

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2016/0593

BETWEEN:

CLEVELAND SEAFORTH

BRIAN GLASGOW

(AS JOINT LIQUIDATORS OF ANTIGUA OVERSEAS BANK LTD

IN LIQUIDATION)

Claimants

And

FREEMAN'S BAY RESORT LTD

ABI DEVELOPMENT COMPANY LIMITED

Defendants

Appearances:

Ms. Kathleen Bennett of Lake & Kentish for the Claimants

Mr. Craig Christopher and Ms. Jan Peltier of Christopher & Associates for the Defendants

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2017: October 10

2019: January 28
.....

DECISION

[1] **HENRY, J.:** Both the Claimants and the Second Defendant claim to be the owner of 100% of the shares in the First Defendant. By Fixed Date Claim filed herein, the claimants seek various Declarations and Orders to include:

1. A declaration that the claimant Antigua Overseas Bank (In Liquidation) (hereafter AOB) was and is the owner of 100% of the issued shares in the First Defendant herein;

2. A declaration that the second defendant ABI Development Company Ltd (hereafter ABI) does not own any shares in the first defendant;
 3. An order that the Records and Register of Members of the above named company Freeman's Bay Resort Ltd may be rectified by striking out the name of ABI therefrom as the holder of 100% shares of the said company, and by inserting in lieu thereof the name of Antigua Overseas Bank (In Liquidation) as the holder of the said shares, and that the claimants may be authorized to effect the necessary alterations in the said Records and Register for carrying such Order into effect.
- [2] In its Statement of Claim AOB avers that AOB was and remains the lawful owner of the shares in the First defendant. The register and/or records available to AOB disclose that AOB was never paid for the shares as required by law and that there was no lawful sale or transfer of the shares by AOB to ABI. This was documented by the former Joint Receivers of AOB in their report to the FSRC dated 15th January 2015.
- [3] AOB has requested proof from Mr. McAlister Abbott and Mr. Eugene Abbott, former shareholders, directors and/or officers of AOB and also of ABI of the lawful transfer or consideration for the shares including payment. They have not provided any evidence or proof of any payment for or lawful transfer of the shares. Therefore AOB remains the owner of 100% of the issued shares in the first defendant. In all the circumstances, the records and Registry of the first defendant ought to be rectified in accordance with section 244 of the Companies Act.
- [4] The defendants filed separate Defences. In each Defence it is asserted that in or about the years 2005 to 2008, ABI, on behalf of AOB, entered into arrangements with the several shareholders of Galleon Beach Limited (GBL) for the purchase of their shares. The purchase of the shares was effected by the advance of US\$928,277.00 from ABI to GBL, being the amount agreed to be the value of the shares and which advance was converted into equity by way of the transfer of shares held by a number of shareholders in GBL. These shares of GBL were, as agreed between the parties, transferred to the first defendant whose shares were being held by ABI for the benefit of AOB.
- [5] AOB, being an International Business Company incorporated under the laws of Antigua and Barbuda, would have been required by law to obtain a Non-Citizen Landholder Licence to hold the shares of GBL directly and would have also had concerns about the offshore banking regulatory restrictions on non-core banking activities. As a consequence, ABI continued to hold title to the shares of the first defendant to the benefit of AOB upon an understanding that ABI would exercise its best endeavours to source a third party purchaser for the said shares.
- [6] During the period 2005 to 2006, the transaction was recorded in the books of AOB as an investment in the sum of US\$1,630,469.00 in a real estate holding company, that is, the first defendant. But for the reasons set out above, AOB did not register title to the shares and did not include the same in its asset register. Later, at the behest of the Financial Services Regulatory Authority, AOB took the decision to divest itself of the investment of the first defendant shares being held by ABI to the benefit

of AOB by making an adjustment in its books to reflect a loan to ABI in the amount of US\$20,000,000.00 being the market value of the shares at the time of the reclassification entry.

- [7] According to the pleadings, in 2009, ABI was successful in arranging funding for the repayment of the loan in the books of AOB in relation to the shares as part of a larger commercial paper transaction which included an issue of commercial paper by an affiliated company of ABI, that is, Freeman's Bay Investment Limited, for the specific purpose of funding the purchase of the shares at market value. The details of the commercial paper are set out in the Defences. According to the Amended Defence of the Second Defendant, the companies participating in the commercial paper include: Freeman's Bay Investment Ltd., the CP amount \$30,000,000.00, Investor EFICER; Jolly Harbour (BVI) Corp, CP amount \$20,000,000.00; Jolly Beach Vacations Ltd, CP amount US\$19,000,000.00, investor EFICER.
- [8] As a result of the above averments, the defendants' pleaded position is as follows:
- (a) AOB has never had legal title to the shares of the first defendant company
 - (b) ABI at all material times held legal title to the shares of the first defendant company for the benefit of AOB;
 - (c) AOB recorded the transaction initially as an investment in a real estate holding company and then subsequently as a loan to ABI booked at the market value of the shares at the time of the reclassification entry;
 - (d) ABI repaid that loan recorded in the books of AOB in or about 2009 from the proceeds of the Commercial Paper issued by Freeman's Bay, and bought by EFICER;
 - (e) The records of AOB clearly reflect or ought to clearly reflect the nature and operation of this transaction to be as set out by ABI.
- [9] Therefore, AOB is not entitled to the relief sought.
- [10] In its Reply, AOB specifically denied paragraph 4 of the Defence and contended that in 2006, the transaction was recorded in the general ledger of AOB as "Investment – Galleon Beach" with a balance of US\$1,630,471.00 and not in the name of the first defendant. There is no evidence on AOB's records to indicate that ABI was ever granted a loan for US\$20,000,000.00. However, on 12th December 2007, a company named Aldride Properties Limited obtained a loan in the amount of US\$20,000,000.00 from AOB to facilitate the purchase of Galleon Beach property and accommodate a joint venture. But the loan was never established until 2nd April 2009 in the name of Freeman's Bay Investment Ltd (formerly Aldride Properties Ltd) for loan account # 1578290. On 3rd April 2009, the loan account of Freeman's Bay Investment Ltd was debited and its proceeds transferred to general ledger # 183370 in the name "Accounts Receivable ABID"
- [11] On 18th May 2009, the said loan in the name of Freeman's Bay Investment Lt was recorded as paid off utilizing funds from an account in the name of Vital Corporate Services Ltd. However, on 8th June 2009, the transaction was reversed and the sums credited back to the account of Vital Corporate

Services Ltd account # 1572455. Therefore there is no evidence whatsoever which shows or establishes that the shares in question were in fact paid for by ABI.

[12] By Order of 15th March 2017 the court made a case management order. Thereafter, the defendants filed the within Application seeking specific disclosure of the following specific documents:

- i) Vital Corporation Services Ltd. Account # 1572455 (or any other account in the name of Vital Corporation Services Ltd) at AOB to wit: the entire account activity, more particular, for the period April 2009 to December 2009;

[13] The Affidavit in Support of Eugene Abbott filed 15th November 2017 sets out that on 30th January 2017, Counsel for the defendants wrote to Counsel for the claimants requesting further information pursuant to the Civil Procedure Rules Part 34. No reply to this letter was ever received. Another letter was sent on February 27, 2017. Sometime thereafter, Counsel for both parties spoke. It was suggested by Counsel for AOB that if requesting Counsel waited for Standard Disclosure he may very well be satisfied. Standard Disclosure was received in August 2017, but none of the requested information was disclosed. On 17th August 2017, Counsel for the defendants wrote to Counsel for the claimant detailing specifically what information was requested. Counsel replied to this letter stating that having taken instructions on the request, “we are not satisfied that the disclosure requested by you is required to fairly dispose of the matters in issue”. He went on to state, “We do however request that you inform us of the relevance of the requested documents to the matters in issue. We are not in a position to meet your request until such time that you have provided a satisfactory basis for the same.”

[14] Counsel for the defendants responded on 25th August 2017, referring Counsel to the provisions of Part 28.6 of the CPR and setting out his reasons for concluding that the requested documents are relevant and have probative value. Thereafter, the within Application for Specific Disclosure was filed along with an Application for an extension of time to file Witness Statements. The claimants have also filed an Application for an extension of time to file certain documents.

[15] The claimants resist the Application. Mr. Cleveland Seaforth in his Affidavit in Reply states that the specific entries set out in paragraph 4 (b) of the Affidavit of Eugene Abbott makes no mention of any funds being used to pay off the loan which the second defendant allegedly obtained from AOB to pay for the shares in the first defendant. The said entries, however, appear to show how Mr. Abbott says the purchase of commercial paper was funded.

Criteria for ordering specific disclosure

28.6 The Civil Procedure Rules (CPR) Section 28.6 provides:

1. When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
2. The court must have regard to –

- (a). the likely benefits of specific disclosure;
 - (b). the likely cost of specific disclosure; and
 - (c). whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.
3. If, having regard to paragraph (2) (c), the court would otherwise refuse to make an order for specific disclosure, it may nonetheless make such an order on terms that the party seeking the order must pay the other party's costs of such disclosure in any event.
 4. If the court makes an order under paragraph (3), it must assess the costs to be paid in accordance with rule 65.12.
 5. The party in whose favour such order for costs was made may apply to vary the amount of costs so assessed.

[16] The issues in this matter concern the ownership of the shares in the first defendant. The defendants have asserted that ABI first held the title to the shares for the benefit of the claimant. Subsequently, however, through a series of somewhat circuitous and complicated transactions, they paid AOB for the shares and are therefore the true owners. AOB says there is no evidence of payment. Proof of payment by ABI is therefore the central issue in the matter.

[17] According to the Defences, AOB's decision to divest itself of the shares in the first defendant by making the adjustment in its books to reflect the loan of US\$20,000,000.00 was in 2007. The repayment of the loan was from the proceeds of a commercial paper issued by ABI's affiliate company, Freemans, and promoted by ABI group of companies in 2009.

[18] The issuers of the commercial paper were Freeman's Bay Resort Limited, Jolly Harbour (BVI) Corporation and Jolly Beach Vacations Ltd. The investor was EFICER Comercio De Generos Alimenticios (EFICER). It is alleged that the remittance of the funds by EFICER involved several customer accounts held at AOB including RASA Import Export; Importadora Esoitadira NAPRICE S.A. and Vital Corporate Services Ltd. The defendants therefore seek documents in relation to the accounts at AOB for the companies involved in the various transactions. They say that the requested records will show the specific entries that completed the transaction in accounting terms. The transaction evidenced in the General Ledger of AOB must be supported by corresponding entries in the individual customer accounts.

[19] The court is of the view that the documents requested in relation to the accounts of the various companies allegedly involved in the commercial paper, shows how the commercial paper was funded. At their highest, the records requested would show that EFICER, the investor, culled funds from various company accounts to finance the investment in the commercial paper. The funds from the various accounts were, according to the pleadings, "recorded in the General Ledger of AOB . . . with **final credit** to the respective accounts of Freeman's Bay Limited, Jolly Harbour (BVI) Corporation and Jolly Beach Vacations Limited", the issuers of the commercial paper. There is nothing in the requested records that would amount to evidence of the application of the proceeds

of the commercial paper towards repayment of the loan, which is the central issue in the matter. If the court were to grant the request, the issue of the loan and therefore the payment for the shares would remain unresolved, notwithstanding that the records would show funding of a commercial paper. Accordingly, the court cannot say that the specific disclosure is necessary in order to dispose fairly of the claim.

- [20] Accordingly, the application for specific disclosure is denied with cost to the claimant, AOB in the sum of \$1200.00.
- [21] The parties are to file and serve all outstanding Witness Statements and List of Documents within 21 days of this decision. Pre-trial Review is fixed for 22nd March, 2019.

Clare Henry
High Court Judge

By the Court

Registrar