

THE EASTERN CARIBBEAN SUPREME COURT  
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2013/0063

BETWEEN:

ELIANNE SCHIEDMAYER

Claimant

AND

[1] HEATHER WILLIAMS  
[2] ABI BANK LTD

Defendant

**Appearances:**

Mr. Hugh. Marshall for the Claimant

Ms. Kamilah Roberts and Ms. S. Roberts for the Defendants

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2015: January 22  
January 23  
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**Judgment**

- [1] **Cottle, J.:** The claimant directed the second defendant to reinvest certain funds by purchasing bonds issued by the Government of Antigua and Barbuda. These bonds were sold by auction. The second defendants bid for the bonds but were not successful in obtaining them. They therefore transferred the funds to an account the claimant had with an associated bank. The auction was held on 27<sup>th</sup> July, 2011. The second defendants say that they informed the claimant that her funds had been transferred to her account in August 2011. The claimant denies that she was so informed.

- [2] In May 2012 the claimant was informed that her funds at the associated bank had been frozen. She filed the present claim against the defendants for breach of duty to carry out her instructions thereby causing her loss.
- [3] After the claim had been through the case management process and was ripe for trial there was an amendment to the Eastern Caribbean Central Bank (ECCB) Act cap 142 of the Laws of Antigua and Barbuda. The ECCB intervened and took control of the second defendant on 22<sup>nd</sup> July, 2011.
- [4] Under the ECCB Act as amended no creditor or shareholder can continue any action against a financial institution that had been taken over by the ECCB until certain conditions are met or the Court directs otherwise. It is common ground that the conditions have not been met.
- [5] The defendants approached the Court for an order “confirming” that the whole of the present proceedings are stayed until the statutorily prescribed conditions are met or the Court directs otherwise. They say the stay has come about by operation of law.
- [6] The relevant statutory provision is to be found in the ECCB Act (Amendment of Schedule) Order 2013. The amended 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

- [7] Counsel for the claimant urged the Court to reject the application for several reasons.
- [8] Firstly, he says, this is an application which is in effect a challenge to the jurisdiction of the court. Such an application should be made under CPR 2000 part 9.7A. While such an application can be made at any time the present defendants have failed to apply for about a year and this application coming on the eve of the scheduled trial ought to be rejected. It also suffers from procedural defects in that it does not specify the particular rule it seeks to invoke.
- [9] This argument is ill conceived. The defendants do not seek to move the Court to grant any order. What they are doing is seeking confirmation of the effect of the intervening legislation on the present proceedings. There is no discretion that the court is being asked to exercise. It is merely confirmation of the application of the statutory provisions to the instant proceedings that is being sought.
- [10] Mr. Marshall argues as well that the legislation, if it applies, only operates to stay the action against the second defendant and not the first defendant who is being sued in her personal capacity. Thus the action against the first defendant must continue as there is no basis for a stay. This argument is only superficially attractive. Upon close analysis it has no merit. A review of the pleadings reveals that the first defendant is being sued in her capacity as employee of the second defendant. In her personal capacity she had no duty to deal with the claimant's funds in any way. She had no power to do so. She thus can have no personal liability for failure to carry out banking instructions when she could not possibly have carried them out in her personal capacity. The claim against the defendants is not capable of being sustained against the first defendant in her personal capacity and thus cannot be dealt with separately from the claim against the second defendant.

- [11] Mr. Marshall also argues that there is no prejudice to the defendants if the claim is not stayed. That may well be so, but the evil that the legislation is meant to address is the danger to the regional financial system if claims against financial institutions under ECCB management should be permitted without leave.
- [12] To the mind this is a far more relevant consideration than the question of prejudice to the defendants.
- [13] There are yet more strings to Mr. Marshall's bow. He cites the case of Stanley Defreitas v International Financial Service Authority et al SVG HCV 2011/0101.
- [14] That case considered litigation against a company in liquidation. I agree that the present position is analogous in the sense that prevention of preferential treatment of one creditor over others similarly circumstanced is to be avoided.
- [15] Mr. Marshall points out that the present claim was filed before the legislation was amended and that the Court should bear in mind that this is continuing litigation rather than fresh litigation.
- [16] At paragraph 44 Thom J as she then was, said this:-  
"The Court has a discretion whether or not to grant leave to an applicant to institute proceedings against a company in liquidation. The Learned Authors of Corporate Insolvency Law Practice at paragraph 20.5 outlines how this discretion should be exercise as follows:-  
"In exercising its discretion to grant leave to continue or commence proceedings against the company the Court will be concerned to ensure that no creditor gains an advantage over other creditors in the same class. The essential object of a winding up is to ensure an equal distribution of the company's assets to the ordinary creditors after payment of

any preferential claims ... where the proceedings are in existence, particularly where they are well advanced, the Court will generally give leave for the action to continue on the ground that it is more convenient to determine the issue between the Claimant and the Company in the existing proceedings than by invoking the procedure of determining disputed proofs, that is by application to the Court in the winding up proceedings. It is usual for leave to be granted on terms that no judgment obtained may be enforced without leave of the Court. Where no proceedings are in existence the creditor will usually not be given leave to commence proceedings, but will be expected to submit a proof of debt and follow the procedure on disputed proof before the winding up Court. After a creditor has submitted a proof he will be required to follow the procedure in disputed proof; he will not be permitted to start proceedings in another Court."

[17] There is a subtle difference in the present case however. This Court is not being called upon to exercise a discretion. The legislature has decided that this matter should be stayed.

[18] As a last resort Mr. Marshall points to the last five words of the Article. He says that in all the circumstances this is a proper case for the Court to direct otherwise and permit this action to continue. The factors which are in favour of this he lists as follows:-

1. The claim was filed before the legislation and is at an advanced stage
2. Even if the claim proceeds and the claimant succeeds she will need to leave of the Court to enforce any judgment
3. The defendants have delayed for a year after the law came into force before making this application

[19] I have carefully weighed these matters. I conclude that it would not be appropriate to go against the clear legislative intent. I note that the claimant has not seen it fit to approach the Court for leave either.

[20] I therefore agree with counsel of the defendants that the action by the claimant stands in abeyance until the claimant obtains leave or the 2<sup>nd</sup> defendant leaves the control of the ECCB.

[21] I thank both counsel for their assistance.

**Brian Cottle**  
High Court Judge