THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2011- 03501

BETWEEN

BRITISH AMERICAN INSURANCE COMPANY LIMITED CLAIMANT

AND

FIRST CITIZENS INVESTMENT SERVICES LIMITED DEFENDANT

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Jonathan Walker and Mr Luke Hamel-Smith for the Claimant

Mr Kerwyn Garcia and Ms Luana Boyack for the Defendant

Dated: 8 July 2015

JUDGMENT

1. This claim concerns seven Government of Panama bonds with a total face value of US $7,518,000.00. The claimant, British American Insurance Company Limited (BAICO), is incorporated in the Bahamas with its main office in Trinidad and Tobago. It had

branch offices throughout the Caribbean basin including in the Republic of Panama. BAICO says these seven bonds were part of the reserves that it was required to hold under the Laws of Panama to keep its registration and it was required to keep them free of liens and encumbrances and they could not be assigned nor transferred.

2. These bonds, before 14 December 2007, were placed with Banistmo Securities Inc (now HSBC) in Panama City as the custodian of the bonds. The claimant's general manager, Mr Cecil Gill, by letter of 14 December 2007, directed Banistmo to deliver the bonds into an account of CMMB whose operations have since been taken over by the defendant.

3. According to the defendant, however, this delivery was done as the bonds were pledged by the claimant as security for a loan the defendant gave to a subsidiary of the claimant named British-American Insurance Company (Trinidad) Limited (BAT). The defendant says this was done on the instructions of the claimant's own manager, Mr Gill, with the authorised signatories doing so. The loan was advanced to BAT. BAT defaulted on the loan and the Defendant sold the bonds and applied the sums realised to repaying the loan given to BAT.

4. The claimant says that being part of the reserves required by Panama law, the bonds could not be removed as to do so would breach Panama law. It was, therefore, illegally done and accordingly the defendant could only hold the bonds in trust for the claimant.

5. In consequence the claimant says it is entitled to a declaration that it is entitled to the bonds. Further, the claimant seeks an account of monies received; delivery up of the bonds or its value; and damages for detention and/or conversion.

6. It is not in dispute that the bonds have since been sold. Any relief must therefore relate to the value of the bonds and interest and damages.

7. There was an undisputed expert report and follow up report of Mr Abraham R. Rosas Arauz filed 25 March 2014 and 21 July 2014 respectively, concerning the laws of Panama. It is not in dispute that the claimant was required to hold certain reserves and to keep those reserves free of encumbrances under the Laws of Panama.

8. BAICO has since gone into bankruptcy and a curator was appointed for the Panama branch. In essence then the curator is bringing the claim to seek to realise all the available assets of the claimant.

9. The critical issues were:

    a. Were the bonds a part of the statutory reserves being held under Panama law?
    b. Did the defendant become a trustee or custodian of the bonds for the claimant?
    c. What were the obligations of the defendant in relation to the transactions that occurred?

10. The witnesses for the claimant were Mr Marcelo Aurelio de Leon Penalba, curator of the Panama branch of BAICO, and Mr William Guarin. The defendant's witnesses were Mr Robert Balgobin and Ms Salisha Abdool. Her witness statement was allowed in by consent without the need for cross examination. There was also no cross examination of Mr Guarin.

The Claimant's Evidence

11. As curator, Mr Penalba's duty is to safeguard the interests of BAICO's policyholders and locate and marshal the company's assets. His analysis of the records show that there are no documents to support that BAICO provided security for a loan to BAT. The records show they transferred it to CMMB (whose assets were transferred to the Defendant) to hold as custodian and that BAICO did not give ownership to anyone else. He gave evidence of the requirements for BAICO to maintain a statutory reserve; BAICO's acquisition of the Panama bonds; BAICO's bankruptcy and his appointment as curator; and the transfer of the bonds to CMMB. None of these aspects were seriously challenged. The real issue was the effect of the transfer of the bonds to CMMB.

12. He said the Panama bonds were purchased between 26 July 2000 and 13 December 2007 and were admitted as part of the statutory reserves. At paragraph 28 of his witness statement he said this was confirmed by the Financial Statements for the end of year, 31 December 2007, prepared for the Panama branch of BAICO by PricewaterhouseCoopers and the Actuary Report of Richard Leiser-Banks. The effect of these financial statements and report was challenged by the Defendant in cross examination.

13. On the issue of whether the claimant has proved the bonds formed part of the statutory reserves, the claimant's evidence is clear. They assert they were. There is actually no evidence of the defendant to the contrary. The defendant is clear that they had no such knowledge. It remains a matter the claimant must prove. The defendant was entitled to test the claimant's evidence in this regard to see if they have proved the fact. But whether the claimant has proved the fact must be determined in the context that no contrary evidence has been advanced by the defendant.

14. **Lord Hoffman in Re: B (Children) [2009] 1AC 11 at 17, para 2** described the judge's task in this way:

> "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. The law operates a binary system in which the only values are zero and one. The fact either happened, or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

15. Applying this approach, there was evidence as noted above that sought to prove this fact. There was no contrary evidence. There is no proper reason to disbelieve the claimant's assertion. On a balance of probabilities, therefore, I find that the claimant has proved that the bonds were part of the statutory reserves.

16. On the next issue of why the bonds were being held by CMMB, Mr Penalba detailed several emails passing within BAICO and with CMMB which he says showed that the bonds were being held by CMMB but that they did not change ownership. He has found no authority to sell the bonds; no mention in any minutes or correspondence of BAICO of any discussion that transfer of ownership of the Panama bonds was ever discussed by BAICO. He said all the records are consistent with merely the custodial function moving from Banistmo to CMMB. And that CMMB had no authority over the bonds.

17. The defendant's evidence came from Salisha Abdool's witness statement and the witness statement of Robert Balgobin.

18. Ms Abdool's witness statement noted she was the Liquidity Management Officer 11. She worked with BAT employees who regularly placed business with CMMB. She knew the signatories. She produced various letters which listed the signatories for BAT as being the same as for other British American Insurance branches throughout the Caribbean. Of significance one of 3 May 2007 said:

> *"Re: Signatories for British – American Insurance Co. Ltd Branch Accounts*
> *This letter serves to establish that the signatories set up under British-American Insurance Company are to be applied to investments made on behalf of all our branches across the Caribbean, see the list below."*

19. 15 countries in the Caribbean region were mentioned including Panama.

20. Further, on 18 December 2007, about the time of the instant transactions, the following letter was sent.

> *"Re: British-American Insurance Co. (Trinidad) Ltd, British American Insurance Company Limited & British-American Insurance Co. (Barbados) ltd.*
> *Please find attached the Authorised Signatories that now supersedes any previous forms."*

21. Four names and their designations were given. This was on a "British American Insurance" letterhead.

22. An account was created for these bonds at CMMB number 0102005462.

23. By letter of 12 March 2008 the following letter was sent to CMMB:

> *"Re: Authorised Signatories – Money Market Account 0102005462*
> *Please be advised that our current signatories for the British-American Insurance company (Trinidad) ltd and British-American Insurance Company Limited are the same for British-American Insurance Company ltd – Panama Branch, as it relates to the captioned Money Market Account and the purchase of any other investment securities for our Panama Branch."*

24. This letter was signed by Mr Antoni Jagan, Senior Manager, Investments, and Mrs Albeadea Mohammed, Chief Accounting Officer, on a British American Insurance letterhead.

25. Mr Robert Balgobin gave evidence of his dealings with BAT. He also noted that the majority shareholder in BAT was BAICO.

26. He detailed the loan transaction to BAT in December 2007. US $11 million would be loaned to BAT in exchange for BAT transferring the Panama bonds worth approx US $9.66 million and with BAT's entitlement under a previous REPO agreement making up the shortfall.

27. There was also a further proposal which was accepted by BAT for an approx US $8.54 million RESO which was secured by CMMB having a lien over the proceeds of the sale of shares BAT held in Neal & Massy Holdings Limited and Republic Bank Limited which CMMB had sold on BAT's request.

28. He noted that following restructuring arrangements, the maturity date for the Panama bonds was extended. CMMB sent out letters each month to BAT with an update of the market value of the bonds.

29. He said he did not know of any Cyril Gill until in October 2009 when he received a letter enquiring about the Panama bonds.

30. He responded on 28 October 2009 indicating that the Panama bonds were pledged for security.

31. He said he cannot speak of arrangements made between BAT and BAICO, but he knew BAT was a subsidiary of BAICO and he saw Mr Gill's letter attached as E to the statement of case dated 14 December 2007.

32. That letter is of some significance and I had regard to it as it was one of the documents attached to the statement of case and specifically pleaded.

33. Paragraph 15 of the statement of case states:

> *"15. By letter dated 14 December 2007 the then manager of the Panama Branch of BAICO, Mr Cyril Gill, wrongfully and/or fraudulently and/or in breach of the Panama Insurance Laws and the mathematical reserves that BAICO was required to maintain, directed Banistmo Securities Inc. to deliver the Bonds from its account to an account in the name of CMMB Limited."*

34. At paragraph 16, notwithstanding the pleading at 15, the claimant said that all this meant is the defendant would have become the custodian of the Bonds for BAICO.

35. I should observe that there is no evidence that Mr Gill fraudulently directed the bonds to be transferred. If it was done in breach of Panama law then it would be unlawful there.

36. But there is no way that the defendant could know that unless they were told so. Nor were they under a duty to find that out. It is to be noted that BAICO was incorporated in the Bahamas and had its head office in Trinidad. Further the authorised signatures for both BAICO and BAT had signed off on the transactions.

37. Exhibit "RB 3" to Mr Balgobin's witness statement is a letter on a British American Insurance letterhead to Banistmo Securities Inc dated 13 December 2007 stating:

> *"RE: ACCT: 46B – 002551*
>
> *BRITISH AMERICAN INSURANCE*
> *Please deliver free of payment from account 46B – 002551 BRITISH AMERICAN INSURANCE to account N4D – 003601 CMMB Limited, the following securities:*
>
> *..."*

38. This was signed by Mrs Albaedea Mohamed, Chief Accounting Officer.

39. This was followed by letters confirming this on 14 December 2007 and with proposals for a 180 day REPO agreement by CMMB on 18 and 19 December signed also by "British American" authorised signatories.

40. What is also not in dispute is that BAICO was the major shareholder in BAT. Both operated from the same office in Barataria, Trinidad.

41. Howsoever structured and arising between BAICO and BAT, it is clear that the money advanced to BAT was secured by the BAICO bonds.

42. Furthermore, what the claimant has not explained satisfactorily is why would BAICO have removed the bonds from Batismo and delivered them to CMMB. They were safely ensconced in Batismo in Panama. The claimant says it was unlawfully delivered to CMMB. Why would this have been done? For CMMB simply to act as a new custodian? This does not make sense to me.

43. What then happened was that money was advanced to its subsidiary BAT. BAT got a benefit from that advance. BAICO being the majority shareholder of BAT would also have gotten an indirect benefit since it stands to reason that a transaction that benefitted the company would have benefitted its shareholders also who have a stake in the operation and viability of the company. CMMB would have been completely reckless to have advanced this money if it was not intended that the bonds were being pledged as security. None of these conclusions require piercing of the corporate veil of BAICO or BAT. It simply requires appreciating how the companies operated in the reality commercial business transactions.

44. I should note that it is the claimant who has brought this claim seeking to enforce what would have been an illegal transaction when the claimant says that the defendant became a trustee of the bonds in breach of their removal from the Panama jurisdiction. To succeed in this aspect of the claim, the claimant had to prove that the defendant knew or ought to have known that the bonds were illegally removed from the Panama reserves and it would be unconscionable for the defendant to retain the benefit of the bonds: **Richardson Arthur v The Attorney General of Turks & Caicos [2012] UKPC 30.**

45. There is no evidence from which the defendant can either have known or reasonably have been expected to know that the bonds were a part of the Panama reserves. The proposition also seems to be incredible. BAICO was Bahamas registered but with its main offices in Trinidad. It had a Panama branch. The transaction was entered into by its subsidiary company BAT, which had the same signatories as BAICO. From the evidence of the correspondence passing between BAICO / BAT / British American, the officers and signatories all appeared to act as the companies were one entity from the same location and on similar letterheads.

46. From this, all appeared to be in order on the face of the transaction, which was a commercial one. As Lord Nicholls of Birkenhead said in **Royal Bank of Scotland (no. 2) (HL(E)) [2002] 2 AC 773 at para 88** in relation to commercial transactions:

> "88 Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees."

47. Even where circumstances dictate that banks and creditors are "put on inquiry", this imposes on them "no more than a modest obligation": Lord Nicholls at para 89 above.

48. The defendant could not know that the bonds formed part of statutory reserves in Panama unless they had been alerted to it. That would not have formed part of any due diligence or "put on inquiry" investigation on its part assuming that such was even necessary.

49. There were also no circumstances to put the defendant on inquiry as to the authority of those signing on behalf of BAT or the claimant. Further, because of how the companies operated, from Mr Balgobin's account, it was not necessary for BAICO to be a party to the transaction between BAT and CMMB, as contended by the claimant. This was a pledge by one company for a subsidiary when the signatories and officers well knew of the transactions.

50. In **Northside Developments Pty Ltd v Registrar General 170 C.L.R. 146 at 170** Brennan J stated:

> "It is convenient now to state in summary the position of a creditor who takes a company's guarantee for another's debt. If the guarantee is not executed in apparent conformity with the formalities prescribed by the company's constitution, the guarantee is void. If the guarantee is executed in apparent conformity with those formalities, the validity of the guarantee can be assumed if it is executed by officers or agents who would ordinarily be expected to have authority to do so, (ii) the guarantee is given for the purposes of the company's business or otherwise for the company's benefit, and (iii) there are no circumstances that put the creditor on inquiry as to the authority of those who executed the guarantee to do so."

51. In **Micarone and Others v Perpetual Trustees Australia Limited [1999] 75 SASC 1** per Debelle and Wicks JJ at paras 623 -625 it was said:

> "...Where an application is made to borrow funds, there is no obligation on the lending institution to go behind the information proferred by the applicant unless there are circumstances which put the lender on enquiry....
>
> The effect of their case is that they seek to be relieved of their obligations to Perpetual because Puma failed to verify the information they had provided. It would be a curious result that a party could be relieved of its obligation when it had given misleading information to a proposed lender and relied on the failure of the lender to investigate the information it had provided: cf Perry J in Citibank v Nicholson (1997) 70 SASR 206 at 229. What enquiries a lender makes to verify information given in support of a loan application is entirely its concern. It may choose to make no independent enquiries.
>
> The plaintiff and Puma were parties contracting at arm's length. So far as Puma was concerned, the plaintiff's application was a standard application for finance. It was not aware of any unusual circumstances....
>
> On receipt of an apparently regular and satisfactory loan application, there is no obligation on the lender to pursue further detailed enquiries as to the circumstances of the applicant for the loan, the proposed business transaction to which it relates, or the commercial viability of the loan: Citibank v Nicholson at 230."

52. Further, the claimant has to show that it would be unconscionable to retain the benefit of the bonds. The defendant made a US $11 million payment to BAT which was a significant detriment. BAT got a benefit. So too did the claimant. On the other hand, if the claimant is to succeed, the defendant would have lost what it advanced to BAT with no present prospect of recovery given BAT's position now.

53. It is also clear that Mr Gill, the claimant's general manager, authorised the transaction. The fact that he may have done so illegally does not change the fact that he did so. His action can be attributed to the company: **Moore v I. Bresler, Ltd [1944] 2 All ER 515**. What consequence should have arisen from that was between him and his employer.

54. The claimant seems to be saying that because Mr Gill gave this authorisation illegally that the only purpose that the defendant could have had the bonds was as custodian. In effect then they would be able to recover the bonds. But what about the defendant who advanced moneys, it says, on the strength of the bonds? They would have lost this money on the basis of a factual circumstance that the bonds were a part of reserves held in Panama that they could not have reasonably have known about. If this is to be the result, the claimant and its subsidiary would have had its cake and eaten it too. The effect of the claimant's case is that it and/or its subsidiary will profit from their act of illegality in delivering the bonds to CMMB (See **Hounga v Allen and Another 2014 1WLR 2889**). It is a result the court is unable to come to.

55. No contrary explanation to the defendant's has been advanced that the defendant advanced money to BAT on the strength of the pledge of the bonds. I accept the defendant's evidence that this was the case as being both reasonable and commercially likely. It is implausible that all the claimant was doing was moving from custodian to custodian. Further, it would seem to be somewhat bizarre that the defendant's predecessor CMMB would have facilitated such a substantial advance of money to BAT without the pledge of some security. This goes against the contention that CMMB had the bonds only as custodian.

56. In addition, the timing of the transactions also favour the conclusion that the movement of the bonds was connected to a pledge on behalf of BAT. Much happened around the 13 to 18 December, 2007 period as evidenced by some of the correspondence referred to

above. Mr Balgobin's evidence also explains how the transaction unfolded over a relatively short period of time.

57. The critical issue was the responsibility of the defendant. The defendant was under no obligation to play detective to find out if the bonds were held as reserves. There was no basis for suspicion. It was entitled to accept the pledge. And no obligation as a trustee or custodian could arise. They gave proper consideration for the bonds in the form of the advance to BAT. The claim has not been proved and must accordingly be dismissed.

58. The claimant must pay the costs of the claim to the defendant to be assessed in default of agreement. I thank the attorneys for the excellent advocacy displayed on both sides in the highest traditions of the Bar.

Ronnie Boodoosingh

Judge