

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010 - 01442

**IN THE MATTER OF
CLICO INVESTMENT BANK LIMITED**

(In Compulsory Liquidation)

AND

**IN THE MATTER OF
THE COMPANIES ACT, CHAP 81:01**

STONE STREET CAPITAL

APPLICANT

AND

CLICO INVESTMENT BANK LIMITED

(In Compulsory Liquidation)

RESPONDENT

Before The Honourable Mr Justice R. Boodoosingh

Appearances:

Mr Martin Daly SC leading Mr Jason Mootoo instructed by Ms Sara Sinanan for the Applicant

Mr Neal Bisnath and Mr Ravindra Nanga instructed by Mrs Lydia Mendonca for the Respondent

Dated: 4 October 2012

RULING

1. This is an application by the claimant for leave to commence proceedings against the defendant under section 364 of the **Companies Act, Chap. 81:01** for declaratory and other relief.

2. The application has been resisted on two main grounds. The first is that the **Central Bank Amendment Act, 2011** (the Amendment Act) imposes a stay on bringing claims to court against certain institutions, including the respondent, until the Central Bank publishes a notification that the stay has been lifted. The second ground is that the applicant has not properly justified that leave should be granted based on the applicable test. I should note that the applicant had set out constitutional arguments also, but it was agreed that the above two matters should be dealt with first before consideration of how the court should deal with the constitutional arguments challenge.

3. The Amendment Act provides as follows at section 5 (b):

Section 44E of the Act is amended

(b) by inserting after subsection (4), the following subsections:

(5) On and after the publication of a notification under subsection (1)—

(a) no creditor, shareholder, depositor, policyholder or any other person shall have any remedy against the institution in respect of any claim, and without prejudice to the generality of the foregoing, no creditor, shareholder, depositor, policyholder or any other person shall commence or continue any action, execution or other proceedings or seek to enforce in any way whatsoever without limitation in Trinidad and Tobago, any judgment or order obtained in Trinidad and Tobago or any other jurisdiction, against the institution or its successor or the transferee of the whole or any part of any property, assets or undertaking of the institution for the recovery of any claim or in respect of any

other liability, until the publication of a notification under section 44G(1) in relation to the institution;

4. Under the definition section, a “claim” is defined as:

any claim whatsoever without limitation, including, without prejudice to the generality of the foregoing, 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, policyholder or any other person;

5. Sections 44 D and E of the Central Bank Act provide as follows:

44D. (1) Where the Bank is of the opinion—

(a) that the interests of depositors, creditors, policyholders or members of an institution are threatened;

(b) that an institution is likely to become unable to meet its obligations or is about to suspend or has suspended payment; or

(c) that an institution is not maintaining high standards of financial probity or sound business practices,

the Bank shall, in addition to any other powers conferred on it by any other law, have power—

(i) to investigate the affairs of the institution concerned and any of its affiliated institutions and to appoint a person or persons for that purpose;

(ii) to such extent as it thinks fit, to assume control of and carry on the affairs of the institution and, if necessary, to take over the property and undertaking of the institution;

(iii) to take all steps it considers necessary to protect the interests, and to preserve the rights of depositors and creditors of the institution;

(iv) to restructure the business or undertaking of the institution or to reconstruct its capital base;

(v) to provide such financial assistance to companies which carry on the business of banking or business of a financial nature as licensed under the Financial Institutions Act, as it considers necessary to prevent the collapse of the institution, other than an insurance company regulated under the Insurance Act or a society registered under the Co-operative Societies Act;

(vi) to acquire or sell or otherwise deal with the property, assets and undertaking of or any shareholding in the institution, at a price to be determined by an independent valuer;

(vii) to appoint such persons as it considers necessary to assist in the performance of the functions conferred by paragraphs (i) to (vi);

(viii) to ensure that each member of the Fund established under Part VB maintains high standards of financial probity and sound business practices and for that purpose to examine and supervise the operations of all member institutions and stipulate prudential criteria to be followed by the institutions as it may deem necessary.

(2) The powers of the Bank under subsection (1) shall not be exercised unless the Bank is also of the opinion that the financial system of Trinidad and Tobago is in danger of disruption, substantial damage, injury or impairment as a result of the circumstances giving rise to the exercise of such powers.

(3) Pursuant but without prejudice to its powers under subsection (1), the Bank may appoint any person or persons to act as Receiver or Manager and such appointment shall take effect as though made by the depositors and other creditors of the Company pursuant to a charge over all the fixed and floating assets of the institution and without prejudice to any other powers vested in such Receiver or Manager the Receiver or Manager shall have power—

(a) to take possession of, collect and get in any property of the institution and for that purpose to take any proceedings in the name of the institution or otherwise as may seem expedient;

(b) to carry on, manage or concur in carrying on and managing the business of the institution or any part thereof and for any of those purposes to raise or borrow any

money that may be required on the security of the whole or any part of the property of the institution;

(c) forthwith to sell or concur in selling (but where necessary with the leave of the Court) and to let or concur in letting and to accept surrenders of leases or tenancies of all or any of the property of the institution and to carry any such sale, letting or surrender into effect by conveying, leasing, letting or accepting surrenders in the name and on behalf of the institution; and any such sale may be for cash, debentures, other obligations, shares, stock or other valuable consideration and may be payable in a lump sum or by instalments spread over such period as the Bank shall think fit and plant machinery and other fixtures may be severed and sold separately from the premises containing them without the consent of the institution being obtained thereto;

(d) to make any arrangement or compromise which he shall think expedient;

(e) to make and effect or repair renewals and any improvements of the institution's equipment and effects and to maintain or renew all insurances;

(f) to appoint managers, agents, officers, servants and workmen for any of the aforesaid purposes at such salaries and for such periods as he may determine;

(g) to do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid and which he or they lawfully may or can do as agent for the Company...

44E. (1) Where the Bank proposes to exercise powers under section 44D (1)(ii), it shall publish in the Gazette and in such newspapers as it thinks appropriate a notification to that effect.

(2) The notification shall state—

(a) the property and undertaking it proposes to take over;

(b) the powers to control it proposes to exercise, and shall give such particulars as the Bank considers necessary for the information of persons having business dealings with the institution

(3) Upon the publication of the notification the property and the powers of control stated therein shall vest in the Bank.

(4) A notification under this section may be amended or supplemented from time to time by subsequent notification in the Gazette and the notification shall have effect as so amended or supplemented.

6. The Amendment Act seeks to bar claims and stay proceedings against any institution which the Central Bank has taken control of by the publication of a notification to that effect under section 44E (1) of the principal Act. No person shall commence or continue any action against such an institution until the publication of a notification under 44G (1) of the principal Act in relation to that institution.

7. The Act therefore applies specifically to institutions for which a notice under section 44E has been issued.

8. The circumstances where the Bank may take control of an institution are stated in section 44D (1) of the principal Act.

9. By subsection (2) the powers of the Bank under subsection (1) shall not be exercised unless the Bank is also of the opinion that the financial system of Trinidad and Tobago is in danger of disruption, substantial damage, injury or impairment as a result of the circumstances giving rise to the exercise of such powers.

10. Under these provisions the Bank must take all steps it considers necessary to protect the interests and to preserve the rights of depositors and creditors of the institution. This includes, under subsection (3), the power to appoint persons to act as Receiver/ Manager who shall have power—

(a) to take possession of, collect and get in any property of the institution and for that purpose to take any proceedings in the name of the institution or otherwise as may seem expedient;

11. By section 44 G:

(1) Where the Bank has under section 44D assumed control of an institution, the Bank shall, subject to subsection (2), remain in control of, and may continue to carry on the business of that institution until such time as the Bank publishes in the Gazette and in such newspapers as it thinks appropriate a notification that it has ceased to be in control of the institution.

(2) The Bank shall relinquish control and shall not continue to carry on the business of an institution where—

(a) the circumstances on the basis of which the Bank assumed control of the institution under section 44D have ceased to exist;

(b) the Bank is of opinion that it is no longer necessary for it to remain in control of the business of the institution; or

(c) the Bank has sold or otherwise disposed of the property, assets and undertakings of the institution.

(3) Upon publication of a notification under subsection (1) and subject to such conditions as may be specified therein, all property not sold or otherwise disposed of by the Bank and all powers of control over the affairs of the institution vested in the Bank by or in consequence of the previous notification published under section 44E (1) shall vest in the institution if it still subsists as a corporate entity and be deemed to have been transferred from the Bank to the institution.

(4) Where the Bank has, in pursuance of section 44D, assumed control of an institution, the High Court may, upon the application of the directors of the institution acting independently of the Bank, if it is satisfied that it is no longer necessary for the protection of the depositors or creditors of the institution that the Bank should remain in control of the business of that institution, order that the Bank cease to control the business of that institution as from a date specified in the Order.

The Companies Act

12. In a winding up by the court, the court appoints a liquidator who effectively is vested with powers to carry on the affairs of the company for its beneficial winding up - subject to the control and supervision of the court.

13. Under section 364 of the Act a party must seek leave to commence proceedings against a company in liquidation.

14. The central issue for consideration is, what is the impact of the Amendment Act on the court's power to grant leave to commence proceedings against a company in liquidation? Following from this, under whose 'control' is an institution in liquidation which is subject to a section 44E notice? And to what extent is control necessary?

15. The applicant says that by invoking the winding up procedure and by the court granting the Winding Up Order, the Central Bank is no longer in control of the institution, the defendant, and as such the provisions of the Amendment Act manifestly do not apply. By the Winding Up order and the appointment of a liquidator, the liquidator is now in control of the defendant subject to the court's supervision. The Companies Act then provides a filter mechanism.

16. The applicant has further submitted that by applying for the winding up of the company, the Central Bank had invoked the jurisdiction of the winding up court. It was seeking to come under the provisions of the Companies Act. By so doing the protection afforded by the Amendment Act is no longer applicable. The provisions of the Amendment Act would have been applicable had they not taken the step of petitioning the court to wind up the company. They say the defendant can't approbate and reprobate. Or put another way, they can't have their cake and eat it too. This is, without doubt, an attractive argument and one which was advanced with much force and clarity.

17. The defendant, on the other hand, has submitted that the Act was designed to prevent claims being brought to court and no more. It was not intended, for example, to disallow the proofing process under the Companies Act.

18. Construing the Amendment Act together with the other relevant provisions of the Central Bank Act, it is clear that the purpose of the Amendment Act is to prevent and stay any proceedings which may be brought against specific institutions where a notice under section 44E has been published in relation to them.

19. Once an institution falls under the Act, no action can be brought against that institution until a further notice under section 44G (1) is published in relation to it.

20. Where such an institution is wound up by the court, the court effectively takes control of the company through the appointed liquidator. However this does not negate the effect of a section 44E notification in relation to that institution - that is, that no action can be brought against the institution. The intention of the Amendment Act is to stay all claims against Central Bank-controlled institutions for which a notice published under section 44E subsists.

21. The court's power to give leave to commence proceedings against a company in liquidation is therefore circumscribed by the Amendment Act in cases of companies where a notification has been published under section 44E and it has not been removed.

22. The real issue is not whether the Central Bank is still in effective 'control' of the institution, but whether the institution remains an institution for which a section 44 E notice has been published and subsists.

23. Under section 44D of the principal Act, the purpose and duty of the Bank in taking "control" of an institution in the circumstances outlined, is to ensure that all is done to put the institution back in order and to protect the interests of all stakeholders.

24. It may do so by the appointment of a Receiver / Manager who is responsible for the effective day to day control and management of the institution. The Manager has the power to start any proceedings in the name of the institution as may seem expedient, such as winding up proceedings. On a successful winding up petition, the court-appointed liquidator then becomes the person in effective control of the institution, supervised by the court, with powers to dispose of all assets etc. for the beneficial winding up of the company.

25. The overall 'control' by the Bank over the institution, however, is not removed until it relinquishes it by the publication of a notice under section 44G. Put another way, the element of 'control' remains at least in relation to the publication of the notification. Where a company is being wound up, albeit under the court's supervision, the Bank may consider whether to wait for the process to be completed before it considers it appropriate to issue the notification relinquishing 'control'. The effect of the Amendment Act is that once the notification under section 44E subsists, no action can be brought against the institution. To hold otherwise would

render the part of the Amendment Act providing for the further publication of a notification lifting the stay to be of no effect.

26. The Amendment Act is plain. It provides that no claims may be brought after a notification is published and until a further notification is published lifting the stay. It does not require that the Central Bank needs to be in direct control of the institution any more. The idea of day to day control is not necessary to give effect to the Amendment Act.

27. The Act appears to be stark in effect. But it is also plainly so. The Act applies to any remedy in terms of claims. The term “claim” is also defined. That definition says any kind of claim. The next section speaks of any remedy in respect of any claim. This suggests that the term relates to any kind of claim which may be brought to court, but is limited to this. Claim then is a subset of any remedy. It is one type of remedy. It in effect suspends the operation of the provisions of the Companies Act as far as claims may be brought.

28. It may have been preferable had Parliament specifically provided which provisions of the Companies Act are suspended, as it were, but the absence of specifically so providing does not take away the effect of the Amendment Act on a plain interpretation. I was urged by the both sides to adopt a purposive approach, but with different results. The purpose that can be gleaned from the meaning of the sections is that the intention is to prevent court claims until a notification lifting the stay is published.

29. On the second ground argued, I was satisfied that the applicant has shown it is fair, just and reasonable to give permission in this case.

30. The evidence provided by the claimant is contained in the affidavit of Mr Andre Monteil dated 12 March 2012.

31. It raises the issue whether there was a set off agreement for the payment of the debt owed. The circumstances of the set off agreement and its terms are matters which would have to be ventilated in court, tested in cross-examination and assessed based on the effect of the documentary evidence. It does not seem to me to be a matter which can adequately be decided in the proofing process. See in particular paragraphs 20 to 23 of the Monteil affidavit where the nature and effect of the alleged agreement is detailed.

32. Further, the applicant says that because of this set off agreement the debt it owed to the respondent was paid off. They, therefore, say that the respondent has no present entitlement to the shares in question. It therefore relates to a claim for the applicant's own property. This would fall within the purview of a claim described in the case of **Lloyd (David) & Co., Re (1877) 6 Ch D 339**. There is also no evidential basis to conclude that the criteria set out in **Bristol & West Building Society v Trustee of the Property of Back and another (Bankrupts) [1998] 1 BCLC 485** should in this case operate to bar the applicants from being permitted to begin a claim.

33. The court in applying the test is not to decide that the claimant will succeed in their claim but it is to consider, based on the facts being advanced, whether it is fair and just to give leave.

34. I accept the arguments of the applicant on this second aspect of the claim.

35. From the evidence presented, I would have held that the applicant had satisfied the court that it was fair and just to give permission to bring the claim, but for the provisions of the Central Bank Amendment Act.

Ronnie Boodoosingh

Judge