

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

GRENADA

GDAHCVAP2015/0034

BETWEEN:

**[1] KEITH CLAUDIUS MITCHELL
(Minister of Finance in the Government of Grenada)
[2] THE ATTORNEY GENERAL OF GRENADA**

Appellants

and

CAPITAL BANK INTERNATIONAL LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario F. Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Thomas Astaphan, QC with him, Mr. Dwight Horsford, Solicitor General
and Ms. Maurissa Johnson for the Appellants.
Mr. George Prime and Mr. Henry Paryag for the Respondent.

2017: April 6;
September 22.

Interlocutory appeal – Banking Act of Grenada – Assessment of damages following entry of default judgment – Whether common law duty of care existed in addition to statutory duty – For what tort or breach of duty are damages to be assessed

Pursuant to powers conferred by section 43 of the Banking Act (the “Act”), the Minister of Finance, Dr. Keith Claudius Mitchell (“Dr. Mitchell”), on 15th February 2008, appointed a receiver over Capital Bank International Limited (the “Bank”). The Bank challenged the appointment of the receiver by filing a claim in the High Court on 25th February 2008. On the same date, the Bank filed an application seeking several reliefs including the revocation of the appointment of the receiver. The application was heard by the trial judge who found that the appointment was invalid and revoked the appointment.

The Bank subsequently filed an amended statement of claim for which no defence was filed by Dr. Mitchell or the Attorney General. Thereafter, the Bank applied for permission to enter a default judgment on the amended claim but the application was refused. The Bank appealed and on appeal the order was set aside and the matter was remitted to the

lower court.

Another request for judgment in default of defence on the amended claim was later filed by the Bank. Judgment in default was granted with damages to be assessed. During the hearing of the assessment of damages, Dr. Mitchell and the Attorney General raised several preliminary issues including whether there were any damages to be assessed, for what tort or breach were damages to be assessed and the period for which damages were to be assessed. The learned master, having heard submissions and scrutinised the pleadings, ruled on the preliminary issues. She held that based on the default judgment obtained, damages were to be assessed in relation to breach of statutory duty and breach of common law duty.

Dr. Mitchell and the Attorney General appealed, challenging the master's ruling that damages were to be assessed for breach of statutory and common law duty of care. Counsel on behalf of the Bank argued that it was clear that the amended statement of claim indicated that Dr. Mitchell and the Attorney General had acted in breach of both their common law and statutory duty of care and that since no defence was filed, the default judgment would be in relation to both the statutory and common law breach. He submitted that the statutory regime does not provide for adequate remedy and that there must therefore be some common law remedy. Learned Queen's Counsel on behalf of Dr. Mitchell and the Attorney General conceded during oral arguments that the master was correct in holding that there was a breach of statutory duty and that damages were to be assessed in relation thereto. He however maintained that there could have been no breach of common law duty in the circumstances which obtained and that the master erred in so concluding. He contended that no common law rights or duties, as alleged, existed in law or attended the exercise of the Minister's statutory power under section 43 of the Act. The main issue to be determined was therefore whether the learned master erred as a matter of law when she ruled that on the default judgment, Dr. Mitchell and the Attorney General were liable to pay damages to the Bank for breach of their common law duty of care as a consequence of the unlawful appointment of the receiver of the Bank.

Held: allowing the appeal in relation to common law duty of care and awarding costs of this appeal to the appellants to be assessed if not agreed within 21 days of this judgment, that:

1. It is incumbent on the judicial officer at the assessment hearing based on a default judgment, to scrutinise the pleadings in order to determine what the default judgment represents. As a general rule, the default judgment does not represent a decision that all of the loss or damage alleged by the claimant was indeed suffered by him or attributable to the defendant. On an assessment of damages all questions going to quantification, including the question of causation in relation to particular heads of loss claimed by the claimant, remain open and could be raised by the defendant provided that it was not inconsistent with liability alleged in the statement of claim.

Lunnun v Singh and others [1999] EWCA Civ 1736 applied; **Kok Hoong v Leong Cheong Kweng Mines Ltd** [1964] 1 All ER 300 applied.

2. The duty that is imposed on the Minister of Finance is a statutory duty. Section 4 of the **Banking Act** of Grenada does not require a notice of intention to be served by the Minister, instead the section merely requires the Minister to post on the premises a notice announcing the appointment of the receiver. Insofar as the statute does not require the Minister to have given notice prior to the appointments, there is no basis for reading into the statute, a breach of statutory duty or a breach of the common law duty of care on the basis of lack of notice.

Century National Merchant Bank Ltd. And Ors v Omar Davies [1998] AC 628 applied;

3. In relation to the alleged common law duty of care, the matters that are pleaded in paragraphs 13(1) – 13(4) of the amended statement of claim do not on their face give rise to an assertion of breach of common law duties. Most of the complaints are in relation to procedural fairness and there is no express provision in the **Banking Act** for these. Further, the statutory provisions provide to the Bank all the protection to meet the procedural fairness to satisfy the justice of the case. There is no requirement for prior notice to have been given and hence there could have been no breach of any common law duty. No common law duty of care could have arisen in consequence of the statutory breaches. Accordingly, the master erred in so holding.

Century National Merchant Bank Ltd. And Ors v Omar Davies [1998] AC 628 applied.

JUDGMENT

Introduction

- [1] **BLENMAN JA:** This is an interlocutory appeal against the ruling of the learned master on a preliminary issue in which the master held, based on the default judgment that had been obtained, that damages were to be assessed in relation to breach of statutory duty and breach of common law duty. The Minister of Finance Dr. Keith Claudius Mitchell (“Dr. Mitchell”) and the Attorney General of Grenada (the “Attorney General”) are dissatisfied with the learned master’s ruling and have appealed against it. Capital Bank International Limited (the “Bank”) in whose favour the ruling was made resists the appeal.

- [2] I turn now to the factual background. The detailed background has helpfully been

provided in the learned master's ruling and for convenience I will utilise the background stated therein.

Background

- [3] Pursuant to powers conferred by section 43 of the **Banking Act**¹ the Minister of Finance, on 15th February 2008 appointed a receiver over the Bank. The Bank challenged the appointment of the receiver by filing a claim in the High Court on 25th February 2008 in which it sought various declarations, damages and other relief. On the same date of the filing of the statement of claim, the Bank also filed an application seeking the revocation of the appointment of the receiver, the delivery up by the receiver of the Bank's books, records, keys and other documents, and the surrender to the court (subject to confidentiality safeguards) of all the documents made or prepared by the receiver following his entry upon the Bank's premises on 15th February 2008. The Bank filed an amended statement of claim on 5th March 2008, seeking various declarations, damages for breach of statutory and/or common law duties, and damages for unlawful interference with the business of the Bank. The trial judge, on hearing the application, concluded that the appointment of the receiver was invalid and revoked the appointment. The learned judge also ordered the receiver to deliver up possession of the business and premises together with, among other things, all books, paper records, and keys by noon the following day; and that the receiver file a report of all action taken by him during the period of the receivership.
- [4] Dr. Mitchell and the Attorney General had failed to file a defence to the claim.
- [5] On 12th November 2008, the Bank applied for permission to enter default judgment on the amended claim for the failure by Dr. Mitchell and the Attorney General to file a defence and on the basis that the court had previously ruled (on the application) that the appointment of the receiver was invalid. Dr. Mitchell and the Attorney General opposed the application, arguing that: (a) the only remedy

¹ CAP 26 A, Revised Laws of Grenada.

available to the Bank pursuant to section 45 of the **Banking Act** (i.e. revocation of the receiver) had already been granted; (b) the Bank suffered no actionable wrong – the acts of the receiver being valid notwithstanding the defects in his appointment; and (c) damages are not available to the Bank. The High Court refused to enter default judgment on the basis that section 45 of the **Banking Act** provides both the right and the remedy and therefore an aggrieved party cannot go outside the remedy provided. The Bank appealed. On 17th June 2014, the Court of Appeal held that section 45 of the **Banking Act** does not create an exclusive remedy in the sense that the Bank is precluded from pursuing and being granted other relief by the court. The Court of Appeal set aside the order dated 23rd September 2010 refusing the application for permission to enter default judgment and remitted the matter to the court below to take its course in accordance with the Rules of Court. On 15th August 2014, the Bank filed a request for judgment in default of defence and on 30th September 2014 judgment in default of defence was granted with damages to be assessed.

[6] During the hearing of the assessment of damages on 10th June 2015, the Bank sought permission to call expert evidence. Dr. Mitchell and the Attorney General raised several issues including whether there are any damages to be assessed, for what tort or breach damages are to be assessed and the period for which damages are to be assessed. Having heard submissions, the learned master ruled on the main preliminary issues raised.

[7] I will now highlight the learned master's ruling.

The Ruling Below

[8] The master stated as follows:

“I am satisfied that there is a tort of unlawful interference with business – sometimes referred to as interfering with the trade or business of another by unlawful means. It is an innominate tort whose elements and scope have been developed by the court over many years.”

- [9] As indicated below, at first instance, learned counsel on behalf of Dr. Mitchell and the Attorney General raised various challenges to the Bank's right to recover damages for breach of statutory duty, breach of common law duty and the tort of unlawful interference with business. The question which arises is for what tort or breach of duty are damages to be assessed?
- [10] The learned master reviewed a number of authorities including **Lunnun v Singh and others**² and stated that in that case the Court of Appeal was considering a claim where the claimant was granted judgment in default in an action in which there was an alleged leakage onto the claimant's land of an unspecified quantity of effluence from a sewer on the defendants' premises. On the assessment of damages following judgment in default, the defendants sought to reduce the damages claimed on the ground that some part of the damage was as a consequence of the influx of water and sewage onto the premises attributable to some source other than the defendants' sewer. The Court held that it was inherent in the default judgment that the defendants must be liable for some damage resulting from the leak, but that was the full extent of the issues concluded or settled. All questions going to quantification, including the question of causation in relation to particular heads of loss claimed was open to the defendants at the assessment hearing 'save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a full hearing on the facts or a default judgment'. The learned master referred to the dicta of Parker LJ and Clarke LJ in that regard.
- [11] The learned master observed that **Lunnun v Singh** was decided prior to the introduction of the UK CPR but the principles which were enunciated were approved by the UK Court of Appeal in the **Pugh v Cantor Fitzgerald International**,³ a case decided after the introduction of the UK CPR. The learned master stated that it is therefore clear that upon a judgment in default the question

² [1999] EWCA Civ 1736.

³ [2001] EWCA Civ 307.

of liability is determined. She stated that on the assessment of the damages the defendant may not take any point which is inconsistent with the liability alleged in the statement of claim but subject thereto, the claimant could take any point relevant to the assessment of damages.

[12] The master also examined **Pugh** and said that the Court stated that a further issue to be considered when determining what issues can be raised on assessment is what issues are determined by a judgment entered in default of defence. The master stated that the Court accepted the correct principle as expressed by Viscount Radcliffe in **Kok Hoong v Leong Cheong Kweng Mines Ltd.**⁴

[13] The master, having reviewed **Kok Hoong v Leong Cheong Kweng Mines Ltd.**, indicated that it concerned the issue of the proper limitations of a default judgment as foundation for an estoppel in cases where a subsequent action was commenced following a default judgment and therefore was not a case of assessment of damages following entry of judgment in default. She went on to state that however, it appears that the Court of Appeal in **Pugh** treated the issue of what can be raised at the assessment of damages following a judgment in default as one of 'issue estoppel' and the statement of claim must be scrutinised to determine what was decided by the entry of judgment in default.

[14] The master further stated as follows:

“I therefore again turn to the statement of claim to scrutinise the facts contained therein to determine the bare essence of what was conclusively determined. I bear in mind that the judgment in default is based on liability **alleged in the statement of claim.**”

The learned master reminded herself that the Bank obtained a declaration that the appointment of the receiver was in breach of section 43 of the Banking Act. The master stated also that the claimant's claim for this relief was effectively determined by the court upon the interlocutory application by Dr. Mitchell and the

⁴ [1964] 1 All ER 300, at p.306.

Attorney General for an order revoking the appointment of the receiver. The court ruled that the appointment of the receiver was not in accordance with the requirements of section 43 of the **Banking Act** and was therefore invalid.

- [15] Critically, the master examined the claim for breach of statutory duty and common law duty and stated that:

“In addition to seeking a declaration that the appointment of the receiver was in breach of section 43 of **the Act** the claimant sought damages for breach of statutory duty. The court has determined that the defendants acted in breach of section 43 of **the Act** in appointing the Receiver... With respect to the claim for damages for breach of common law duty, it is my view that the statement of claim also contains averments and particulars with respect to this claim. In particular, paragraph 13 avers that the defendants acted in breach of their common law duties owed to the claimant by, inter alia, deliberately making the appointment of the receiver when they knew or ought to have known that they did not have the recommendation of the ECCB to do so, failing to act pursuant to the rules of natural justice and failing to act fairly.”

- [16] The learned master stated as follows:

“In summary, I find that based on the liability alleged in the statement of claim, the damages which are to be assessed following the entry of judgment in default are damages for breach of statutory duty and breach of common law duty.”

This Appeal

- [17] Dr. Mitchell and the Attorney General have filed several grounds of appeal against the master’s ruling that the damages were to be assessed based on breach of statutory duty and breach of common law duty of care. However, during the oral arguments that were advanced on their behalf, learned Queen’s Counsel Mr. Astaphan quite properly indicated that the appellants were only pursuing one ground of appeal in relation to the master’s ruling on the common law duty of care. As a consequence of the concession in relation to the master’s alleged error in relation to the breach of statutory duty, only the ground in relation to the common law duty of care was left to be determined.

Issue on Appeal

- [18] The issue that I have therefore distilled from the grounds of appeal is as follows:

Whether the learned master erred as a matter of law when she ruled that on the default judgment, Dr. Mitchell and the Attorney General were liable to pay damages to the Bank for breach of their common law duty of care as a consequence of the unlawful appointment of the receiver of the Bank.

Submissions on behalf of the Bank

- [19] Learned counsel Mr. Pariag, in arguing for this Court to uphold the ruling of the learned master, stated that she did not err. He said that it was clear that the pleadings indicated that Dr. Mitchell and the Attorney General had acted in breach of both their common law and statutory duty of care. Insofar as no defence had been filed by them, Mr. Pariag said that the default judgment would be in relation to both the breach of statutory duty and the common law duty. Mr. Pariag was adamant that the learned master properly scrutinised the pleadings and carefully reviewed the authorities and arguments that were advanced by both parties and came to an unassailable conclusion that damages were also to be assessed for breach of common law duty of care.

- [20] Mr. Pariag said that the amended statement of claim was very comprehensive and clearly indicated that Dr. Mitchell and the Attorney General had breached their common law duty to the Bank. He said that the learned master examined their breach of common law duty and there is no basis upon which this Court could properly interfere with the ruling of the learned master. In support of this argument, he referred this Court to **Lunnun v Singh**. He sought to rely on this case in asserting that the learned master properly concluded that Dr. Mitchell and the Attorney General were liable to the Bank for breach of the common law duty of care that they owed to the Bank. Mr. Pariag was adamant that the statutory regime does not provide for adequate remedy and there must therefore be some common law remedy. He sought to distinguish between the relevant **Banking Act**

in Jamaica and the **Banking Act** of Grenada. Indeed, learned counsel Mr. Pariag urged this Court not to rely on the Board's decision in **Century National Merchant Bank Limited and Trust Co. Ltd and Others v Omar Davies and Others**⁵ since in his view the Banking Act of Jamaica is dissimilar to that of Grenada. He therefore opined that the case at bar is to be distinguished from the **Century National Merchant Bank Ltd** case.

- [21] Finally, Mr. Pariag stated that the learned master made certain findings of fact based on her scrutiny of the amended statement of claim and he implored this Court not disturb those "findings of fact". He maintained that on those bases it was open to the learned master to conclude that the Bank was entitled to damages for breach of common law duty of care. Accordingly, he implored this Court to dismiss the appeal.

Submissions on behalf of the Appellants

- [22] Learned Queen's Counsel Mr. Astaphan acknowledged that it is an established principle emerging from the authorities that default judgments are to be strictly and narrowly construed. He stated that the appropriate scrutiny the Court must apply in its approach to default judgments, must be guided by the caution commended to us by Lord Wright in the House of Lords decision in the classic case of **New Brunswick Railway Co. v British & French Trust Corporation**,⁶ Lord Wright said, thusly:

"There are grave reasons of convenience why a party should be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppels as an illegitimate extension of the doctrine, which, in the absence of express authority, I am not prepared to accept."

- [23] Mr. Astaphan, QC posited the House of Lords decision in **New Brunswick**

⁵ [1998] AC 628.

⁶ [1938] 4 All ER 747 (HL) at p. 766 H.

Railway Co. v British & French Corporation was followed by the Privy Council in **Kok Hoong v Leong Cheong Mines Ltd.** He submitted that the learned master fell into error by treating the default judgment concerned in this appeal as conclusive of every matter of fact or law alleged in the claim.

[24] Turning his attention to the damages based on breach of statutory duty, Mr. Astaphan, QC stated that Dr. Mitchell and the Attorney General readily concede that, as a matter of law and legal reasoning, the claim for damages for breach of section 43 of the **Banking Act** can be taken to be determined in the Bank's favour by the default judgment since the revocation of the appointment of the receiver as provided by section 45 of the **Banking Act** has been held by this Court not to be exclusive relief which the Court is able to give to the Bank and, certainly, not the exclusive recourse or process which the Bank has or was open to in relation to a challenge to the receiver's appointment over its assets. He said therefore that it is quite legitimate for the Court to proceed to conduct a quantum hearing relative to the averments at paragraph 12 sub paragraph 1 of the amended statement of claim. Mr. Astaphan, QC made clear that his concession in relation to the breach of statutory duty of care only relates to paragraph 12(1) of the amended statement of claim.

[25] Mr. Astaphan, QC complained that neither alleged duty at sub-paragraphs 2 or 3 of paragraph 12 of the amended statement of claim as therein stated is required by any of the relevant sections of the **Banking Act**. Those so-called duties do not arise by the language of the provisions. He submitted that they are not duties created by the statute. He referred to sections 43 and 44 of the **Banking Act**. He pointed out that on the Bank's pleadings in paragraph 7 of the amended statement of claim, it is admitted by the Bank that the requisite notice of the appointment of the receiver was indeed affixed to the Bank's premises as directed in section 44 of the **Banking Act**. He said that it does not therefore lie in the mouth of the Bank to say that no notice as required by law was given. He argued that there was therefore no breach of the statutory duty to give notice in the form and manner

required. He said that the master failed to address her mind to and appreciate this point of fact in her examination of the pleadings and her conclusions at paragraph 62 – 64 of her judgment cannot be supported.

[26] Mr. Astaphan, QC submitted therefore that the default judgment in the present case could not, necessarily and with complete precision, be taken to have determined that those duties, other than that conceded as stated above, namely, failing or refusing to act upon the recommendation of the Eastern Caribbean Central Bank prior to making the appointment as maintained by section 43 were breached. He therefore submitted that the only breach of statutory duty for which any damages are to be assessed in law is that of section 43 of the **Banking Act** alleged (at paragraph 12, sub-paragraph 1) of the amended statement of claim.

[27] Turning his attention to the main issue in this appeal, Mr. Astaphan, QC addressed breach of common law duties. Indeed, Mr. Astaphan, QC focussed his attention on the learned master's ruling in relation to the common law duty of care. He referred to the Bank's submission that Dr. Mitchell and the Attorney General acted unlawfully and in breach of their common law duties in appointing a receiver. He said that the question that arises on those pleadings is what common law duties were owed at law to the Bank by Dr. Mitchell and the Attorney General in the purported exercise of the section 43 power to appoint a receiver over the Bank? Mr. Astaphan, QC highlighted that the common law duties alleged to be breached by Dr. Mitchell and the Attorney General are set out in the particulars at paragraph 14 of the amended statement of claim:

“(1) Deliberately making the appointment of the receiver when they knew or ought to have known that they did not have the recommendation of the ECCB to do so; (2) Failing or refusing in the circumstances to act pursuant to the rules of natural justice to give a hearing to the claimant and not to act as a judge in their own cause; (3) Failing to act judicially in the circumstances of the case; (4) Failing or refusing in all circumstances of the case to act fairly.”

[28] Mr. Astaphan, QC posited that the **Banking Act** created the power in the Minister

to intervene and appoint a receiver over a financial institution; he was adamant that the power did not and does not exist at common law for the Executive to do so. The power conferred on the Minister in section 43 of the Act is therefore purely statutory. I agree entirely with him. Mr. Astaphan, QC therefore submitted that the duty to obtain the recommendation of the Eastern Caribbean Central Bank in order to trigger the power under section 43 is expressly statutory. He argued that no common law duty to do that which the statute commands or requires can be implied conterminously with that statutory obligation as is alleged by the Bank. In support of his contention, he referred this Court to **Century National Merchant Bank Ltd. v Omar Davies**. The Court notes that it does not appear as though this very instructive decision of the Board was brought to the learned master's attention.⁷ In my view, this decision is very persuasive on this Court and has the effect of disposing of this ground of the appeal. I will therefore later treat in some detail with **Century National Merchant Bank Ltd. v Omar Davies**.

- [29] Mr. Astaphan, QC acknowledged a matter of fundamental principle of public law is that a party is entitled to be given notice of and a fair hearing in respect of an administrative or judicial action which may adversely affect that party's rights or livelihood. This is an expression of the hallowed principles of natural justice – the audi alteram partem rule; procedural fairness and due process existing at common law. He reminded this Court that the duty to afford procedural fairness will depend on the circumstance and will correspond to the right of the subject to a fair hearing. He said that however, the question is: whether those common law natural justice requirements/duties attend the statutory scheme of the **Banking Act** and the exercise by the Minister of the section 43 power to appoint a receiver in the circumstances there described. He suggested that it is not objectionable for Parliament expressly or by implication to exclude the right of a person to be given notice of proceedings or to be heard at a preliminary stage which does not finally decide the rights of parties. He referred this Court to **Wiseman and Anr. v.**

⁷ Counsel who then appeared for the appellant in the lower did not appear in the appeal.

Borneman⁸ applied in **AG v Aleen Mohammed**⁹ and to **Century National Merchant Bank Ltd. v Omar Davies**.

[30] Mr. Astaphan, QC suggested that the clear intention of Parliament in enacting the provisions of section 43, 44 and 45 of the **Banking Act** was to enable swift and urgent action by the Minister of Finance in the public interest to appoint a receiver over a financial institution (including a bank) which fell into the category of specific circumstances listed in section 43 to arrest the negative impact on the national economy. He opined that that must be the primary enacting objective. He said that the provisions of sections 43 to 45 must be read contextually with sections 46 to 59 which reveal that appointment of the receiver is a provisional and pre-emptive measure, preliminary in nature. Section 45 provides for speedy access to the courts by the Bank to achieve the revocation of the receiver's appointment. The powers of the courts in that regard is not limited or abridged in any way as to the kinds of breath of relief that may be granted.

[31] Queen's Counsel Mr. Astaphan argued that the exercise of the section 43 power of the Minister is preliminary and occurs at a preliminary stage of a process set out in the **Banking Act**. At that stage, Parliament has by necessary implication excluded the right of a hearing before the power is exercised. He referred to **Wiseman and Anr. v. Borneman** applied in **AG v Aleen Mohammed**. He said that the power given to the Minister under section 43 is not a judicial or quasi-judicial power; it is purely an executive power, which is triggered only upon the recommendation of the Eastern Caribbean Central Bank. He posited that the Minister is not engaged in the determination, final or otherwise, of any interests or rights of any party. He argued that the duties alleged at paragraph 13, (subparagraphs 2 to 4) of the particulars do not attend the exercise of statutory power and therefore do not arise. He therefore submitted that the learned master erred in ruling that common law duty of care arose and for which damages were to

⁸ [1969] 3 All ER 276 WIR 359.

⁹ [1985] 36 WIR 359.

be assessed.

- [32] Mr. Astaphan, QC was adamant that no common law rights or duties as alleged existed in law or attended the exercise of the Minister's power in section 43 of the Act to appoint a receiver over the Bank in circumstances set out in that provision. He said that the default judgment in this case could not, necessarily and with complete precision, be taken to have so concluded. He relied heavily on the decision of the Board in **Century National Merchant Bank Ltd. v Omar Davies** in support of his submission. Finally, Mr. Astaphan, QC argued that the learned master failed to appreciate these matters in her examination and scrutiny of the pleadings in the court below and consequently fell into error when she ruled as she did at paragraphs 66 and 67 of her judgment. He therefore urged this Court to allow the appeal in relation to the ground of breach of common law duty of care.

Discussion

- [33] In my view, this appeal has turned out to be in relation to a very short point which has been definitively answered by the Board in **Century National Merchant Bank Ltd. v Omar Davies**.
- [34] Based on paragraph 83 of the amended statement of claim, there is no doubt that the Bank had alleged that their common law duty was breached. The question which the learned master would have had to determine is whether or not any such common law duty arose in the circumstances.

In this regard, it is not because it was asserted, without more, that it means that a common law duty of care arose. A close reading of the master's ruling indicated that she analysed the cases that were cited to her, examined the pleadings and reviewed the submissions that were advanced in an effort to determine what the default judgment should have been taken as having concluded as mandated by **Kok v Hoong v Leong Cheong**. But unfortunately, it seems as though the

learned master was unaware of the very important Board decision in **Century National Bank Ltd. v Omar Davies** and thus fell into error.

[35] Let me say right away that the duty that is imposed on the Minister of Finance is a statutory duty. In relation to breach of statutory duty as stated in paragraphs 12(2) and 12(3), I have perused the relevant section of the **Banking Act** namely section 4 and it does not require a notice of intention to have been served by the Minister, instead the section merely requires the Minister to post on the premises a notice announcing the appointment of the receiver. Insofar as the statute does not require the Minister to have given notice prior to the appointments, there is no basis for reading into the statute, a breach of statutory duty or a breach of the common law duty of care to that effect. Neither is there any basis upon which this Court could properly conclude that there was a breach of statutory duty in failing to give any notice to the Bank of their intention to appoint a receiver since the statute did not provide for any such notice to be given.

[36] Turning to the default judgment, I agree that it is incumbent on the judicial officer at the assessment hearing based on a default judgment to scrutinise the pleadings in order to determine what the default judgment represents. I have no doubt that as a general rule the default judgment does not represent a decision that all of the loss or damage alleged by the claimant was indeed suffered by him or attributable to the defendant; authority for this proposition is **Lunnun v Singh** read together with **Kok Hoong v Leong Cheong Kweng Mines Ltd.**

[37] The Court in **Lunnan v Singh** highlighted that on an assessment of damages all questions going to quantification of damage, including the question of causation in relation to particular heads of loss claimed by the claimant, remain open and could be raised by the defendant provided that they are not inconsistent with liability alleged in the statement of claim. Further, in **Kok Hoong v Leong Cheong Kweng Mines Ltd** the Court held that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the

purpose of ascertaining the bare essence of what they must necessarily have decided and they can estop only for what must “necessarily, and with complete precision” have been thereby determined.

[39] In the case at bar, therefore it behooved the learned master to carefully examine whether breach of common law duty could properly have arisen in the circumstances of this case where there was an undisputed breach of statutory duty. The master did scrutinise the pleadings and correctly referred to the authorities above however it is unfortunate that neither party appeared to have been aware of the Board’s decision in **Century National Merchant Bank Ltd. v Omar Davies** and it does not seem that it was brought to the master’s attention. However, I agree with learned Queen’s Counsel Mr. Astaphan that the learned master was required to determine whether common law duty existed in addition to the clear statutory duty. The master sought to do so without paying regard to the highly persuasive case of **Century National Merchant Bank Ltd. v Omar Davies** which effectively addresses the issue of this appeal.

[40] I now turn to the gravamen of this appeal, the common law duty of care. In relation to the common law duty of care as held by the learned master, the matters that are pleaded in paragraphs 13(1) – 13(4) of the amended statement of claim do not on their face give rise to an assertion of breach of common law duties. Most of the complaints are in relation to procedural fairness and there is no express provision in the **Banking Act** for these. The question which therefore arises is whether the legislative framework of the **Banking Act** is amenable having read into it rights which are in effect public law rights. This question would be answered shortly.

[41] Apart from paragraph 13(1) of the amended statement of claim which stated as follows: ‘[d]eliberately making the appointment of the receiver when they know or ought to have known that they did so’, I fail to see how paragraphs 13(2) – 13(4) could even give rise to common law duties. In addition, I have no doubt that the

statutory provisions/scheme provides to the Bank all the protection to meet the procedural fairness to satisfy the justice of the case.

[42] I am fortified in the above view by the very instructive and helpful pronouncements of the Board in **Century National Merchant Bank Ltd. v Omar Davies** where the Board, when faced with similar arguments to those deployed by the Bank in the case at bar stated that the Jamaica Banking Act requires notice announcing an intention to assume management of the Bank from such date and time as may be provided. In those circumstances, their Lordships examined the alternate position and expressed themselves as follows:

“But, if contrary to their Lordships’ view, it is assumed that the language is capable of letting in more than one meaning the contextual scene removes any doubt. A prior notice of an intention to assume management may cause grave problems - ... The risk of advance notice of the minister’s intention leaking out, once it is communicated to the bank, must also be substantial. A run on a bank may not only finally destroy any prospect of reconstruction of a bank but it may have systemic consequences in the sense of adversely affecting the banking sector as a whole and thus the national economy. Finally, there is the risk that directors or other insiders, who have been responsible for unsound practices, may destroy incriminating records. The context therefore supports their Lordships’ view that [the relevant section] does not require prior notice.”¹⁰

[43] I can do no more than apply those very instructive principles which lead me to the ineluctable conclusion and fortify my view that there is no requirement for prior notice to have been given and hence there could have been no breach of any common law duty.

[44] Turning next to the issue of natural justice as raised by the Bank in this case, the Board in **Century National Merchant Bank Ltd. v Omar Davies** made some very significant and highly persuasive pronouncements on the question of natural justice:

“That leads to the appellants’ related argument that the notice given on 10 July 1996 was in breach of standards of procedural fairness. Counsel for

¹⁰ At p. 638.

the appellants argued that the very least the minister should have given the bank an opportunity to make representations to the effect that it would be wrong to assume temporary management rather than present a winding up petition. He invokes a common law principle which is a cornerstone of administrative law in the United Kingdom and in Jamaica. Nevertheless, the limitations of that principle must be borne in mind. In **Wiseman v Borneman** [1971] A.C. 297, 308, Lord Reid said:

'Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.'

"For the reasons already explained their Lordships are satisfied that the statutory right of appeal to the Court of Appeal, exercising wide original jurisdiction, should be sufficient to achieve justice to the bank. Moreover, and for reasons also explained, a prior opportunity for the directors and other insiders in the bank to make representations that a temporary management is inappropriate is both impractical and contrary to the public interest. The argument based on procedural unfairness must be rejected."

[45] I am guided by the above enunciations and apply them to the case at bar. I am therefore fortified in my view that the learned master erred in ruling that based on the default judgment in consequence of Dr. Mitchell's and the Attorney General's breach of statutory duty also gave rise to the breach of common law duty of care. Insofar as the learned master ruled that the Bank is entitled to have damages assessed for breach of the common law duty of care, that aspect of the ruling can be assailed. No common law duty of care could have arisen in consequence of the statutory breaches. The learned master erred in so holding.

[46] Accordingly, I would allow the appeal against this aspect of the learned master's ruling which deals with the assessment of damages in relation to breach of common law duty of care and set aside the order to the effect that damages are to be assessed for breach of common law duty of care. Mr. Astaphan, QC, having

conceded against the master's order in relation to damages for breach of statutory duty, the appeal is dismissed in relation to this issue.

Costs

- [47] Insofar as Dr. Mitchell and the Attorney General have succeeded in this appeal they are entitled to have their costs. Such costs are to be assessed, if not agreed between the parties, within 28 days.

Conclusion

- [48] (1) The appeal of Dr. Keith Mitchell and the Attorney General of Grenada against the learned master's ruling, that Capital Bank International Limited is entitled to have damages assessed for breach of the common law duty of care, pursuant to the default judgment, is allowed.
- (2) Dr. Keith Mitchell and the Attorney General of Grenada shall have their costs of this appeal, which are to be assessed if not agreed, within 28 days of this judgment.
- [49] I gratefully acknowledge the assistance of all learned counsel.

I concur
Mario Michel
Justice of Appeal

I concur
Paul Webster
Justice of Appeal [Ag.]

By the court

Chief Registrar