

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

AD 2010

CLAIM NO: ANUHCV 2010/0188

BETWEEN:

BANK OF ANTIGUA LTD.
STANFORD BANK HOLDINGS LTD.

Claimant

and

GOVERNOR OF THE EASTERN CARIBBEAN CENTRAL BANK

Defendant

Appearances:

Mr. David Joseph, Q.C. with Mr. Hugh Marshall Jr. for the Claimants/Applicant(s)
Mr. Emile Ferdinand, Ms. E. Ann Henry and Ms. Merlese O'Loughlin for the Defendant

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2010: April 27
May 11
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JUDGMENT

[1] **MICHEL, J.:** On 25th March 2010 a Claim Form and Statement of Claim were filed by Bank of Antigua Ltd and Stanford Holdings Ltd as Claimants, naming the Governor of the Eastern Caribbean Central Bank as the Defendant and seeking various orders against him. Then on 31st March 2010 an Application was filed with an Affidavit in Support by Andrea Stoelker seeking (among other things) an Order of the Court that the Defendant

shall take no steps either to sell the assets of, or the Bank of Antigua itself, pending the determination of the claims in the Claim Form, without the Order of the Court.

- [2] On 22nd April 2010 the Defendant filed an Acknowledgement of Service of the Claim Form and on the following day (23rd April) filed an Affidavit in Opposition to the Application of 31st March 2010 and also filed a Notice of Application, with Affidavit in Support, to strike out the Claim Form and Statement of Claim.
- [3] Both Applications were set down for hearing on 27th April 2010.
- [4] On the day of the hearing, Counsel for the Applicant(s) in the Application filed on 31st March 2010 objected to the Court proceeding with the Application by the Defendant, since it was served on the Claimants less than seven days before the date of hearing, and urged the Court to proceed with the Application of his client(s), unless Counsel for the Defendant was willing to give an undertaking to the Court that there will be no sale of the assets of, or the Bank of Antigua itself, until the trial of the matter.
- [5] Counsel for the Defendant conceded that the Defendant's Application was short served, but expressed that he was unwilling and/or unable, on behalf of the Defendant, to give the undertaking sought by opposing Counsel and so the hearing proceeded only on the Application filed on 31st March 2010.
- [6] In his submission on behalf of the Applicant(s), Learned Queen's Counsel informed the Court that whereas the ultimate relief being sought by the Claimants is the cessation of the emergency powers of the Defendant, the interim relief being sought at this time is the preservation of the status quo, which would expressly allow the Defendant to come back into Court, if there are circumstances justifying it, asking the Court for a variation. He submitted that the relief being sought is to preserve the position rather than to prejudice the parties, that it does not pronounce on the merits of the position of either party or prejudice the case of either, but is simply a preservation order.

- [7] Learned Queen's Counsel submitted that the governing principles for the grant of the application sought by the Applicant(s) would be the principles laid down in the American Cyanamid case – (1) that there is a serious issue to be tried, (2) that an award of damages is not an adequate remedy and (3) that the balance of convenience is in favour of granting the injunction. He then made a very thorough submission elaborating on the Applicant(s) satisfying of all three of the American Cyanamid prerequisites for the grant of an interlocutory injunction in this case and, although the submission was responded to no less thoroughly (both orally and in writing) by Learned Counsel for the Defendant, the Court would have - on the facts of this case - preferred the submission of Learned Queen's Counsel on the issue of the Applicant(s) having satisfied the American Cyanamid test.
- [8] The Court however has a problem with the identity and capacity of the Applicant(s).
- [9] The Application commenced with the words "We, as Directors of the Bank of Antigua and in its name and Stanford Bank Holdings Limited" and concluded with the signature of Hugh C. Marshall of Marshall & Co. as Attorneys at Law for "the Applicant." Having perused the documents filed and heard Counsel in support of and in opposition to the Application, the Court is still unsure who the applicant or applicants is or are who seek this injunctive relief. At no time was the Court enlightened as to who were "We, as Directors" who made the Application or, for that matter, who was "the Applicant" on behalf of whom Mr. Marshall signed the Application. The Application was supported by an Affidavit by Andrea Stoelker who alleged therein that she had been appointed a member of the Board of Directors of the First Named Claimant by a Written Resolution dated 17th March 2010 for the sole purpose of bringing this action in the Bank's name in accordance with the Eastern Caribbean Central Bank Act. In her Affidavit she stated (in paragraph 7 thereof) that the Defendant "invoked the provisions of Part 5A of the Eastern Caribbean Central Bank Agreement and took over management of the Bank under the emergency powers;" she stated (in paragraph 10 thereof) that she accepts that "under Part 5A of the aforesaid Agreement establishing the Eastern Caribbean Central Bank, the Governor has the power to take such steps as specified at Part 5B of the Agreement;" and referring to the First Named Claimant, she asked the Court (in paragraph 24 thereof) to order that "the Central

Bank cease to control the business of that financial institution forthwith.” Ms. Stoelker also referred several times in her Affidavit to the Board of Directors of the First Named Claimant and specifically referred by name to “Sir Kenneth Allen a member of the Board of Directors of the First Claimant.”

- [10] Having acknowledged that the Defendant “invoked the provisions of Part 5A of the Eastern Caribbean Central Bank Agreement and took over management of the Bank under the emergency powers” and that “under Part 5A of the aforesaid Agreement establishing the Eastern Caribbean Central Bank, the Governor has the power to take such steps as specified at Part 5B of the Agreement” and having, by virtue of the Application, acknowledged “the continued exercise by the Defendant of the emergency powers under the Eastern Caribbean Central Bank Agreement” (as per Ground III of the Grounds of the Application), two consequences immediately follow. The first is that, in accordance with Article 5D (2) of the Schedule to the Eastern Caribbean Central Bank Act (the Schedule), “No acts done or resolutions, rules, bye-laws or decisions made or conveyances, transfers, assignments or instruments executed during such period relating to the business affairs, property, undertaking or management of the financial institution shall have effect unless they are approved by or are in conformity with the directions of the Bank.” The effect of this is that the purported resolution appointing Andrea Stoelker as a member of the Board of Directors of the First Named Claimant is invalid on account of it not having been approved by the ECCB or being otherwise in conformity with the directions of the ECCB – the First Defendant so states at paragraph 9 of the Affidavit in Opposition filed on his behalf, the Applicant(s) does/do not dispute it, and the Court accepts it. The second consequence is that, in accordance with Article 5E (4) of the Schedule, any application to the Court (such as the one filed on 31st March 2010) that the Eastern Caribbean Central Bank cease to control the business of the First Named Claimant must be made by the directors of the First Named Claimant. There is no indication that the Application filed on 31st March 2010 was made by the persons listed as directors of the First Named Claimant, whose existence was specifically averted to in the Affidavit of Ms. Stoelker, and who alone can make application under Part 5E (4).

- [11] The provisions of Article 5A (2) of the Schedule do not assist the Applicant(s) because (among other reasons) there is no evidence in this case or on the record that Andrea Stoelker and/or any other applicant or applicants has or have ever been a director or directors of the First Named Claimant. So that, persuasive though the submission of Learned Queen's Counsel for the Applicant(s) may have been, it does not overcome the objection of Learned Counsel for the Defendant that it can only be successful if advanced by "a proper party ... in a proper case brought against a proper defendant." Although Learned Counsel for the Defendant went on to submit that none of these proprieties have been established in this case, this Court is only prepared to rule at this juncture that it does not have before it an application made by a party entitled to make it in the circumstances of this case.
- [12] The Court can only grant injunctive relief to a party who has established a legal right, the violation of which he is asking the Court to restrain or the assertion of which he is asking the Court to enforce. This circumstance has not been established in the application made to this Court. The Court accordingly declines to grant an injunction to a yet unascertained applicant or applicants without the locus standi of the applicant or applicants to make the application first being established, far less the legal right of the applicant or applicants which it is claimed is being violated or the violation of which is threatened. The application is therefore declined.
- [13] The Defendant is entitled to his costs on this application to be agreed between Counsel or otherwise assessed, both as to quantum and as to the identity of the payer.

Mario Michel
High Court Judge