

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2014/0643

BETWEEN:

PDV CARIBE ANTIGUA AND BARBUDA LTD

Applicant

and

ABI BANK LTD.

Respondent

Appearances:

Mr. H. Marshall and K. Benjamin for the Applicant

Ms. E. Ann Henry QC and C. Debra Bunette for the Respondent

2015: March 11
April 01

Judgment

- [1] **Cottle, J.:** This is an application filed by PDV Caribe Antigua and Barbuda Ltd for leave to bring an action against ABI Bank Ltd. In support of the application there was filed an affidavit by Keith Hurst, Chairman of the Board of Directors of the applicant company. The Eastern Caribbean Central Bank (ECCB) Act cap 142 of the 1992 Revised Laws of Antigua and Barbuda as amended by Section 4 of the ECCB Act (Amendment of Schedule) Order 2013 requires that the leave of the court is needed before any claim can be brought against the respondent bank as that bank is now under the control of the ECCB. Article 5c(5)(a) reads:-

“(5) On and after the publication of a notification under paragraph (1)-

(a) no creditor, shareholder, depositor or any other person shall have any remedy against the financial institution in respect of any claim, and without prejudice to the generality of the foregoing, no creditor, shareholder, depositor or any other person shall commence or continue any action, execution or other proceedings or seek to enforce in any way any judgment or order obtained against the financial institution or its successor or the transferee of the whole or any part of any property, assets or undertaking of the financial institution for the recovery of any claim or in respect of any other liability, until the publication of the notification under Article 5E(1) in relation to the financial institution or without the prior leave of the court unless the court directs otherwise;”

[2] Counsel for the applicant filed helpful written submissions. He attempted to persuade the court that no leave was required or alternatively that this was a fit case for leave to be granted.

Leave required?

[3] Counsel argued that the legislation is aimed at regulating the affairs of the respondent bank as a financial institution operating in the Eastern Caribbean Currency Union (ECCU). The expressed mission of the ECCB is to fulfill the desire:-

“To maintain a common currency and to establish a Common Central Bank with powers to issue and manage that currency, to safeguard its international value, to promote monetary stability and a sound financial structure and to further the economic development of the territories of the Participating Governments”

[4] It is the exercise of its mission under this expressed intention that the ECCB has intervened in the management of the respondent bank. Their remit is to protect the regional financial system from

dangers which might stem from possible management weaknesses in a financial institution in the ECCU.

- [5] As I understand Mr. Marshall's argument, the applicants do not seek to bring an action against the respondents in relation to any action carried out as a financial institution regulated by the ECCB. In Mr. Hurst's affidavit, he swears that the intended parties entered into an agreement to manage some \$40 million. That agreement was memorialized in writing. The investments intended to be made were to be in the name of the applicant and not otherwise. Mr. Hurst swears that the applicant seeks to have ABI Bank account on affidavit as to the location and status of investments made with the funds provided by the applicant.
- [6] The Respondent bank is a registered broker dealer under the Securities Act (No. 14 of 2001). As a broker dealer it engages in certain financial activities on behalf of customers. Mr. Marshall says the applicant's complaint is strictly with regard to the actions of the bank as a broker dealer and not qua bank or financial institution under the ECCB Act. No leave is thus required, he suggests.
- [7] In considering this argument the court has to look at the 2013 amendment to the ECCB Act. At section 3 it defines "claim" while amending Article 5A:-
"claim means any claim whatsoever without limitation, including claims which are secured or unsecured, present or future, actual, prospective or contingent, or arising out of contract, tort, bailment, restitution, breach of trust or any other cause of action and whether or not made by a creditor, shareholder, depositor or any other person:"
- [8] Article 5C(5)(a) as reproduced earlier, prohibits the commencement or continuation of any claim action execution or other proceedings against a financial institution in the position of the ABI Bank which remains under the management of the ECCB exercising its emergency management powers.

- [9] Mr. Marshall urges the court to interpret this legislation in a restrictive manner. The legislation is meant to protect the financial system from actions by a bank or financial institution acting in that capacity. He says that the court should consider the evil that the legislation is intended to prevent and restrict its application to deal only with that evil. With respect to counsel, I find myself unable to accede to that argument.
- [10] Had the legislation been in any way ambiguous, it might have been permissible to have regard to the mischief rule to ascertain the legislative intent. In this case however the legislative intent is clearly expressed. I can see no good reason to restrict the meaning of any claim against a financial institution to mean any claim against a financial institution acting in that capacity. Mr. Marshall offers the example of an action against the bank for negligence by an employee in driving a motor vehicle on the institution's business. I still consider that leave would be required for such a claim although it may well be that a court would grant such leave upon application.
- [11] I conclude then that the present applicants require the leave of this court and I go on to consider the merits of the application.

Trusts

- [12] Mr. Marshall argues that the ABI Bank is a trustee for the applicant in that the bank holds property which it is bound to deal with for the benefit of the applicant to whom the bank stands in a fiduciary relationship. Trustees are bound to comply with the terms of the trust. The trustee must also furnish the cestui que trust, on demand with information or the means of obtaining information as to the mode in which the trust property has been invested or otherwise dealt with. Mr. Hurst in his affidavit, deposed that repeated requests to the ABI Bank to identify the assets have been refused or ignored. He has thus been compelled to seek the assistance of the court to identify the assets of the applicant currently under the management and control of ABI Bank.

Contract

- [13] In the alternative, Mr. Marshall argues that the contractual document can form a basis for allowing the claim to be brought for an account.
- [14] The ABI Bank resists the application for leave. An affidavit in support was sworn by Hyasis Mullen, General Manager. In that affidavit the investments by the ABI Bank on behalf of the applicant are said to be by way of fixed rate zero coupon bond, with scheduled payments from 2010 to 2033. It is denied that the investments were made under the written contract. There is clearly a factual dispute between the parties to be tried. It is common ground that ABI Bank remains under the emergency management of the ECCB. The bank says that to permit litigation at this time is to risk disruption and expose the ABI Bank to compulsory liquidation with possible consequential damage to the banking system in the ECCU. The bank also feared that the action for an account would only be a fore runner to a demand for payment.
- [15] The legislation being considered in this matter is very recently enacted. Not many decided cases have considered it. None from the Court of Appeal have been drawn to my attention and I am not aware that any matters concerning the criteria for the grant of leave have been pronounced upon by the Court of Appeal. It may be that this situation will soon change.
- [16] Master Taylor-Alexander in Charter Capital Ltd v National Bank of Anguilla and ECCB AXAHCV2014/0036 dealt with an attempt by depositors to commence an action without seeking leave. After the issue was raised, the claimant then sought leave to maintain the action. Master Taylor- Alexander pointed out that the legislation is silent as to the matters to be considered by the court on dealing with an application for leave. The learned Master declined to grant leave. She thought that a grant of leave would severely prejudice the bank and had the potential to encourage other applications by other prospective litigations.

- [17] The effect of such a course of action would be to undermine the very financial system that the legislation seeks to safeguard. I find myself in agreement with the sentiments expressed by the learned Master.
- [18] I would require very cogent reasons to permit one potential claimant leave to bring a claim against a financial institution under emergency management. This would amount to preferential treatment of that applicant solely on the basis that they were first to approach the court. A race to the court office to file applications is akin to a run on a bank in difficulties. It is not to be encouraged.
- [19] The present applicant has advanced no good reasons why it should be allowed to proceed with its claim when the expressed legislative intention is that such claims should not be permitted. I express no views as to the kind of application for leave which might find favour with a court.
- [20] Suffice it to say that very good reasons must be advanced to take one applicant out of the class of other potential applicants.
- [21] I decline to grant leave to the applicant. I express my gratitude to both sets of counsel for the assistance they have provided the court in this matter. I make no order as to costs.

Brian Cottle
High Court Judge