

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2020/0005

BETWEEN:

IAN HOPE-ROSS

Appellant

and

- [1] MARTIN DINNING
- [2] HUDSON CARR
- [3] SHAWN WILLIAMS
- [4] ROBERT MILLER
- [5] EASTERN CARIBBEAN CENTRAL BANK

Respondents

CONSOLIDATED WITH:

AXAHCVAP2020/0006

BETWEEN:

- [1] CHRISTOPHER LISS
- [2] KATHY LISS
- [3] YELLOW WOOD HOUSES LTD.
- [4] TIRDEO DHARAMRAJ
- [5] SUMMER BREEZE LTD.
- [6] OCEAN INVESTMENT
- [7] NORTH EASTERN INSURANCE SERVICES
- [8] NIVEK LIMITED
- [9] ERMANNIO GALLI
- [10] SUNIL PISHU KHATNANI
- [11] MARTIN OLIVER
- [12] IAN GURR
- [13] RENDEZVOUS TOUR COMPANY LTD.
- [14] WILLIAM DORSEY
- [15] DOTTY DORSEY
- [16] LONGWALL INVESTMENTS N.V.
- [17] DWS GROUP LIMITED
- [18] JURGEN KURT SCHWIRTLICH
- [19] WINCHESTER CORP. LIMITED
- [20] DR. AHMET BAYDAR

[21] TERI BAYDAR  
[22] KENNETH R. LANG  
[23] TOMAZ SLIVNIK  
[24] MONIQUE BAUSSAN  
[25] RICHARD HOLUBOWICZ  
[26] LITTLE BAY VENTURE CAPITAL LTD  
[27] KEVIN GAVIN  
[28] LENA GAVIN  
[29] DANIEL GAVIN  
[30] DARLENE SPICER  
[31] MARIE THERESE ROBERT  
[32] MARY VAN DEN BERG  
[33] ROBERT HORVATH  
[34] DANIELLE HORVATH  
[35] ROACH MERLE  
[36] JUDETT BLACK  
[37] DR. CATHERINE VUALA  
[38] JOSETTE SOPHIA PETERSON  
[39] INTERNATIONAL MORTGAGES LTD.

Appellants

and

[1] MARTIN DINNING  
[2] HUDSON CARR  
[3] SHAWN WILLIAMS  
[4] ROBERT MILLER  
[5] EASTERN CARIBBEAN CENTRAL BANK

Respondents

**CONSOLIDATED WITH:**

**AXAHCVAP2020/0007**

**BETWEEN:**

[1] SATAY LIMITED  
[2] UNITED DUTY FREE CONCESSIONARIES LTD.  
[3] HELEN BAYER CONSTABLE, PATRICK  
CONSTABLE AND WALTER BAYER II.  
[4] HELEN BAYER CONSTABLE, TERESA BAYER  
AND WALTER BAYER II  
[5] CADIZ HOLDINGS LTD  
[6] CHANTAL CLOUTIER  
[7] CMS MANAGEMENT LTD

[8] DAVID CROWLEY  
[9] D.N.A. PATENTS, INC  
[10] DCIPHER INC.  
[11] VODACO LIMITED  
[12] DIAMONT COMPANY N.V.  
[13] DUNA HOLDING LIMITED  
[14] EQUIPMENT LEASING LTD  
[15] VAN VEEN CARIBBEAN HOLDINGS  
[16] JASON FREEMAN  
[17] HBM(ANGUILLA) LTD  
[18] HEIDI HOBGOOD  
[19] HOPE-ROSS AND THOMPSON  
[20] IHATSU FUDOSAN CAPITAL LIMITED  
[21] SEAN KENNELLY  
[22] A & A LIMITED  
[23] EDOUARD LEDEE  
[24] ANTHONY MARINI  
[25] MARS EXPLORATION INC  
[26] LISA MARSHALL  
[27] LATIN RETREATS  
[28] DOMINIQUE NOIRE  
[29] FRANK OLIVIERO  
[30] COLIN PERCY  
[31] FRANCIS RAINEAU  
[32] NECOL LIMITED  
[33] RHINO LLC  
[34] FSC MANAGEMENT ATTORNEY LLC  
[35] CANON LIMITED  
[36] SUNNY DAYS MANAGEMENT CORPORATION  
[37] SYNETICS CAPITAL CORP LIMITED  
[38] GLENYS TAILLON  
[39] TSS LLC  
[40] ROBERT VELASQUEZ  
[41] ANNETTE KRABBE  
[42] SIMON DRAKE  
[43] JOHN MICHAEL VICTORY  
[44] LORRAINE TYSON  
[45] STEPHEN JOSEPH CAVAGNARO  
[46] GARY CHARKHAM  
[47] SUNSHINE PROPERTIES LIMITED  
[48] LAURA F. E. VAN HOEVE  
[49] VANITA MIRCHANDANI  
[50] SHARRON YUAN-SAM  
[51] GILLIAN LOOSER  
[52] ANGELA TYLER  
[53] THE LITTLE SHIP COMPANY LTD  
[54] JERRI-LYN ZIMMERMAN

[55] RAYMOND LONGBOTTOM  
[56] MANNING KONG  
[57] PAMELA YEE LAWRENCE  
[58] ISABELLE PATRY  
[59] MARIA INES ALMEIDA  
[60] MARLAM LTD.  
[61] DARLINE DESTEPHENS  
[62] HOLLY HAVEN, LTD  
[63] HABIB JIHA  
[64] MENAVIA LANGLAIS  
[65] HIROKO YOSHIDA

Appellants

and

[1] MARTIN DINNING  
[2] HUDSON CARR  
[3] SHAWN WILLIAMS  
[4] ROBERT MILLER  
[5] EASTERN CARIBBEAN CENTRAL BANK

Respondents

**Before:**

The Hon. Mr. Mario Michel  
The Hon. Mr. Gerard St. C. Farara  
The Hon. Mde. Esco Henry

Justice of Appeal  
Justice of Appeal [Ag.]  
Justice of Appeal [Ag.]

**Appearances:**

Mr. Ian Benjamin, SC with him, Ms. Rayana Dowden for the Appellants  
Mr. Paul Dennis, QC with him, Mrs. Nadine Whyte-Laing and Ms. Navine Fleming  
for the Respondents

---

2021: January 28;  
April 30.

---

*Interlocutory appeal – Case management powers under rule 26.3 of Civil Procedure Rules 2000 – Rule 26.3(1)(b) of Civil Procedure Rules 2000 – Striking out of statement of claim – Reasonable grounds for bringing the claim – Whether pleadings disclosed reasonable grounds for bringing claims – Negligence – Breach of fiduciary duty – Breach of trust – Exercise of judicial discretion – Approach of appellate court to exercise of case management discretion – Whether the master erred in law by concluding that the appellants’ statements of claim disclosed no reasonable grounds for bringing the claims against the respondents*

*for negligence, breach of fiduciary duty and breach of trust – Whether the master erred in failing to properly consider matters pleaded in the appellants' statements of claim – Amendments to statements of claim in lieu of striking out – Whether the master ought to have granted leave to appellants to amend statement of claim in lieu of exercising his discretion to strike them out*

The appellants in these consolidated appeals were depositors either with the National Bank of Anguilla (Private Banking and Trust) Limited ("PBT") or the Caribbean Commercial Investment Bank Limited ("CCIB") (collectively referred to as "the Banks"). The Banks are companies licensed to carry on offshore banking business in Anguilla and are regulated by the Anguilla Financial Services Commission. PBT is wholly owned by the National Bank of Anguilla Limited ("NBA") and CCIB is wholly owned by the Caribbean Commercial Bank (Anguilla) Limited ("CCB Anguilla"). In August 2013, the Eastern Caribbean Central Bank (the "ECCB"), as the monetary authority and regulator of domestic banking in Anguilla, exercised its powers under article 5B of the Eastern Caribbean Central Bank Agreement Act ("the ECCB Act") to place NBA and CCB Anguilla under conservatorship. During the period August 2013 to April 2016, the ECCB appointed the 1<sup>st</sup> to 4<sup>th</sup> respondents variously as conservators over NBA and CCB Anguilla ("the Conservators"). On 22<sup>nd</sup> April 2016, the assets of PBT and CCIB were transferred to a new legal entity, the National Commercial Bank of Anguilla ("NCBA").

The appellants commenced three claims against the ECCB and against the Conservators as *de facto* directors of PBT and CCIB. The claims were for breach of fiduciary duty, breach of trust, and knowing assistance occasioned by the alleged conduct of the Conservators and the ECCB in relation to the monies deposited by the individual appellants with the Banks. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents sought to strike out the appellants' statements of claim on the basis that the statements of claim did not disclose any reasonable ground for bringing the claims; alternatively, that the appellants had no reasonable prospect of succeeding on their claims and there was no reason why the claims should be disposed of by way of a trial. The learned master granted the strike out application and held that two contractual relationships may exist in this case: one between the Banks and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as directors and another between the Banks and the appellants as customers. The learned master found that there was no duty of care owed to the appellants by the respondents and that no fiduciary duties could be made out on the pleadings. The learned master found further that the deposit of money by the appellants gave rise solely to a debtor and creditor relationship and did not give rise to a trustee relationship capable of giving rise to a breach of trust.

Being dissatisfied with the learned master's decision, the appellants appealed. The following issues arise for this Court's determination: (i) whether the master erred in law by concluding that the appellants' statements of claim disclosed no reasonable grounds for bringing the claims against the respondents for negligence, breach of fiduciary duty and breach of trust; (ii) whether the master erred in failing to properly consider the appellants' pleaded case in their statements of claim in relation to the alleged breach of article 5B of the ECCB Act; the alleged breach of section 7 of the Constitution; and the 'knowing assistance' allegation at paragraph 30 of the statements of claim; and (iii) whether the learned master ought to have

granted leave to the appellants to amend their statements of claim in lieu of exercising his discretion to strike them out.

**Held:** dismissing the appeals and ordering the appellants to pay the respondents' costs, to be assessed by a judge or master of the High Court at no more than two-thirds of the costs in the court below, if not agreed within 21 days, that:

1. The court, in the exercise of its case management powers under CPR 26.3(1)(b), has a discretion to strike out a statement of claim or any part thereof where it is shown that the statement of claim discloses no reasonable ground for bringing the claim. It is settled that an appellate court will not lightly interfere with the exercise of a discretionary case management power. In order to successfully challenge the exercise of the court's discretion, the appellants must therefore discharge the heavy burden of showing that the learned master was wrong in the exercise of his discretion to strike out the appellants' claims in the sense that the decision to strike out the claims was plainly wrong or falls outside the generous ambit within which reasonable disagreement is possible.

Rules 1.2 and 26.3(1)(b) of the **Civil Procedure Rules 2000** applied; **Michel Dufour and others v Helenair Corporation Limited and others** [2002] ECSCJ No. 243 (delivered 2<sup>nd</sup> August 2002) considered **Peter Toussaint et al v Martine Johnson (Representative of the Estate of Peter Michael Barnard)**, SLUHCVP2018/0024 (delivered 16<sup>th</sup> September 2020, unreported) considered; **America 2030 Capital Limited et al v Sunpower Business Group PTE Ltd et al** [2020] ECSCJ No. 361 (delivered 26<sup>th</sup> October 2020) considered.

2. In this case, the master's decision to strike out the claims for breach of fiduciary duty and breach of trust cannot be impeached. This is because the relationship between banker and customer does not ordinarily give rise to a fiduciary relationship or to a trustee/beneficiary relationship. The relationship between banker and customer is purely one of debtor and creditor. Accordingly, the monies deposited by a customer with a bank gives rise to a debt as between the depositor and the bank, and not a right or interest over any property held by the bank. The deposit gives rise to a chose in action, namely the right of the depositor, on request, to payment by the bank of the whole or any part of the aggregate amount of principal and interest which has been credited or ought to be credited to the depositor's account at the bank.

**Foley v Hill and Others** (1848) 2 HLC 28 applied; **Hirschhorn v Evans (Barclays Bank Ltd garnishees)** [1938] 2 KB 801 considered; **Space Investments Ltd v Canadian Imperial Bank of Commerce and others** [1986] 1 WLR 1072 applied.

3. In this case, the master's finding that the appellants had no reasonable grounds in law for bringing their claims against the respondents cannot be impugned. This is so because a party seeking to establish that a fiduciary relationship or a trustee/beneficiary relationship (and therefore questions of breach of fiduciary duties, or a breach of trust) can arise in the context of a bank/customer relationship, must specifically plead and prove that such a relationship and duty exists. The facts

relied on in the appellants' pleaded cases must be sufficient to establish a viable claim for breach of fiduciary duty and breach of trust, outside the mere existence of the banker/customer relationship. In the present case, however, the pleadings do not go further than relying on the usual parameters of the bank/customer relationship in seeking to establish that a fiduciary relationship or a trustee/beneficiary relationship existed. Accordingly, the learned master did not err in the exercise of his discretion in striking out the appellants' claims.

**National Commercial Bank (Jamaica) Ltd v Hew and others** [2003] UKPC 5 considered; **Fahad Al Tamimi v Mohamad Khodari** [2009] EWCA Civ 1109 considered; **Bartlett v Barclays Bank Trust Co Ltd** [1980] 1 All ER 139 considered; **Tiger v Barclays Bank Ltd** [1952] 1 All ER 85 considered; **Bristol and West Building Society v Mothew** [1997] 2 WLR 436 applied; **Williams v Central Bank of Nigeria** [2014] AC 1189 applied.

4. In the present case, the appellants' claim is one against the Banks for recovery of the debts owed to them (the chose in action) in the sum of their deposits plus any interest due to them in accordance with the terms of their banking contracts. Therefore, while it is arguable on certain pleaded facts that a parent company may owe a common law duty of care to individuals who suffer harm as a result of their subsidiary's dangerous activities, the appellants' pleaded case on the issue of negligence, fails on the basis that the appellants' monies, once deposited with the Banks, were no longer the property of the appellants. Accordingly, the master rightly found that the appellants are not permitted to claim against the Conservators as *de facto* or *de jure* directors for their deposits with the Banks.

**Williams v Natural Life Health Foods Ltd** [1998] WLR 830 considered; **White v Jones** [1995] 2 AC 205 considered; **Lungowe v Vedanta Resources** [2019] UKSC 20 considered; **Okpabi and others v Royal Dutch Shell Plc and another** [2021] UKSC 3 considered.

5. It is not open to the appellants to transform their claim for breach of fiduciary duties, breach of trust and negligence, into a claim for deprivation of property under the Constitution or into a challenge to the nature and exercise by the ECCB of powers under the ECCB Act, where it is clear that the claims were not instituted for that purpose or on that basis. The appellants' claims clearly sought to establish the respondents' liability for negligence, breach of fiduciary duty and breach of trust. The appellants' claims were neither in form nor substance claims for deprivation of property under the Constitution nor did they seek relief under the Constitution or pursuant to CPR Part 56. Moreover, the claim at paragraphs 27 and 29 respectively of the appellants' statements of claim asserts a breach of section 7 of the Constitution as a consequence of the transfer of the deposits made by the appellants in PBT and CCIB to NCBA, with respect to which deposits the appellants have no legal or proprietary interest. Further, by logical extension, there could be no viable claim against the respondents, as pleaded, for knowingly assisting the Government of Anguilla with depriving the appellants of their monies, even if such a cause of action exists in law or in equity. Accordingly, the learned master's

decision to treat with the matter as a claim engaging the causes of action set out in the claim forms, was correct and cannot be a basis upon which this Court may interfere with the said decision.

**The Attorney General of Anguilla et al v Bernice Lake et al** Anguilla Civil Appeal No. 4 of 2004 (delivered 4<sup>th</sup> April 2005, unreported) distinguished; **Gulf Insurance Ltd v The Central Bank of Trinidad and Tobago** [2005] UKPC 10 distinguished.

6. When called upon to strike out a statement of claim or part thereof, the court ought to consider whether it is in the interests of justice to permit an amendment to the impugned statement of claim in lieu of striking out. In this case, there were several defects in the appellants' claims as pleaded, principal among which is that the claims seek relief of the court in relation to the money deposited with the Banks by the appellants. To permit an amendment in these circumstances would be to grant leave for the appellants to transform their claims into something that it was clearly never intended to be, this would be overwhelmingly and disproportionately unfair to the respondents and accordingly inimical to the overriding objective.

**Real Time Systems Limited v Renraw Investments Limited and Others** [2014] UKPC applied.

## JUDGMENT

- [1] **FARARA JA [AG.]:** By a written judgment dated 20<sup>th</sup> March 2020, a learned master struck out three claims brought by 105 claimants against the Eastern Caribbean Central Bank and the four conservators of two banks located in Anguilla, on the basis that there were no reasonable grounds for bringing the claims; and made an order for costs against the appellants. The claims in the court below were for breach of fiduciary duty, breach of trust, and knowing assistance occasioned by alleged conduct of the conservators and the Eastern Caribbean Central Bank in relation to the monies deposited by the individual claimants with the offshore banks. By this consolidated appeal, the appellants (the claimants in the court below) seek to have the decision of the learned master set aside in its entirety and the claims restored on the grounds that the learned master failed to properly consider the circumstances of each case in arriving at his decision, and in so doing misapplied the test for striking out a statement of claim pursuant to rule 26.3(1)(b) of the **Civil Procedure Rules 2000** (the "CPR").



## Background

- [2] The appellants were depositors either with the National Bank of Anguilla (Private Banking and Trust) Limited (“PBT”) or the Caribbean Commercial Investment Bank Limited (“CCIB”). I shall refer to PBT and CCIB collectively as “the Banks”. PBT and CCIB are companies incorporated under the laws of Anguilla, licensed to carry on offshore banking business in Anguilla and are regulated by the Anguilla Financial Services Commission. PBT is wholly owned by the National Bank of Anguilla Limited (“NBA”) and CCIB is wholly owned by the Caribbean Commercial Bank (Anguilla) Limited (“CCB Anguilla”).
- [3] On 12<sup>th</sup> August 2013, the 5<sup>th</sup> respondent, the Eastern Caribbean Central Bank (the “ECCB”) as the monetary authority and regulator of domestic banking in Anguilla, exercised its powers under article 5B of the **Eastern Caribbean Central Bank Agreement Act**<sup>1</sup> (“the ECCB Act”) to place NBA and CCB Anguilla under conservatorship. Article 5B of the ECCB Agreement on its face permits the ECCB, in certain circumstances, to take control of the property and undertakings of a financial institution licensed under the **Banking Act**.<sup>2</sup> In the cases of NBA and CCB Anguilla, this included taking control of the rights attached to their shareholdings in the Banks. During the period 12<sup>th</sup> August 2013 to 22<sup>nd</sup> April 2016, the ECCB appointed Martin Dinning, Hudson Carr, Shawn Williams and Robert Miller (the 1<sup>st</sup> to 4<sup>th</sup> respondents) as the conservators over NBA and CCB Anguilla. I hereafter refer to the 1<sup>st</sup> to 4<sup>th</sup> respondents as “the Conservators”.
- [4] As at the date of their appointment, the Conservators continued the management of the day-to-day operations of the Banks in accordance with management agreements between the Banks on the one hand and NBA and CCB Anguilla on the other, while a resolution plan was being formulated and funding was being sourced for the resolution. On 22<sup>nd</sup> February 2016, Mr. William Tacon was appointed as administrator and took control of the Banks. On 22<sup>nd</sup> April 2016, the ECCB

---

<sup>1</sup> Revised Statutes of Anguilla, c.E5.

<sup>2</sup> Revised Statutes of Anguilla, c. B11.

relinquished control of NBA and CCB Anguilla and, on that date, NBA and CCB Anguilla were placed in receivership and ceased to carry on banking business in Anguilla.

### **The claims**

- [5] The appellants, in their capacities as depositors of the Banks, commenced three claims against the ECCB, as the monetary authority for Anguilla and against the Conservators, as *de facto* directors of PBT and CCIB. These claims respectively are AXAHCV2016/0051, AXAHCV2019/0035 and AXAHCV2019/0039. Both in the court below, and before this Court, it is common ground that the pleaded cases in each of the claims are materially identical, save for the quantum of damages sought on each claim.
- [6] The claims allege that the appellants, who held personal savings accounts, personal chequing accounts and deposit accounts with the Banks, were able to transact normal banking business with the Banks from April 2005 to 12<sup>th</sup> August 2013. Thereafter, the appellants were granted limited access to their funds. From October 2013, the appellants who had personal savings accounts or certificates of deposits were unable to access their funds, and from 19<sup>th</sup> April 2016 to present, the appellants have been unable to access any funds deposited into their respective accounts before 24<sup>th</sup> March 2016.
- [7] The appellants, by their claims, attribute this state of affairs to the intervention of the ECCB and the Conservators.
- [8] In relation to the ECCB, the appellants claimed that article 5B of the ECCB Agreement does not give the ECCB the power to take control of the affiliates of the financial institutions which it perceives to be in financial difficulty. The Notice of Intervention gazetted on 22<sup>nd</sup> August 2016, pursuant to article 5B, states that the ECCB was taking control of the property and affairs of NBA and CCB Anguilla. This notice did not and could not extend to the Banks which are separate legal entities not regulated by the ECCB. In the premises, during the period 12<sup>th</sup> August 2013 to

24<sup>th</sup> March 2016, the appellants claimed that the respondents had no authority to take control of the Banks and intermeddle with its property.

- [9] The appellants claimed that by providing oversight and management of the Banks, the Conservators and the ECCB acted as de facto directors of the Banks and owed a fiduciary duty of care to the appellants, as creditors, to act in good faith and with due diligence when they assumed the custody and administration of the property of the Banks, including deposits made by the appellants since 2005. This duty of care to consider the interest of the appellants as creditors was paramount, as the respondents were aware or ought to have known that the Banks and their respective parent companies were insolvent, on the brink of insolvency, at risk of insolvency or of doubtful solvency. The respondents therefore acted negligently in their management of the Banks and in breach of trust, which resulted in loss to the appellants.
- [10] The appellants further pleaded that, on 22<sup>nd</sup> April 2016, a 'resolution plan' was effected with the full knowledge of the ECCB. As part of this plan, the assets of the Banks, including the deposits made by the appellants, were transferred to a new legal entity, the National Commercial Bank of Anguilla ("NCBA"), in breach of section 7 of the **Anguilla Constitution Order, 1982**<sup>3</sup> ("the Constitution"); and of the European Convention on Human Rights, which was extended to Anguilla in 1988. The respondents, being aware of the details of the 'resolution plan' and its consequences, knowingly assisted the Government of Anguilla in depriving the appellants of their monies.
- [11] The appellants claimed that, as of the date of the claims, they were still unable to access their funds deposited in the Banks, and sought damages in the following sums:
- (i) in AXAHCV2016/0051, USD \$13,028,846.17.

---

<sup>3</sup> S.I. No. 334 of 1982.

(ii) in AXAHCV2019/0035, USD \$17,328,419.81, GBP 25,681.25 and Euro €42,990.89; and

(iii) in AXAHCV2019/0039, USD \$472,743.83; plus, interest in accordance with the term of the accounts for the period August 2013 to present.

[12] Learned Senior Counsel, Mr. Benjamin who appeared for the appellants (but who did not appear for the appellants in the court below) apprised the Court of his instructions that the respondents filed a defence only in AXAHCV2016/0051 and therefore that the pleadings in that claim are closed, whereas no defence was filed in AXAHCV2019/0035 or AXAHCV2019/0039. A copy of the respondents' defence in AXAHCV2016/0051 had not been included in the record of appeal.

#### **The application to strike and the master's decision**

[13] On 27<sup>th</sup> September 2019, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents filed an application ("the strike out application") seeking, in the main, orders that the appellants' statements of claim be struck out pursuant to CPR 26.3(1)(b) and/or that summary judgment be granted to the defendant pursuant to CPR 15.2(a), on the basis that the statements of claim did not disclose any reasonable ground for bringing the claims; alternatively, that the appellants had no reasonable prospect of succeeding on their claim and there is no other reason why the claims should be disposed of by way of trial. The application centred principally on the grounds that the relationship between the appellants on the one hand, and the Banks on the other hand, was contractual and was that of creditor and debtor and therefore could not give rise to a breach of trust or duty of care as between the Banks (and by extension the Conservators as *de facto* directors) and the appellants. The respondents contended that as the funds deposited with the Banks by the appellants were not held in trust by the Banks on behalf of the appellants, and therefore the respondents could not have acted in breach of trust. Further, the directors of a company have a duty to consider the interest of creditors when the company is insolvent or when there is a real risk of insolvency. However, that duty is owed to the company and not to its

creditor. The Conservators therefore, whether as *de facto* or *de jure* directors could owe no fiduciary duty or duty of care to the appellants as creditors of the Banks.

[14] In a written judgment dated 20<sup>th</sup> March 2020, the learned master granted the strike out application, having accepted the respondents' submissions in their entirety. The master accepted that the test for determining whether a duty of care exists under the tort of negligence is derived from **Caparo Industries Plc. v Dickman and others**,<sup>4</sup> which established that a duty of care will only exist in law where the relationship between the parties is one of sufficient proximity, it is reasonably foreseeable that the actions of the defendant will cause harm or loss to the claimant, and where the court considers it to be fair, just and reasonable to impose a duty of care on the defendant. On the footing of **Caparo v Dickman**, the learned master opined that the court must seek to determine what relationship, if any, exists between the defendants and the claimants. In determining whether a duty of care was owed, the learned master was guided by the decision of the House of Lords in **Foley v Hill and Others**.<sup>5</sup> He reasoned that two contractual relationships may exist in this case – one between the Banks and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, as directors, and another between the Banks and the appellants, as customers.<sup>6</sup> The learned master found, on the basis of **Foley v Hill**, that there was no duty of care owed to the appellants by the respondents.

[15] On the question of whether the appellants had a real prospect of succeeding on their claims for breach of fiduciary duties, the master accepted the submissions of the respondents which were founded on the decision of **BTI 2014 LLC v Sequana SA and Others**.<sup>7</sup> The learned master accepted that **BTI** established the principle that the directors of a company will only have a duty to regard the creditors of the company in circumstances where the company is insolvent, and the assets of the insolvent company are, in a practical sense, the assets of the creditors pending

---

<sup>4</sup> [1990] UKHL 2.

<sup>5</sup> (1848) 2 HLC 28.

<sup>6</sup> See paragraph 66 of the judgment below.

<sup>7</sup> [2019] EWCA Civ 112.

liquidation or return to solvency. Once it is established that directors are under a duty to have regard to the interest of creditors, a breach of that duty will entitle only the company to recover compensation for loss caused to the company. Without making any such finding expressly, it is clear that the learned master did not consider that any fiduciary duties could be made out on the pleadings, on the basis that the pleadings in this case did not fall within the parameters of **BTI**.

- [16] On the question of breach of trust, the master accepted the respondents' submission that the deposit of money by the appellants solely gave rise to a debtor and creditor relationship and did not give rise to a trustee relationship capable of giving rise to a breach of trust. In this regard the learned master relied on a passage from **Halsbury's Laws of England Trust and Powers**<sup>8</sup> which states:

"The deposit of money with a bank normally gives rise to a loan (a debtor – creditor) and not a trust. This remains the case where a bank that is a trustee holding trust money, banks the money with itself pursuant to an authority in that behalf in the trust instrument, so that the money can be used as normal in the bank's business (for example lending money). If the bank becomes insolvent the beneficiaries, merely having a taking in action against the bank, rank only as unsecured creditors."

- [17] The learned master accordingly ordered:

1. The [appellants'] claim forms and statements of claim are struck out.
2. The [appellants] are to pay the [respondents'] cost[s] of this application to be assessed in default of agreement."

### **The Appeal**

- [18] The appellants now appeal the decision of the learned master on grounds which challenge, as blatantly wrong, the learned master's conclusions that the statements of claim did not disclose any reasonable grounds for bringing the claim and that respondents could not in law owe the appellants, in their capacities as creditors of the Banks, a duty of care either in equity or at common law. From the grounds of appeal, the oral arguments and the written submissions and authorities on both sides, the following issues arise for this Court's determination:

---

<sup>8</sup> Halsbury's Laws of England, Vol. 98 (2013).

- (i) Whether the master erred in law by concluding that the appellants' statements of claim disclosed no reasonable grounds for bringing the claims against the respondents for negligence, breach of fiduciary duty and breach of trust.
- (ii) Whether the master erred in failing to properly consider the appellant's pleaded case in their statement of claim in relation to: (i) the alleged breach of article 5B of the ECCB Act; (ii) the alleged breach of section 7 of the Constitution; and (iii) the 'knowing assistance' allegation at paragraph 30 of the statements of claim.
- (iii) Whether the master ought to have granted leave to the appellants to amend their statements of claim in lieu of exercising his discretion to strike them out.

[19] As a background to these issues, I will now briefly discuss the law applicable to applications to strike pursuant to rule 26.3(1)(b) of the CPR.

#### **Law Applicable to Strike Out Applications**

[20] CPR 26.3(1)(b) confers on the court a discretion to strike out a statement of claim or any part thereof where it is shown that the statement of claim or part of it does not disclose any reasonable ground for bringing or defending a claim. CPR 26.3(1)(b) states as follows:

“(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

...

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim...”.

[21] As with every discretion conferred upon the court by the CPR, the discretion to strike out must be exercised in accordance with law and with a view to furthering the

overriding objective.<sup>9</sup> The central principles which undergird the court's jurisdiction to strike out all or part of a statement claim are now settled, have been consistently cited and applied by this Court, and need not be extensively recited. In brief, these principles are as follows:

- (i) The court must be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the case in the sense that it has no real prospect of succeeding at trial.<sup>10</sup>
- (ii) A statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence. Further, a statement of claim should not be struck out where the dispute between the parties involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the strength of the case may not be clear because it has not been fully investigated.<sup>11</sup>
- (iii) On hearing an application to strike pursuant to CPR 26.3(1)(b), the pleadings alone are to be examined. The trial judge should assume that the facts alleged in the statement of claim are true unless they are manifestly incapable of proof.<sup>12</sup>
- (iv) Striking out is a draconian step or "nuclear option" and ought only to be deployed sparingly, in the clearest of cases. The reason for proceeding cautiously is that the exercise of the jurisdiction to strike out deprives a party of its right to a trial and of its ability to strengthen its case through the

---

<sup>9</sup> See rule 1.2 of the Civil Procedure Rules 2000.

<sup>10</sup> CITCO Global Custody NV v Y2K Finance Inc [2009] ECSCJ No. 165 (delivered 19<sup>th</sup> October 2009).

<sup>11</sup> Ian Peters v Robert George Spencer [2009] ECSCJ No. 212 (delivered 22<sup>nd</sup> December 2009), per Pereira CJ; Tawney Assets Limited v East Pine Management Limited and others [2012] ECSCJ No. 284 (delivered 17<sup>th</sup> September 2012) per Gordon JA [Ag].

<sup>12</sup> CITCO Global Custody NV v Y2K Finance Inc [2009] ECSCJ No. 165 (delivered 19<sup>th</sup> October 2009) per Edwards JA at para. 13, and Martin Didier G.C et al v Royal Caribbean Cruises Ltd. SLUCVAP consolidated appeals 2014/0024 and 2014/0004 (delivered 6<sup>th</sup> June 2016, unreported) per Pereira CJ at para. 28.



process of disclosure, the filing of witness statements or witness summaries and other procedures such as requests for further information.<sup>13</sup>

- (v) As striking out is a draconian step, the court must consider whether the interests of justice are better served by permitting an amendment, to pleadings or deploying some other sanction, instead of striking out the statement of claim.<sup>14</sup>

[22] Again, the power to strike out a statement of claim or part of a statement of claim is one of the discretionary tools in the artillery of the court in the exercise of its case management powers under CPR 26.3(1)(b). This appeal therefore engages the well-known principles set out in cases such as **Michel Dufour and others v Helenair Corporation Limited and others**,<sup>15</sup> **Peter Toussaint et al v Martine Johnson (Representative of the Estate of Peter Michael Barnard)**,<sup>16</sup> and **America 2030 Capital Limited et al v Sunpower Business Group PTE Ltd et al**<sup>17</sup> which underpin this Court's jurisdiction to review a lower court's exercise of a case management discretion. An appellate court will not lightly interfere with the exercise of a discretionary case management power. Therefore, in order to successfully challenge the exercise of the court's discretion, the appellants must therefore discharge the heavy burden of showing that the learned master was wrong in the exercise of his discretion to strike out the appellants' claims in the sense that the decision to strike out the claims was plainly wrong or falls outside the generous ambit within which reasonable disagreement is possible.

---

<sup>13</sup> Ian Peters v Robert George Spencer ANUHCVP2009/0016 (delivered 22<sup>nd</sup> December 2009) per Creque JA; see also HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and another [2014] EWCA Civ 1106.

<sup>14</sup> Pereira CJ in The Attorney General of Saint Lucia v Darrel Montrope [2020] ECSCJ No. 235. (delivered 9<sup>th</sup> July 2020); See also Peerless Limited v Gambling Regulatory Authority and others [2015] UKPC 29 and Real Time Systems Limited v Renraw Investments Limited and Others [2014] UKPC 6.

<sup>15</sup> [2002] ECSCJ No. 243 (delivered 2<sup>nd</sup> August 2002).

<sup>16</sup> SLUHCVP2018/0024 (delivered 16<sup>th</sup> September 2020, unreported).

<sup>17</sup> [2020] ECSCJ No. 361 (delivered 26<sup>th</sup> and 30<sup>th</sup> October 2020); See also Nilon Limited and another v Royal Westminster Investments S.A. and others [2015] 3 All ER 372; HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and another [2014] UKSC 64 and Marinor Enterprises Limited et al v First Caribbean International Bank (Barbados) Ltd. DOMHCVP2013/0003 (delivered 6<sup>th</sup> July 2016, unreported).

**Issue 1: Whether the master erred in law by concluding that the appellants' statements of claim disclosed no reasonable grounds for bringing the claims against the respondents for negligence, breach of fiduciary duty and breach of trust?**

- [23] The appellants argue that in reaching his decision to strike out, the master relied solely on the propositions that because the relationship between a banker and a bank will usually be one of creditor and debtor, rather than trustee and beneficiary, and that the so-called "creditors' interests duty" is owed only to the company and not to creditors, it followed that no duty of care (either at common law, or of a fiduciary nature in equity) could be owed by the respondents to the appellants. This finding by the master in relation to the creditors' interest duty has not been challenged in this appeal.<sup>18</sup>
- [24] The appellants contend however that the nature of the "creditors' interests duty" is a separate question from whether the directors of a company or, for that matter any other person, may have assumed a duty of care to another, including to a creditor or customer of a company of which they are the director/controller, so as to attract liability in negligence. By failing to consider this, the master failed to address the appellants' case which positively asserted that the respondents acted in breach of duty of care and/or fiduciary duties, having assumed fiduciary duties in the particular circumstances of this case. He therefore wholly misunderstood the nature of the appellants' case in concluding that it should be struck out because it was unsustainable as a matter of law.
- [25] The appellants further contend that whether a party owes fiduciary duties to another is a fact-sensitive question for the court, which will not seek to impose rigid categories of fiduciary relationship on the situation given that the categories of fiduciary relationships are not closed. Indeed, in appropriate circumstances banks and those through whom they act may owe fiduciary duties to a bank's customers.

---

<sup>18</sup> See paragraphs 33 and 34, and 71 to 73 of the supplemental submissions filed by the appellant on 12<sup>th</sup> December 2020.

In principle, this includes the directors of a bank. Thus, it is perfectly possible for a bank and those controlling its affairs to owe fiduciary duties to the bank's customers in appropriate circumstances which, if breached, would give rise to liability for breach of fiduciary duty. The appellants contend that by their words and/or conduct, including by sending letters and intermeddling in the relationship between the Banks and their customers (and indeed doing so beyond the powers granted to the ECCB under ECCB Act), the respondents assumed a duty of care in negligence and/or fiduciary duties to the appellants. The respondents then singularly failed to take reasonable care to safeguard the appellants' interests, causing them significant loss in circumstances where they had relied upon the respondents' words and/or conduct by not seeking to withdraw their funds from the Banks in the meantime and continuing to operate them as normal.

[26] I shall first turn to the claim for breach of fiduciary duty and breach of trust.

## **Discussion**

### **(i) Claims for breach of fiduciary duty and breach of trust**

[27] The courts have to a large extent clarified the nature of the legal relationship between a banker and a depositor. It has been consistently held that the relationship between banker and customer does not ordinarily give rise to a fiduciary relationship or to a trustee/beneficiary relationship. The most oft cited case on this point is **Foley v Hill** which establishes that the relationship between banker and customer is purely one of debtor and creditor. This relationship excludes any element or suggestion of trusteeship on the part of or fiduciary relationship with the banker with regard to a current account. As Lord Brougham stated:

“The trade of a banker is to receive money and use it as if it were his own he becoming debtor to the person who has lent or deposited with him the money to use as his own... That being the trade of a banker, and that being the nature of the relation in which he stands to his customer ... I cannot confound the situation of a banker with that of a trustee and conclude that the banker is a debtor with a fiduciary character.”

[28] **Foley v Hill** has been followed, applied and restated in several cases including **Joachimson v Swiss Bank Corporation**,<sup>19</sup> where the Court described the relationship as follows:

“The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours.”<sup>20</sup>

[29] As a corollary, it is also well established that at the heart of the banker/depositor relationship is a debt in the sum of monies deposited. The depositor holds no interest in the money that was itself deposited with the bank. As the learned Lord Chancellor, in **Foley v Hill**, stated at paragraph 36:

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

[30] Further, the credit balance created by the deposit of money into a bank does not give rise to a question of property or to any proprietary interest in an asset being held by the bank on behalf of the depositors but to a chose in action that is to a contractual right to the repayment of a debt in the value of the deposited sum. This was confirmed as early as the case of **Hirschhorn v Evans (Barclays Bank Ltd**

---

<sup>19</sup> [1921] 3 KB 110 at 127.

<sup>20</sup> See also *Duggan v Governor of Full Sutton Prison and another* [2004] 2 All ER 966 at para. 35.

**garnishees**).<sup>21</sup> More recently, the Privy Council in its decision in **Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co. and others**<sup>22</sup> stated that:

“A customer who deposits money with a bank authorises the bank to use that money for the benefit of the bank in any manner the bank pleases. The customer does not acquire any interest in or charge over any asset of the bank or over all the assets of the bank. The deposit account is an acknowledgment and record by the bank of the amount from time to time deposited and withdrawn and of the interest earned. The customer acquires a chose in action, namely the right on request to payment by the bank of the whole or any part of the aggregate amount of principal and interest which has been credited or ought to be credited to the account. If the bank becomes insolvent the customer can only prove in the liquidation of the bank as unsecured creditor for the amount which was, or ought to have been, credited to the account at the date when the bank went into liquidation.” (Underlining supplied)

[31] Accordingly, in **Space Investments** the Board went on to express that:

“When a customer deposited money with [a bank] and the amount of the customer's money was credited to a customer's deposit account, the customer did not become entitled to any interest in any asset or in all the assets of [the bank]. The sole right of the customer was to be paid at his request a sum equal to the amount standing to the credit of his deposit account. There was nothing to trace.”

[32] The clear position, evidenced in the cases above, is therefore that there is no automatic fiduciary relationship or trustee/beneficiary relationship existing between the Banks (and therefore by extension the Conservators – whether as *de jure* or *de facto* directors) and the appellants. Rather, the relationship between the appellants on the one hand, and the Banks on the other hand, is primarily that of debtor and creditor. The monies deposited by a customer with a bank gives rise to a debt as between the depositors and the bank, and not a right or interest over any property held by the bank. The deposit gives rise to a chose in action, namely the right of the depositor, on request, to payment by the bank of the whole or any part of the aggregate amount of principal and interest which has been credited or ought to be

---

<sup>21</sup> [1938] 2 KB 801 at 815.

<sup>22</sup> [1986] 1 WLR 1072.

credited to the depositor's account at the bank. There is therefore no traceable asset created or maintained by the act of the appellants' depositing sums of money with the Banks.

[33] It has been recognised that a party seeking to establish that a fiduciary relationship or a trustee/beneficiary relationship (and therefore questions of breach of fiduciary duties, or a breach of trust) can arise in the context of a bank/customer relationship, must specifically plead and prove that such a relationship and duty exists. In **National Commercial Bank (Jamaica) Ltd v Hew and others**,<sup>23</sup> for example, the Privy Council reasoned that although the relationship of banker and customer is not a relationship presumed to generate the influence of trust and confidence or of ascendancy and dependency, such a relationship can exist but must be proved as a fact in a particular case. Similarly, in **Fahad Al Tamimi v Mohamad Khodari**,<sup>24</sup> the Court of Appeal of England observed that: '[t]he relationship between a lender and a borrower is not in principle a fiduciary relationship. The relationship between a bank manager and a customer may in certain circumstances acquire a fiduciary character.' (Underlining supplied) Further, cases such as **Bartlett and others v Barclays Bank Trust Co Ltd**<sup>25</sup> and **Tiger v Barclays Bank Ltd**,<sup>26</sup> show that a trustee/beneficiary relationship will exist where the banker assumes the office of trustee of property owned by a depositor/customer. The narrow question here, therefore, is whether the facts relied on in the appellants' pleaded case must be sufficient to establish viable claims for breach of fiduciary duty and breach of trust, outside the mere existence of the banker/customer relationship.

[34] In relation to the claim for breach of fiduciary duties, the case of **Bristol and West Building Society v Mothew**<sup>27</sup> is instructive on the meaning and applicability of fiduciary duties. At page 710, Millett LJ explained as follows: 'The expression

---

<sup>23</sup> [2003] UKPC 51.

<sup>24</sup> [2009] EWCA Civ 1109.

<sup>25</sup> [1980] 1 All ER 139.

<sup>26</sup> [1952] 1 All ER 85 at 88.

<sup>27</sup> [1997] 2 WLR 436.

“fiduciary duty” is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties.’ At pages 711-712, Millett LJ continued:

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.”

[35] Indeed, as the appellants have argued, the question of whether fiduciary duties are owed is by nature a fact-sensitive question. As with any other pleaded cause of action, a party seeking to establish that such a relationship and duty exists, is required to particularise the facts and circumstances attendant on their case which give rise to the relationship and duty. In the words of **Bristol** therefore, the appellants’ statements of claim must have disclosed viable allegations that the respondents undertook to act for or on behalf of the appellants in relation to the monies deposited in the Banks in circumstances which give rise to a relationship of trust and confidence, outside the usual customer/banker relationship which, the law clearly states, does not give rise to such a relationship.

[36] The pleadings central to the assertion that the respondents owed fiduciary duties to the appellants are paragraphs 24, 25, 26 and 27 of the statements of claim. Those paragraphs read as follows:

“24. In providing oversight and management of PBT and CCIB, the [respondents] acted as de facto directors of PBT and CCIB and owed a fiduciary duty of care to the [appellants], as creditors, to act in good faith and with due diligence when they took upon themselves the custody and administration of the property of PBT and CCIB, including deposits the Claimants made since 2005.

25. This duty of care to consider the interest of the [appellants] as creditors was paramount, as the [respondents] were aware or ought to have known that PBT and CCIB and their respective parent companies were insolvent, on the brink of insolvency, at risk of insolvency or of doubtful solvency.

26. The [respondents] acted negligently in their management of [the Banks] in breach of trust, which has resulted in loss to the [appellants].

27. Particulars of Breach of Trust and Negligence

(a) The [respondents] failed to establish a policy which ensured the safety of deposits;

(b) The [respondents] failed to procure and ensure that all property of PBT was secure and under their control;

(c) The [respondents] failed to take reasonable steps to recoup any property or assets or deposits which were placed with NBA and CCB prior to their involvement in PBT and CCIB respectively;

(d) The [respondents] knew or ought to have known that NBA and CCB were not financially sound, as the ECCB had taken control of these entities with a view to establishing financial stability;

(e) The [respondents] failed to insure the deposits received by PBT and CCIB respectively;

(f) Despite the precarious financial state of NBA and CCB the [respondents] allowed or were reckless to the fact that the [appellants'] monies were placed in those financial institutions by PBT and CCIB respectively for safe keeping without due regard to NBA and CCB's ability to repay those deposits upon demand;

(g) The [respondents] failed to take reasonable steps to minimize the potential loss to the [appellants] as creditors; and

(h) The 1st [respondent] represented to the [appellants] that their deposits were safe and they could continue to trade with their accounts which were not affected by the intervention of ECCB in NBA and CCB." (Underlining supplied)

[37] Having examined these pleadings, in the context of the remainder of the appellants' pleaded cases, I agree with the learned master that it was appropriate to strike out the appellants' claims in this regard for two main reasons. First, the pleadings, in my



view, do not go further than relying on the usual parameters of the bank/customer relationship in seeking to establish that a fiduciary duty was owed by the Banks (and therefore, by extension, the Conservators and the ECCB) or by the Conservators independent of the Banks. No factual basis has been asserted which could possibly found a relationship of trust and confidence, or an obligation of loyalty on the part of the Banks or the Conservators to the appellants. Without these specifically pleaded facts, the appellants' case fell squarely within the confines of the usual parameters of the **Foley v Hill** line of cases, and there therefore could be no basis, in law, upon which to assert that a fiduciary duty existed in the circumstances.

[38] Secondly, the appellants' pleaded cases centre on the Conservators' treatment of the monies deposited into the Banks. **Foley v Hill**, and the **Hirschhorn** and **Space Investments Ltd** cases make plain that the appellants' monies, once deposited with the Banks, were no longer the property of the appellants. The appellants instead acquired choses in action in the form of debts owed by the Banks to the creditors. The appellants' claim against the Conservators (as *de facto* or *de jure* directors) and the ECCB, framed with specific reference to the deposits is not and cannot, in law, be construed to be a claim for recovery of the debts, against the Banks who are, in law, the debtors. Therefore, even if there was a sustainable allegation that the Conservators assumed fiduciary duties, no duties could be owed in relation to their treatment of the monies deposited. It is therefore in my view ineluctable to conclude that there were no reasonable grounds on which the appellants could bring their claims for breach of fiduciary duties.

[39] As to the claims for breach of trust set out in the statements of claim at paragraphs 26 and 27 (quoted above), it is clear that these pleadings, or any other part of the statement of claim, do not assert a trustee/beneficiary relationship or any facts surrounding an assumption of a trust relationship as between the appellants and the Banks (and therefore by extension the Conservators). Further, in the absence of any express pleaded trust relationship, there can also be no sustainable argument that the respondents were trustees *de son tort* – that is constructive trustees by

virtue of intermeddling with trust property as defined by Lord Neuberger in **Williams v Central Bank of Nigeria**.<sup>28</sup> The statements of claim therefore do not present any legal basis outside of the fact of the banker/depositor relationship on which a legal trustee/beneficiary relationship could exist. No trust relationship has been pleaded or demonstrated on the statements of claim. Accordingly, these pleadings therefore similarly fall within the direct purview of the general position articulated in the **Foley v Hill** line of authorities. The appellants had no reasonable grounds for bringing a claim for breach of trust against the respondents, and the learned master was therefore correct to so conclude.

- [40] Further a fiduciary relationship or a trustee/beneficiary relationship must first exist before there can be a breach. The pleaded claims did not seek to establish any such relationships. There was therefore no reasonable basis upon which the appellants could have brought the claims for breach of fiduciary duty and breach of trust against the Conservators, and the learned master did not err in so concluding.

#### (ii) Negligence

- [41] The appellants contend that a director, or indeed any person involved in a company, may owe a duty of care to those dealing with that company if, on the facts, they act in such a way as to assume such a duty of care. In support of this argument, the appellants rely on **Williams v Natural Life Health Foods Ltd**<sup>29</sup> and **White v Jones**<sup>30</sup> which, in essence, establish that a duty of care in negligence may be owed by one person to another where there is an assumption of responsibility in circumstances where the law deems it appropriate to extend a duty of care.

- [42] The appellants further rely on the recent decisions of the United Kingdom Supreme Court in **Lungowe v Vedanta Resources**<sup>31</sup> and **Okpabi and others v Royal Dutch**

---

<sup>28</sup> [2014] UKSC 10.

<sup>29</sup> [1998] WLR 830.

<sup>30</sup> [1995] 2 AC 205.

<sup>31</sup> [2019] UKSC 20.

**Shell Plc and another**<sup>32</sup> where the court accepted that depending on the facts, a parent company may owe a duty of care to persons who suffer harm as a result of the dangerous operations of its overseas subsidiary; that in certain factual situations a parent company may owe a common law duty of care to individuals who suffer harm as a result of their subsidiary's dangerous activities; and that:

“... the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.”<sup>33</sup>

The appellants contend, on the basis of the above, that it is a triable issue whether a duty at common law in negligence can properly be owed only to the company of which the *de facto* director is a fiduciary.

[43] While it is arguable, on certain pleaded facts, that a parent company may owe a common law duty of care to individuals who suffer harm as a result of their subsidiary's dangerous activities, the appellants' pleaded case on the issue of negligence, fails on the basis that the appellants' monies, once deposited with the Banks, were no longer the property of the appellants. Therefore, although the cases of **Williams, White, Lungowe and Okpabi** all tend to the possibility of there being some duty of care as between the respondents and the appellants, the law simply does not permit the appellants to claim against the Conservators, as *de facto* or *de jure* directors, for their deposits with the Banks. The appellants' claim is one properly made against the Banks for recovery of the debts owed to them (the chose in action) in the sum of their deposits plus any interest due to them in accordance with the terms of their banking contracts. This is not a matter simply of form but goes to the heart of the claims and their validity.

[44] For the sake of completeness, at the hearing of the appeal, Mr. Benjamin relied on letters sent to the appellants by Mr. Martin Dinning, as Conservator for CCB, and by

---

<sup>32</sup> [2021] UKSC 3.

<sup>33</sup> Paragraph 53 of Lungowe, and paragraph 148 of Okpabi.

Mr. Hudson Carr, as the ECCB Officer in Charge,<sup>34</sup> and argued that the said letters bolster the appellants' claims that the respondents had in fact assumed responsibility over the appellants' deposits so as to create a duty of care in relation to the deposits, and that the respondents had breached that duty of care by causing their deposits to be co-mingled with other funds. I however agree with the arguments of Mr. Dennis, QC that the letters do not offer the support sought by the appellants.

[45] The letters outline the circumstances under which the ECCB assumed control of the Banks, and the steps being taken pursuant to the conservatorship to safeguard the stability of the banking system in Anguilla and the interests of the depositors and creditors of the Banks, including the imposition of new guidelines for withdrawals and the payment of interest. In his letter, Mr. Carr states that '...both institutions are operating as normal, all services are in place and their employees remain ready and willing to provide the excellent service which you have enjoyed' and further that "[w]e wish to reaffirm our pledge to continue to provide our customers with the best banking products and services to meet your needs and express our appreciation for your continued loyalty'. The letter from Mr. Dinning is in almost identical terms. The letters simply do not support the assumption of any responsibility or duty of care by the respondents in relation to the appellants' deposits, and do not further their case that such a duty was breached by the respondents' alleged co-mingling of funds.

[46] Furthermore, and for what it is worth, I note that in their written submissions on this point, the appellants cite the following excerpt from the American text **Individual Personal Liability of Bank Directors for Negligent and Excess Loans**<sup>35</sup> at page 187, which says:

"The rule that the depositor cannot bring an action at law in his own right against the directors of the bank for negligence, is not without its exceptions, and there are a few cases that hold a contrary opinion. In those instances, the actions have been maintained on the theory that the directors are trustees for creditors. Notable among those decisions is the case of

---

<sup>34</sup> See for example the letter dated 24<sup>th</sup> September 2013 to Maria Ines Almeda, the 56<sup>th</sup> Appellant and letter dated 17<sup>th</sup> October 2013 to Walter Bayer II, the 3<sup>rd</sup> and 4<sup>th</sup> appellants in AXAHCVAP2020/0007.

<sup>35</sup> John A. Skiles, *Individual Personal Liability of Bank Directors for Negligent and Excess Loans*, Notre Dame L. Rev. 185 (1932).

Delano v Case<sup>517</sup> Ill App 531 (1835) which was an action by a general depositor against the directors of the bank for negligence. The court stated in opinion:

"For the ordinary negligence of directors, they are responsible alone to their principal, but, for such gross negligence or incompetency as shows a reckless disregard of their duty to care for and protect the funds committed to their charge, we think they are directly responsible to the depositor."

[47] Relying on the above, the appellants have argued that the common law in the Commonwealth is ready for further development to allow for the initiation of claims by creditors of an insolvent bank against directors who are negligent and/or grossly negligent, incompetent and/or show a reckless disregard of their duty of care, especially in circumstances such as the present case.

[48] The US common law position, so far as it is evidenced by the excerpt above, is premised on the imputation of a trustee relationship as between the directors of a bank and the depositors, in circumstances of gross negligence or incompetency rising to the level of reckless disregard by the directors of their duty to protect the funds committed to their charge. In my view, the consistency with which the courts of England and the courts of the Eastern Caribbean, have stated, restated and applied the principles contained in **Foley v Hill** is such that any court should hesitate to chart a different path or develop the law along a new artery in this area, and to do so only in the clearest of cases and after the fullest of assistance on the applicable law. As recently as 2004, the English Court of Appeal in the case of **Duggan v Governor of Full Sutton Prison and another**<sup>36</sup> has stated that '...it is trite law that the relationship between banker and customer is that of debtor/creditor, not that of trustee/beneficiary (see *N Joachimson (a firm) v Swiss Bank Corp* [1921] 3 KB 110 at 127, [1921] All ER Rep 92 at 100).' In my view, there is very little scope in this case to expand these principles that are well-established as a part of the common law of both England and this jurisdiction. Accordingly, and for these reasons the Court respectfully declines the invitation by the appellants to do so.

---

<sup>36</sup> [2004] 2 All ER 966.

**Issue 2: Whether the master erred in failing to properly consider pleas in the appellants' statement of claim in relation to: (i) the alleged breach of section 7 of the Constitution; (ii) the alleged breach of article 5B of the ECCB Act and (iii) the 'knowing assistance' allegation**

**(i) Breach of section 7 of the Constitution**

[49] The appellants complain that the learned master did not consider the allegations pertaining to the breach of section 7 of the Constitution. The statements of claim only advert to the alleged breach of section 7 of the Constitution very briefly in the following terms at paragraph 27 of the statements of claim:

“On 22 April, 2016 assets of PBT, including the deposits made by the claimant, were transferred to a new legal entity, National Commercial Bank of Anguilla (“NCBA”), in breach of Section 7 of the Constitution of Anguilla in 1988.”

[50] In my judgment, this pleading does not advance the appellants' claims in any way. The appellants' claims clearly sought to establish the respondents' liability for negligence, breach of fiduciary duty and breach of trust. The claim forms, which provide a précis of the nature of the relief sought by the appellants make plain that the claims against the respondents are 'for breach of fiduciary duty...in respect of loss and damage suffered by the Claimants and a result of the Defendants' negligence and/or breach of trust'. This is borne out by the statements of claim which set out in detail the particulars of breach of fiduciary duty and negligence, and the corollary claim for breach of trust. It is clear that the appellants' claims were neither in form nor substance claims for deprivation of property under the Constitution nor did they seek relief under the Constitution or pursuant to CPR Part 56. Moreover, the claim at paragraphs 27 and 29 respectively of the appellants' statements of claim asserts a breach of section 7 of the Constitution as a consequence of the transfer of the deposits made by the appellants in PBT and CCIB to NCBA, with respect to which deposits the appellants have no legal or proprietary interest. Also, the Attorney General on behalf of the Government of Anguilla, was not joined as the appropriate party against whom one seeks relief under the Constitution. In substance, the claims were clearly for negligence, breach of fiduciary duty and breach of trust as set out in the appellants' claim form and

particularised in their statements of claim. It is simply not open to the appellants, at this stage, and by way of argument, to transform their claims, by sidewind, into claims for deprivation of property under the Constitution where it is clear that the claims were not instituted for that purpose or on that basis.

[51] In their written submissions, the appellants sought to rely on the case of **The Attorney General of Anguilla et al v Bernice Lake et al**,<sup>37</sup> where this Court struck down by way of severance, certain provisions of the **Land Acquisition Act**.<sup>38</sup> The appellants argue that challenges to deprivation of property are familiar to all Caribbean courts, and therefore the master erred in failing to consider whether ‘the question of the unconstitutional deprivation of property in the context of the question of vires was also a triable issue’.<sup>39</sup> Reliance on the **Bernice Lake** case by the appellants is clearly misplaced in these circumstances. The claimants in **Bernice Lake** frontally attacked the constitutionality of the **Land Acquisition Act** and the **Crown Proceedings Act**.<sup>40</sup> This is made clear in the judgment of the High Court delivered by Baptiste J (as he then was).<sup>41</sup> **Bernice Lake** is in no way comparable to the appellants’ claims in this case and provides no basis for the appellants’ claims to be construed as one for deprivation of property under the Constitution.

[52] In any event, even if paragraph 27 of the statements of case properly invoked the court’s jurisdiction to adjudicate on a constitutional claim for deprivation of property, it suffers from the same defects identified in relation to the remainder of the claims. Paragraph 27 asserts a breach of the constitution as a consequence of the transfer by the Conservators of the deposits made by the appellants to the NCBA. The property to which paragraph 27 refers is the deposits made by the appellants into the Banks. The law is clear. The appellants have no legal interest in the deposits which were made to the Banks, but rather have a right to recover the choses in

---

<sup>37</sup> Anguilla Civil Appeal No. 4 of 2004 (delivered 4<sup>th</sup> April 2005, unreported).

<sup>38</sup> Revised Statutes of Anguilla, c.L10.

<sup>39</sup> See paragraph 51 of the appellants’ supplemental bundle.

<sup>40</sup> Revised Statutes of Anguilla, C160.

<sup>41</sup> See paragraph 3 of the judgment of the High Court in **Bernice Lake QC et al v The Attorney General of Anguilla et al AXAHCv2003/0074** (delivered 5<sup>th</sup> April 2004, unreported), per Baptiste J.

action (the debts) created by the deposits in the context of the bank/customer relationship. In their written submissions on appeal, the appellants have referred to the claim at paragraph 27 as a claim for 'the choses of action which the debt represents'. Unfortunately, the pleadings were not framed with regard to the debts owed to the appellants but were focused on the recovery of the said deposits flowing from the respondents' alleged treatment of the deposits. There is simply therefore no scope to argue that the pleadings which refer to section 7 of the Constitution in any way advanced the appellants' claim.

- [53] For these reasons, the learned master's decision to treat with the matter solely as a claim engaging the causes of action set out in the claim form, was correct and cannot be a basis upon which this Court may interfere with the said decision.

**(ii) Breach of article 5B of the ECCB Act**

- [54] The aspect of the statements of claim which refer to a possible breach of article 5B was also not addressed by the learned master. The statements of claim advert to the alleged breach of article 5B of the ECCB Act at paragraphs 21, 22 and 23 in the following terms:

"21. Article 5 B of the ECCB Act enacted as of 24 March, 2016 does not give the ECCB the power to take control of the affiliates of the financial institutions it perceives to be financial difficulty.

22. The notice of intervention gazetted on 22 August, 2016 clearly states that the ECCB was taking control of the property and affairs of NBA This notice did not and could not extend to PBT which is a separate legal entity not regulated by the ECCB.

23. In the premises, during the period 12 August 2013 to 24 March, 2016 the [respondents] had no authority to take control of [the Banks] and intermeddle with its property."

- [55] In relation to this aspect of the pleaded case, I respectfully adopt the following response levied by the respondents at paragraph 8 of their further written submissions:

"It is clear that the averments in the Statement of Claim in relation to Article 5B are simply a part of the narrative to establish that in managing [the



Banks], the Conservators were acting as de facto directors and not Regulators. The Appellants' pleaded case is based solely on the fact that the Conservators took control of [the Banks] as directors/de facto directors of those banks and in doing so acted in breach of fiduciary duty and negligently. There is therefore no real issue between the parties as to whether the ECCB or the Conservators acted in breach of Article 5 B when it intervened in the management of [the Banks]."

[56] The appellants rely on the decision of the Privy Council in **Gulf Insurance Ltd v The Central Bank of Trinidad and Tobago**,<sup>42</sup> and contend that the master, by virtue of the pleadings on article 5B of the ECCB Act, was required to consider the challenge to the vires of the acts of the ECCB and the Conservators. Again, I respectfully agree with the respondents on this point. **Gulf Insurance** concerned a frontal challenge to the powers of the Central Bank of Trinidad and Tobago 'to assume the additional powers and to transfer the assets and undertaking of two banks. In my view, and in similar stead to my findings on the section 7 point made above, it is not open to the appellant in these circumstances to transform by sidewind and by argument at this stage, a claim for breach of fiduciary duties, breach of trust and negligence, into a challenge to the nature and exercise by the ECCB of powers under the ECCB Act, especially in circumstances where such a challenge was clearly not contemplated, having not been undertaken pursuant to the peculiar procedure for what is properly an claim for administrative orders under Part 56 of the CPR.

[57] The arguments on this point therefore fail.

### **(iii) Knowing assistance**

[58] The learned master likewise did not expressly address the appellants' claims for knowing assistance. The claim for knowing assistance was set out at paragraph 30 as follows: 'The Defendants, being aware of the details of the 'Resolution Plan' and its consequences, knowingly assisted the Government of Anguilla in depriving the [appellants] of their monies.' I observe that in their written submissions, the

---

<sup>42</sup> [2005] UKPC 10.

appellants refer to this pleading as a claim for knowing or dishonest assistance in relation to the alleged breach of fiduciary duties and breach of trust committed by the respondents.<sup>43</sup> Paragraph 30 however is not framed along those lines, that is, in a way that seeks to establish breaches of trust or fiduciary duties, and is rather concerned with establishing the knowing assistance on the part of the respondents vis-à-vis the actions of the Government of Anguilla in 'depriving the [appellants] of their monies'. In the context of the claims in their entirety, this pleading can only be a reference to knowing assistance with the alleged deprivation of property in breach of section 7 of the Constitution, discussed above. For reasons already expressed, the appellants' statements of claim did not disclose viable claims for deprivation of property under section 7 of the Constitution. By logical extension, there could be no viable claim against the respondents, as pleaded, for knowingly assisting the Government of Anguilla with depriving the appellants of their monies, even if such a cause of action exists in law or in equity.

- [59] Even if the statements of claim were framed with reference to the knowing assistance vis-à-vis the alleged breaches of fiduciary duty or trust, there would similarly have been no sustainable claim in that regard. It is trite law that a claim for knowing or dishonest assistance is made out in circumstances where a person dishonestly assists another with committing a breach of trust or fiduciary duty. As the English Court of Appeal stated in **Novoship (UK) Limited and others v Yuri Nikitin and others**:<sup>44</sup>

“Where a person is not himself a fiduciary, he may become mixed up in a breach by another of a fiduciary duty. He may be liable in one of two ways:  
i) As a knowing recipient of trust property or its traceable proceeds  
or  
ii) As a dishonest accessory to the fiduciary's breach of duty.  
The former is now known by the shorthand "knowing receipt" and the second by the shorthand 'dishonest assistance.'”

- [60] A successful claim for knowing assistance is clearly parasitic on a viable claim for breach of fiduciary duty or breach of trust, in the sense that a knowing assistance

---

<sup>43</sup> See paragraphs 52 to 59 of the appellants' supplemental written submissions.

<sup>44</sup> [2014] EWCA Civ 908 at 67.

claim depends on the existence of either of such breaches on the part of a defendant. There therefore could never have been a viable claim for knowing assistance in this case, where there was no viable claim for breach of fiduciary duty or breach of trust. As I have already reasoned, the claims for breach of fiduciary duty and breach of trust were wholly unsustainable and the learned master correctly concluded that the appellants had no reasonable grounds for pursuing them. As a result, the claims for knowing assistance, if properly pleaded, would also have been unsustainable as a matter of law. The learned master's decision to strike out the appellants' claims cannot therefore be impugned on the basis of his failure to expressly consider the claims for knowing assistance. Any such consideration could not have affected, one way or the other, the outcome of the respondents' application to strike.

### **Issue 3: The possibility of amendment**

[61] Mr. Benjamin argued that the learned master was duty bound, when faced with the application to strike, to consider whether it would have been in the interests of justice to permit the appellants to amend their statements of claim as an alternative to deploying the nuclear option of striking out. This point does not appear to have been argued by learned counsel who appeared for the appellants in the court below, and the learned master did not give express consideration to it in his judgment.

[62] The law is now clear that when called upon to strike out a statement of claim or part thereof, the court ought to consider whether it is in the interests of justice to permit an amendment to the impugned statement of claim in lieu of striking out. This is evidenced by the approach of the Privy Council in **Real Time Systems Limited v Renraw Investments Limited and Others**<sup>45</sup> where Lord Mance stated at paragraph 17, that:

“As the editors of *The Caribbean Civil Court Practice* (2011) state at Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular

---

<sup>45</sup> [2014] UKPC 6.

case militates against this nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period.”

This approach is necessitated by the obligation placed on the court by the overriding objective to deal with cases justly and is consistent with the court’s usual preference to avoid shutting out a litigant on account of an easily remediable error and to deal with matters on their merits.

[63] In my view, the learned master’s failure to expressly address this matter in his written judgment does not provide a basis on which to set aside his decision to strike out the claims, as an amendment to the appellants’ claims in the circumstances would not be in keeping with the overriding objective. I have already discussed the several defects in the appellants’ claims as pleaded, principal among which is that the claims seek relief of the court in relation to the money deposited with the Banks by the appellants. This is a fundamental defect in the pleadings given the consistent legal position evidenced in **Foley v Hill**, **Hirschhorn** and by the Privy Council in **Space Investments Ltd** that a depositor is not legally entitled to and has no proprietary interest in the monies he deposited with a bank, but is entitled to recover, from the bank, the debt owed to them in the sum deposited, subject to any further stipulations contained in the banking contract. The appellants by their pleaded cases are not in any way concerned with any effect which the respondents’ actions have had on the debts due to them. As already stated, the appellants’ pleadings show that their real concern is with the Conservator’s treatment of the very monies deposited with the Banks by the appellants. In the words of paragraph 27(h) of the statements of claim, their concern was with the ‘safety of the deposits’. To permit an amendment in these circumstances would be to grant leave for the appellants to transform their claims into something that it was clearly never intended to be. Such permission, in my view, would be overwhelmingly and disproportionately unfair to the respondents and accordingly inimical to the overriding objective. It would therefore not be appropriate in the circumstances to permit an amendment to the

appellants' pleaded claims and further, the fact that the learned master did not give this his express consideration does not impugn his decision.

### **Conclusion**

- [64] It is clear from the above conclusions that I take the view that the learned master did not err in the exercise of his discretion in striking out the appellants' claims in the court below. The appellants had no reasonable grounds in law for bringing their claims against the respondents. Further, it would not, in my view, have been in keeping with the overriding objective for the learned master to have granted leave to the appellants in this case to amend their statements of claim and, in any event, were he minded to not strike out their pleaded cases as disclosing no reasonable grounds for bringing the claims they did not urge this consideration upon him or posit in their submissions what types of amendments they would wish to make. There is therefore no basis upon which this Court ought to interfere with the learned master's decision, and the appeal should be dismissed.

### **Costs**

- [65] The general rule is that costs follow the event. In other words, a successful party will ordinarily be entitled to its costs. In my view, there is no reason to depart from the general rule in the circumstances of this case. The respondents, therefore, having successfully resisted the appeal, are entitled to their costs in the proceedings before this Court.

**Order**

[66] For all the above reasons, I would make the following orders:

- (i) The appeal is dismissed.
- (ii) The appellants shall pay the respondents' costs in the appeal, to be assessed by a judge or master of the High Court at no more than two-thirds of the costs in the court below, if not agreed within 21 days.

I concur.

**Mario Michel**

Justice of Appeal

I concur.

**Esco Henry**

Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**