regarding eligibility for the DPT benefits were the signatories to the DPTs. Instead, he accepted that the Chief Minister was not a party to it or trustee under it. He merely repeated the submissions made by the Chief Minister that he made no decisions as to eligibility. In fact, as pointed out by the receiver and the ECCB, the learned judge held at paragraph 56 of his judgment that the eligibility for distribution under the DPT is the sole province of the ECCB and the receiver under the Banking Act.

[180] The learned judge’s exact words are:

‘[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.’ (underlining supplied)

[181] I agree that the subsidiary banks’ have mischaracterised the statements made by the learned judge in those paragraphs. The learned judge made no finding that the ECCB and the receiver made any relevant decision in relation to the PAAs and DPTs. This truth undermines the referenced grounds of appeal in which the appellants assert that he did. I would therefore dismiss grounds of appeal 3 (i) (iii) and (iv).

[182] Moreover, it is noteworthy that the learned judge held that, by operation of law, the PAAs which were executed by the receiver in April 2016 could not accommodate a transfer of the subsidiary banks’ deposits to NCBA.⁹⁶ Accordingly, his observations that the subsidiary banks failed to supply evidence that a PAA was made by the requisite parties to effect the transfer of their

⁹⁶ Para. 55 of the judgment.

deposits to NCBA;⁹⁷ his findings that those deposits were not part of the Resolution Plan and did not fall to be transferred under section 142 of the Banking Act and could not have been transferred to NCBA under any PAA⁹⁹ must be read together for full effect.

[183] The learned judge was thereby signifying that in face of the protection order made by the other court, the receiver had no authority to execute a PAA effecting transfer of the subsidiary banks' deposits to NCBA or to a DPT and could not do so without instructions from the administrator or his duly appointed designate. His conclusion that the application for leave was premature as against the receiver in relation to the transfer and deposits decisions and against the ECCB in relation to the direction and recommendation decisions is unimpeachable. There was simply no evidence that they had made those decisions.

[184] The appellants' contention that the learned judge erred by failing to have regard to the point that execution of the DPTs must logically be preceded by a decision as to eligibility of primary beneficiaries overlooks the reality that while this is so, the appointment of the administrator and the legislative environment governing his appointment vested him with sole authority to determine what should happen to those deposits. In the round, no evidence was produced to the court to establish that the purported decisions were made by the receiver or the ECCB between 22nd April 2016, and 12th December 2019, as alleged. Accordingly, no relevant decisions were referred to the court which could be the subject of a judicial review application.

[185] In the absence of any such decision and in view of the applicable legislation, the learned judge rightly concluded that the leave application against the ECCB and the receiver was premature. It is not a decision which is the product of some error in principle arising from a failure to take account of relevant factors or by giving too little or too much weight to relevant factors which resulted in a perverse

⁹⁷ Para. 54 of the judgment.

outcome. The learned judge did not err in law in deciding that the threshold test for an arguable case had not been made out in relation to them. His determination is not irrational or plainly wrong. It was quite reasoned and reasonable.

- [186] In the circumstances, based on the reasoning elucidated in relation to the Chief Minister, the Attorney General and EXCO, consideration of the duty of candour on the part of the receiver and the ECCB did not arise once a determination was made that they had made no relevant decision. In any event, in view of the regulatory framework, the learned judge's summary of the applicable legal principle and his conclusions and findings, it has been demonstrated that he obviously determined that disclosure of documents evidencing the directive from ECCB to the receiver to enter the PAAs was not required to resolve the matter fairly and justly.

Further Grounds of Appeal

- [187] The appellants raised other grounds of appeal including that the learned judge wrongly failed to take into account that the GOA was the NCBA's sole shareholder; and that the Chief Minister represented Anguilla on the Monetary Council. In light of the decisions on the striking out, the substitution and the leave issues it is not necessary to consider the other grounds in connection with those issues or the disclosure issue (namely grounds 3 (d)(ii) and (iii) (l), (o)). It is also unnecessary to consider the grounds of appeal which deal with the learned judge's 'pyrric victory' and conjecture comments and the immunity issue – grounds 3 (j) (i) – (iii). I refrain from so doing and turn finally to the costs issue.

Costs Issue

- [188] Grounds 3(m) and (n) of the appeal are short. They state simply:

“(m) The judge failed to give reasons for his award of costs to the Respondents in light of CPR rule 56(13)(6).

(n) The Learned Judge failed to take into consideration the general rule

wherein no order for costs may be made against an applicant for an administrative order.”

- [189] Learned Queen’s Counsel Mr. Ronald Scipio submitted on behalf of the appellants that the learned judge wrongly awarded costs to the respondents, to be assessed in accordance with CPR 65.11 and 65.12, unless agreed. He contended that this part of the order was wrong and ought to be overturned.
- [190] He submitted that the learned Judge has not stated anywhere in his decision that he considered that the appellants acted unreasonably in making their application for judicial review or in the conduct of their application. He argued that such a finding would not be sustainable in light of the evidence presented. He reasoned that the fact that they were granted leave to appeal is proof that they did not act unreasonably in making their application or in how they conducted the application.
- [191] He contended further that the learned judge failed to take into consideration the general rule that no order for costs may be made against an applicant for an administrative order. Mr. Scipio, QC concluded that regardless of the final outcome of this appeal, the appeal against the order for costs should be allowed.
- [192] On this point, Dr. Alexis, QC submitted on behalf of the Chief Minister and the Attorney General, that the issues were not worthy of a costs order, in the spirit of the culture of the CPR in relation to judicial review. He submitted further that the costs order could be changed. For his part, learned Queen’s Counsel Mr. Paul Dennis pointed out that the ECCB and the receiver were not involved in the court below and they would not be affected by the costs order.
- [193] A review of the appeal hearing bundle reveals that none of the parties appeared to have made any submissions to the learned judge on the matter of costs. In his decision, he did not explain the basis on which the costs order was made. He ordered simply, ‘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.⁹⁸

[194] The learned judge made no mention of CPR 56.13 which gives the judge a discretion to make such order as to costs as appears just to him. It provides further that the judge may make an order of costs against an applicant for judicial review only if he considered that the applicant acted unreasonably either in making the application or in the manner he conducted the application.⁹⁹

[195] Rule 56.13 (6) provides, '[t]he general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.'

[196] This ground of appeal involves consideration of whether the learned judge was wrong to make the impugned costs order a) without supplying reasons for doing so; and b) thereby deviating from the general rule.

[197] It is established that a court must give reasons for its decision by outlining the principles considered and the rationale for its determination.¹⁰⁰ A concise statement of that principle can be extracted from the judgment of Griffiths LJ in **Eagil Trust Co Ltd v Pigott-Brown and another**¹⁰¹ where he stated:

'... the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. ... It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision.'

⁹⁸ At para. [79] 3.

⁹⁹ Sub-rules (4) and (6).

¹⁰⁰ See Peter Andrew English et al v Emery Reimbold & Strick Limited et al [2002] EWCA Civ 605 which was applied in Emmerson International Corporation v Renova Industries Ltd. et al BVIHCMAP2016/0029 (delivered March 23rd, 2017).

¹⁰¹ [1985] 3 All ER 119 at para. 19.

- [198] Unfortunately, the decision under contemplation in this appeal contains no reasons for the costs order. The learned judge did not indicate whether he considered that the applicants were unreasonable in making the application or the way in which they conducted the proceedings. It appears that those considerations did not factor into his deliberations on this issue. In that regard, the learned judge erred. It is now settled that where a judge does not give reasons for his decision, that decision is vitiated if the appellate court is unable to ascertain the reasons from the record.¹⁰² In such a case, the appellate court is entitled to exercise its own discretion.¹⁰³
- [199] The issue of costs in judicial review hearings was considered by this Court in **Friar Tuck Ltd. and Quiver Inc. v International Tax Authority**.¹⁰⁴ In the court below, the learned judge had made an order that the appellants pay costs to be assessed pursuant to CPR 65.11 and 65.12 on the prescribed costs scale. On appeal, the Court held, *inter alia*, that the learned judge erred in law by failing to apply and/or dis-applying without good reason the costs regime applicable to judicial review claims under CPR 56.13(5).
- [200] In exercising a discretion under the CPR, the Court is duty bound to give effect to the overriding objective to act justly. It must also have regard to all applicable law including relevant provisions of the CPR. It must also examine any prejudice or advantage that its order would visit on the respective parties.
- [201] The basis on which the court makes costs orders in judicial review proceedings is outlined in CPR 56.13. Sub-rule (4) provides that the judge may, however, make such orders as to costs as appear to the judge to be just including a wasted costs order. Sub-rule (5) provides that if the judge makes any order as to costs the judge must assess them.

¹⁰² Peter Thomas v Desireen Douglas et al [2016] ECSCJ No. 17 (delivered 15th February 2016)

¹⁰³ Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste [2010] ECSCJ No. 8 (delivered 11th January 2010).

¹⁰⁴ [2019] ECSCJ No. 77 (delivered 12th March 2019).

[202] Taken with sub-rule (6), the foregoing provisions confer discretionary power on a judge to make a costs order in judicial review proceedings. However, an order of costs is generally not made unless the court considers that the applicant was unreasonable in the respects mentioned. The court must take all of pertinent circumstances into account when making a costs order.¹⁰⁵ In particular, in addition to the factors listed in CPR 56.13, it must have regard to the manner in which a party has pursued a particular allegation, particular issue, or the case; whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings; whether it was reasonable for a party to pursue a particular allegation; and/or raise a particular issue; and whether the claimant gave reasonable notice of intention to issue a claim. The record reveals that the appellants provided such notice.

[203] A crucial question in deciding the costs issue is whether the appellants acted unreasonably in applying for leave to bring judicial review proceedings or in their conduct of the proceedings. A critical and objective assessment of the subsidiary banks' claims demonstrates that they advanced weighty factual and legal assertions and did not engage in frivolous or vexatious excursions. Their submissions before the court have delved into substantive areas of the law which required a comprehensive analysis of the averred factual underpinnings and relevant law.

[204] I am of the considered opinion that the application to commence judicial review proceedings by them and their conduct of such proceedings cannot be justifiably characterised as being unreasonable. Nothing has been urged on the court to warrant a departure from the general rule. In the circumstances, I find that there is no basis in law for doing so. I would allow the appellants' appeal on these two grounds. Paragraph 79 (3) of the judgment would be set aside and replaced with an order that each party bears his or its own costs.

¹⁰⁵ CPR 64.6(5).

Costs on Appeal

[205] The parties have each been partially successful. The respondents have prevailed overwhelmingly. Pursuant to CPR 56.13 (6) and 65.6(1) I would make no order is made as to costs in respect of the appeal.

[206] I would make the following orders:

- (1) The appeal against the learned judge's determination is dismissed except in respect of the award of costs.
- (2) The appeal against the costs order is allowed, the costs award to the respondents is set aside and an order that each party bears his or their own costs in the court below substituted.
- (3) No order as to costs on the appeal.

[207] The Court was presented with very comprehensive and helpful submissions from all parties. I am grateful for the assistance provided.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar [Ag.]