IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 02951 OF 2008

BETWEEN	**RAYTON ELECTRIC COMMERCIAL EQUIPMENT LTD.**	**CLAIMANT**
AND	**BANK OF JAMAICA**	**DEFENDANT**

Miss A. Lindsay and Dr. Christopher Malcolm instructed by John Graham & Co. for the Claimant.

Mr. Michael Hylton Q.C., and Miss Kalaycia Clarke instructed by Michael Hylton & Associates for the Defendant.

Ms. Malaica Wong instructed by Myers, Fletcher & Gordon for First Caribbean International Bank.

Application to Strike out Claim pursuant to Part 26.3(1)(b) and 26.3(1)(c) of Civil Procedure Rules 2002 - Banker Customer relationship – whether relationship one of contract – Supervisory and Regulatory role of the Bank of Jamaica in relation to its licencees - Complaint made to the Bank of Jamaica by the customer against its banker - Refusal of the Bank of Jamaica to intervene in the exercise of its Supervisory and Regulatory role – review of the Bank of Jamaica's decision – whether by way of Judicial Review

Heard November 3, 2008 and March 19, 2009

THOMPSON-JAMES, J (Ag.)

The Background to the Application

By way of fixed date claim form dated and filed on the 10th June 2008 the Claimant, Rayton Electrical Commercial Equipment Ltd (hereinafter referred to as the Claimant) claims against the Defendant the Bank of Jamaica (hereinafter referred to as BOJ) seeking inter alia the following declarations;

1. That Sections 30, and 34a of the Banking Act and Sections 29 and 29a of the Financial Institutions Act impose on the BOJ an obligation and in particular the department of Supervisor of Banks and Financial Institutions to investigate into the operation of its Licensees and in particular First Caribbean International Bank Jamaica Ltd (hereinafter referred to as FCIB)
2. That the complaint received by the BOJ from the claimants provided reasonable grounds on which the Supervisory function of the BOJ ought to have been involved in relation to the operations of FCIB.
3. That the decision of the BOJ, and in particular the supervisor of the Department of Supervision of Banks and Financial Institutions not to cause investigations to be carried out into the operations of FCIB given the circumstances of the case may be construed as "**misfeasance**" in public office.

The Application

It is against this background that on the 5th September 2008 the applicant/defendant BOJ filed a notice of application seeking the following court orders;

1. That the claim be struck out pursuant to the inherent jurisdiction of the court or pursuant to part 26.3(1) (b) or 26.3(1) (c) of the Civil Procedure Rules amongst other reliefs.

The grounds on which the application is sought are:

1. That the claimant has no reasonable grounds for bringing the claim; and
2. That that the claim is an abuse of the process of the court.

This application is supported by the affidavit of Mr. Randolph Dandy.

The Facts

Mr. George Hugh in his affidavit in support of the fixed date claim form filed on the 10th of June 2008 depones at paragraphs 6 & 7 that the claimant began its banking practices with the FCIB after it succeeded the Canadian Imperial Bank of Commerce (CIBC).

For over 25 years the claimant has enjoyed a good cooperate relationship with CIBC and then FCIB. However sometime in 1998 the relationship started to deteriorate as a result the claimant through its attorneys Malcolm Gordon wrote to the BOJ.

In its letter to the BOJ dated the 22nd of February 2008 over the name of Dr. Christopher Malcolm the claimant, at paragraph 5(a), contends that CIBC unilaterally changed and added extremely damaging and penal clauses in the agreement of 1999 without any discussion, advice or notice to the assignees.

At paragraph 5(c) the claimant contends

> That CIBC failed to take notice of the facilities and conditions that existed in the previous agreement to their detriment without any proper discussion or notice.

At paragraph 8 the Claimant further contends that

> It also appears that FCIB continue to disregard the credit agreement as well as good banking practice – Rayton have sought but have not receive evidence to contradict this assumption. This conclusion has been arrived at since FCIB continue to debit what my client considers to be excessive penalty fees, personal interest and fees.

On the 10th March 2008 Miss Celeste McCalla Legal Counsel of the BOJ wrote to FCIB copied to Dr. Christopher Malcolm indicating that the matter is primarily one of contract and not one which falls directly within the BOJ's supervisory role.

On the 30th March 2008 Dr. Christopher Malcolm wrote to the BOJ.

On the 14th April 2008 Miss McCalla responded reiterating her stance and suggesting at paragraph 5 of her letter –

> "...that situation is quite unlike in the instant case in which you are demanding that the BOJ step outside of its express statutory parameters to intervene in a contractual matter arising between your customer and FCIB."

It is on the basis of these facts that the Claimants sought the declarations in the fixed date claim form.

The Applicant's Submission

In essence learned Queen's Counsel Mr. Michael Hylton on behalf of the applicant submitted that there might be no reason for the hearing of the fixed date claim as the claim is an abuse of the process of the court and should be struck out pursuant to Rule 26.3(1)(b) of the CPR or alternatively it should be struck out or dismissed on the basis that it discloses no reasonable grounds for bringing the action pursuant to Rule 26.3(T)(c).

He proposed that the BOJ's decision not to investigate FCIB is contained in its letter to the Claimant's attorney dated the 14th April 2008 wherein Miss Celeste McCalla Legal Counsel to the BOJ states, in paragraph two (2) of that letter

> "A review of the issues as outlined in the various items of correspondence received both from yourself and from the attorneys-at-law representing FCIB firmly establishes that this matter falls squarely within the confines of the banker/customer contract between your Client and FCIB. There are no regulatory issues involved and as such Bank of Jamaica (BOJ) has no power to intervene."

And in paragraph 3

> "Where, however, as in the present case, the matter consists purely of contending claims between a bank and its customer as to whether or not the bank has acted in the customer's interest in the performances of the banker/customer contract, such matters must be settled through the mutual efforts of the parties or via available legal avenues. BOJ clearly has no statutory power to adjudicate in such matters."

This decision was an exercise of a function given to the BOJ under statue. The supervisory department of the BOJ is established by section 34a of the Bank of Jamaica Act as well as the supervisor, whilst sections 29 and 29a of the Banking Act detail the functions and powers of the supervisory department.

The decision as to whether the circumstances warranted that an investigation is to be made by the BOJ who in making this decision is acting in its statutory capacity.

In fact the Claimant's claim for a declaration that the decision by the BOJ maybe construed as a misfeasance in public office implicitly acknowledges that in making the decision not to investigate the BOJ was carrying out a public/statutory function. Further the Claimant is challenging the BOJ's decision not to investigate FCIB. Although as worded the claim is only seeking declarations, these declarations are being sought after the BOJ informed the Claimant that in its view,

> "The matter falls squarely with the confines of the banker/customer contract ... There are no regulatory issues

involved and as such Bank of Jamaica (BOJ) has no power to intervene."

The Claimant is therefore challenging the correctness of that decision and the courts have consistently held that such a challenge must be brought by way of Judicial Review proceedings.

In Jamaica such proceedings must comply with the provisions of Part 56 of the CPR 2002, instead the Claimant has followed the provisions set out in Part 8 of the CPR.

Mr. Hylton in seeking to buttress his position further proposed that the Claimant neither sought nor obtained the courts leave to institute his claim.

The reason for this requirement was explained by the House of Lords in the judgment of Lord Diplock in **Inland Revenue Commissions v. National Federation of Self Employed and Small Business (1981) 2AER 93 at page 1051**

Lord Diplock noted that the purpose of a hearing for leave to apply for Judicial Review;

> ".....is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for Judicial Review of it were actually pending even though misconceived."

Further there is clear authority that following the wrong process amounts to an abuse of the process of the court. The Learned Queen's Counsel cited the

case of **O'Reilly vs Mackman [1983] 2AC 237** and proposed that the Jamaican Courts have made similar ruling since the implementation of our new rules referring to **Inspector Max Marshalleck vs. The Inspector's Branch Board of the Police Federation and Superintendent KA Wade. Claim #2004 HCV 1499 (unreported) delivered July 9 2004;** a judgment of Sykes J wherein the learned judge struck out the claim as an abuse. He emphasized ~~that the learned judge said~~,

> "In purely public law disputes Judicial Review is the only route to go...."and" to go by a method that permits you to side step the safeguards against abuse where a clear procedure is provided by the courts is itself an abuse of the process."

Mr. Hylton referred to the Privy Council decision in **Bahamas Telecommunications Company Ltd. vs. Public Utilities Commission and Systems Resources Ltd. Privy Council Appeal No. 192007 delivered February 12, 2008,** ~~wherein the importance of preventing any~~ abuse of the process by which the decisions of public bodies may be challenged was also recently recognized. On this ground alone, he submitted, the claim should be struck out.

Under the heading **No Reasonable Grounds** for bringing the claim, the Learned Queens Counsel submitted as noted earlier that the Claimant is effectively challenging the decision of the BOJ which was an exercise of its statutory power. The court has no general jurisdiction to substitute its decision

for that of the BOJ referring to the case; **Chief Constable of the North Wales Police vs Evans [1982] 1 WLR 1155.**

He went on further to propose that the court will also be reluctant to interfere in what is a specialist area, as pointed out by Lord Hope in the **Bahamas Telecommunications Company** case.

In the present matter the court should only be concerned with the decision making process and whether the BOJ acted within the limits of its powers under the Legislation.

The Legislation does not indicate what factors the BOJ should consider in coming to a decision as to whether to conduct an investigation of a financial institution but it is accepted that in appropriate proceedings, the court will look to see if the BOJ has taken into account any factors which it should not have or failed to take into account any factors it should have. **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1KB 223.**

He concluded that the claim should be struck out as an abuse of the process of the court or alternatively, dismissed on the ground that there was no reasonable ground for bringing the action.

The Claimants/Respondents Submission

In essence Learned Counsel Miss Annaliesa Lindsay submitted that this is not an application for Judicial Review in respect of a decision of the BOJ neither

are they seeking a substitute for that decision, neither are they asking the court to substitute a decision.

The Claimant is not asking the court to review a purported exercise of the BOJ's supervisory function in relation to the Claimant's complaint.

The Claimant's relief sought in relation to the declaration sought is grounded in the interpretation of Sections 30 and 34a of the Bank of Jamaica Act.

Sections 29 & 29a of the Banking Act and Sections 29 & 29a of the Financial Institution Act.

With reference to the BOJ's letter dated the 10th March 2008 bearing the signature of Miss Celeste McCalla where Miss McCalla states at paragraph 4 that

> "...as this matter is primarily one of contract and not one which falls directly within the Bank's Supervisory mandate, we would suggest that the parties make efforts to resolve this issue amicably, failing which the aggrieved party may exercise the option to pursue legal resolution."

Miss Lindsay submits that the Bank is not recognizing its regulatory functions and the letter can be construed as saying that the BOJ is suggesting that we have no regulatory function in relation to this matter which ought to be settled between the parties. Under the sections stated, the BOJ is mandated to supervise and regulate its licencees of which FCIB is one. Therefore the BOJ should discharge its regulatory and supervisory function.

With reference to the BOJ's letter to Dr. Malcolm dated the 14th April 2008 bearing the signature of Miss Celeste McCalla the Bank's Legal Counsel at paragraph 2, which states –

> "A review of the issues as outlined in the various items of correspondence received both from yourself and from attorneys-at-law representing FCIB firmly establishes that this matter falls squarely within the confines of the banker/customer contract between your client and FCIB. There are no regulatory issues involved and as such Bank of Jamaica (BOJ) has no power to intervene."

And paragraph 3 which states,

> "Where, however, as in the present case, the matter consists purely of contending claims between a bank and its customer as to whether or not the bank has acted in the customer's interest in the performance the banker/customer contract, such matter must be settled either through the mutual efforts of the parties or via available legal avenues. BOJ clearly has no statutory power to adjudicate in such matters".

Miss Lindsay submits that the BOJ has interpreted this to mean that they have no power as arbitrator or adjudicator.

The Claimant has requested that BOJ exercises a power in relation to the Bank of Jamaica Act, the Banking Act and the Financial Institution Act.

Referring to paragraph 6 of the letter dated 14th April 2008 where Miss Celeste McCalla states –

> "That unlike the instant case in which you are demanding that BOJ step outside of its express statutory parameters to intervene in a contractual matter arising between your customer and FCIB."

Miss Lindsay submits that the three (3) Acts are what the parameters of their powers are. It is a matter of clarifying and to adjudicate on what these parameters are.

The Claimant has provided reasonable grounds for the Bank to exercise its power and the BOJ is saying that what exists between the Claimant and FCIB is a contract.

Under the old rule where an interpretation is being sought it is usually under rule 8 1(4), where it is not likely to involve a substantial dispute as to facts.

Further in seeking the courts declaration as to interpretation, the proper way is to use a fixed date claim form.

Referring to Declaratory Judgment and Part 8.6 of the CPR – the Learned Counsel submitted that there is no absolute requirement for Judicial Review in this case. The Claimant is seeking the courts declaration in interpreting statutes.

In relation to striking out the claim as an abuse of process, there being no reasonable ground for bringing the claim as the grounds are misconceived, Miss Lindsay submitted that the Claimant has one interpretation and the Defendant has another. The court, therefore, is the laboratory to determine these issues.

Although declaratory reliefs are being sought, the circumstances and the background are that there is a real dispute as to the interpretation of the Banking Act, the Bank of Jamaica Act and the Financial Institutions Act.

In relation to the dispute as to the BOJ's real function it is the right case for the court to look at the interpretation of both parties and reach its own decision. Given the importance of these functions there is a real need for such adjudication.

In relation to the claim being subject to Judicial Review she said Judicial Review does not apply.

The Applicable Law

By Section 29(T) of the Banking Act

(1) The Bank of Jamaica is responsible for the supervision of banks.

(2) For the purposes of subsection (1), the Bank of Jamaica shall –

(a) compile such statistics relating to banking practice in Jamaica as the Minister may require; and maintain a general review of banking practice in Jamaica;

(b) examine and report to the Minister on the several returns delivered to him pursuant to section 16;

(c) at least once in each year examine in such manner as it thinks necessary the affairs or business of every bank carrying on business in Jamaica or elsewhere for the purpose of being

satisfied that the provisions of this Act are being complied with and that the bank is in a sound financial position, and report to the Minister the results of every such examination;

(d) examine and make recommendations to the Minister with respect to applications for licences;

(e) subject to such provisions as may be prescribed be entitled to summon the auditor or any former auditor of a bank for the purpose of making enquires into the operations and financial position of that bank;

(f) submits to the Minister –

(i) an annual report relating generally to the executions of its duties;

By Section 29a of the Banking Act

(1) Where in any particular case, the Supervisor has reasonable cause for believing that a special audit of a bank, should be conducted by an auditor other than the bank's auditor, the Supervisor may appoint an auditor or a firm of auditors for that purpose.

(2) Where an auditor or a firm of auditors is appointed pursuant to subsection (1), the Supervisor shall require

that auditor or firm of auditors to carry out and report in writing to the Supervisor on –

(i) such examination of the bank's procedures as the Supervisor may specify in order to determine whether or not those procedures are adequate for the protection of the bank's depositors and shareholders;

(ii) such other examination of the bank as, in the opinion of the Supervisor, is necessary in the public interest.

(3) The expenses, as approved by the Supervisor, of any audit or examination carried out pursuant to subsection (1) shall be paid by the Supervisor and the amount so paid –

(a) shall be repaid to the Supervisor by the bank concerned; and

(b) may be recovered by or on behalf of the Supervisor summarily in a Resident a Magistrate's Court without limit of amount, as a civil debt.

(4) An auditor or firm of auditors, appointed under subsection (1), of a bank shall not be regarded as being

in breach of a duty of confidentiality to the bank in consequence of any report made to the Supervisor in compliance with subsection (1).

By Section 30 of the Bank of Jamaica Act

(1) The Bank may –

(a) require any commercial bank or specified financial institution to furnish, within such time ~~and in such~~ form as the Bank thinks necessary, such information as the Bank thinks requisite for the purpose of ascertaining whether that bank or specified financial institution is complying with the provisions of section 14 or 15 of the Banking Act, or section 14 or 15 of the Financial Institutions Act, ~~or section 28, 28a or 29 of this act;~~

(b) require any commercial bank or specified financial institution to furnish, within such time and in such form as the Bank thinks necessary, such information of any prescribed class as the Bank considers requisite for the proper discharge of is functions and responsibilities;

(c) require any person ~~mentioned in section 22B~~ (1) to ~~furnish, within such time and in such form as the~~ Bank thinks necessary, such information as the Bank thinks

requisite for the purpose of ascertaining whether that person is complying with the provisions of section 22B.

(2) Any person who fails to furnish information in accordance with a requirement made under paragraph (a), (b) or (c) of subsection (1) shall –

(a) be guilty of an offence and liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding one hundred and fifty thousand dollars; and

(b) if the offence is continued after conviction, be guilty of a further offence and liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding five thousand dollars for every day during which the offence is so continued.

By Section 34A of the Bank of Jamaica Act

(1) There shall be established for the purposes of this Act, a department in the Bank to be called the Department of Supervision of Banks and Financial Institutions.

(2) The Department shall be charged with the supervision and periodic examination of all commercial banks and specified financial institutions.

By Section 29 of the Financial Institutions Act

(1) The Bank of Jamaica is responsible for the supervision of licensees.

(2) For the purposes of subsection (1), the Bank of Jamaica shall –

(a) compile such statistics relating to the practice of licensees in Jamaica as the Ministry may require; and maintain a general review of such practice in Jamaica;

(b) examine report to the Minister on the several returns delivered to him pursuant to section 16;

(c) at least once in each year examine in such manner as it thinks necessary the affairs or business of every licensee carrying on business in Jamaica for the purpose of being satisfied that the provisions of this Act are being complied with and that the licensee is in a sound financial position, and report to the Minister the results of every such examination;

(d) examine and make recommendations to the Minister with respect to applications for licences;

(e) subject to such provisions as may be prescribed, be entitled to summon the auditor or any former auditor of a licensee for the purpose of making enquiries into the operations and financial position of that licensee;

(f) submit to the Minister –

(i) an annual report relating generally to the execution of its duties; and

(ii) at any time, a report relating to the condition of any licensee examined by it,

And any such report may contain such recommendations as the Bank of Jamaica considers necessary or desirable to correct any malpractices or deficiencies discovered in the execution of its duties.

(3) Where an auditor is summoned under paragraph (e) of subsection (2), the Bank of Jamaica shall in writing notify the licensee concerned which shall have the right to attend any meeting held by the bank with that auditor.

By Section 29A of the Financial Institution Act

(1) Where in any particular case, the Supervisor has reasonable cause for believing that a special audit of a licensee should be conducted by an audit other than the licensee's auditor, the Supervisor may appoint an auditor or a firm of auditors for that purpose.

(2) Where an auditor or a firm of auditors is appointed pursuant to subsection (1), the Supervisor shall require that auditor or firm of auditors to carry out and report in writing to the Supervisor on –

(i) such examination of the licensee's procedures as the Supervisor may specify in order to determine whether or not those procedures are adequate for the protection of the licensee's depositors and shareholders;

(ii) such other examination of the licensee as, in the opinion of the Supervisor, is necessary in the public interest.

(3) The expenses, as approved by the Supervisor, of any audit or examination carried out pursuant to subsection (1) shall be paid by the Supervisor and the amount so paid -

(a) shall be repaid to the Supervisor by the licensee concerned; and

(b) may be recovered by or on behalf of the Supervisor summarily in a Resident Magistrate's Court without limit of amount, as a civil debt.

(4) An auditor or firm of auditors, appointed under subsection (1), of a licensee shall not be regarded as being in breach of a duty of confidentiality to the licensee in consequence of any report made to the Supervisor in compliance with subsection (1).

The Head note in O'Rielly vs. Mackman [1983] 2 AER 1124

A person seeking to establish that a decision of a public authority infringes rights which he is entitled to have protected under public law must as a general rule proceed by way of an application for Judicial Review under RSC Ord 53 1 – rather than by way of ordinary action. Since it is a prisoner's right that a board of prison visitors should act within its jurisdiction and observe the rules of natural justice when conducting a hearing concerning

him, is a right protected only under public law and not by private law, a prisoner who seeks to challenge a decision of a board of prison visitors must do so by way of an application under Ord 53 for Judicial Review of the board decision.

The Application of the Law to the Facts

By Pagets Law of Banking 12th Edition at page 117

> "The relationship of Banker to customer is one of contract (Foley vs Hill 1848 2HL case 28
>
> It consists of a general contract which is basic to all transactions together with special contracts which arise only when they are brought into being in relation to specific transactions or banking services."

Interest rates fall within to the purview of these transactions (**Negril, Negril Holdings Ltd and Negril Investment Company Ltd Privy Council Appeal # 37 of 2003 delivered on the 22nd July 2004.**

I therefore hold that the relationship between the Claimant and FCIB is that of a contractual one.

In the affidavit of Mr. George Hugh filed on the 10th June 2008 interest rates and penalties are two of the contentious issues.

Having reviewed the relevant sections of the three (3) legislations referred to in the claim, the application as well as the submissions, that is the Banking Act, the Bank of Jamaica Act and the Financial Institution Act. I have found that the Bank of Jamaica has supervisory and regulatory responsibilities for

deposit taking institutions licensed under financial legislations administered by it. This responsibility involves assessing the quality of the licencees operations and financial conditions under the powers contained in section 34 of the Bank of Jamaica Act.

The BOJ is required to examine, at least once per year, the affairs of each licensee to ensure that the various statutory requirements are being complied with and determine the financial position of the institution.

I find that there is no contest as to FCIB being one of the BOJ's licencees.

Clearly the BOJ has a supervisory and regulatory function in relation to FCIB, FCIB being one of BOJ's licencees.

In analyzing the correspondences exchanged between the Claimant and the BOJ, I find that the Claimant seems to believe that the existing situation between themselves and FCIB warrants intervention of the BOJ in its supervisory and regulatory capacity.

The BOJ on the other hand is of the view that this is purely a contractual situation between Rayton, the Claimant and FCIB and to intervene in this dispute would be overstepping its bounds

I am of the view that the BOJ's position may well be the correct one.

Learned Queen's Counsel Mr. Hylton in his very thorough and erudite submissions filed, seeks to persuade that the BOJ's decision not to intervene is an exercise of the function given to the BOJ under statute and the BOJ

having decided not to investigate is acting in its statutory capacity and as such the decision in this case was that of a public authority relying on its statutory power.

Therefore any challenge to this position should be by way of Judicial Review.

In the case of **the Chief Constable of the North Wales Police vs Evans [1982] 1WLR 1155** – Lord Brighton said

> "Judicial Review as the words imply, is not an appeal from a decision, but a review of the manner in which the decision is made and in the same case Lord Hailshank of St. Maryleborne LC said that the purpose of Judicial review is to ensure that an individual is given fair treatment by a wide range of authorities whether judicial, quasi judicial, or administrative, to which ever the individual has been subject.
>
> It is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matter in question.

In paragraph 17 of his affidavit in support of the fixed date claim form Mr. George Hugh states that the Claimant has commenced action against FCIB as a result of the breaches of its contractual obligations.

Having commenced action against the FCIB, it seems to me that that is the proper forum to deal with this dispute.

I find that this is not a situation involving the performance of a public duty. This is a private matter outside of the scope of judicial review and as such any issue arising are such that that can be aired in the action commenced by

the Claimant against the FCIB and any effective remedy or relief can be granted in that forum.

I am afraid that the learned Queen's Counsel has not convinced me that Judicial Review is the way to go.

Conclusion

By Part 26.3(1) (c) of the CPR

> "In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim."

Having found that the BOJ could not be expected to intervene in what is exclusively a private matter between the parties I therefore conclude that there is no reasonable ground for bringing the action

Hence the claim will have to be struck out pursuant to Part 26.3(1) (c) of the CPR.

Order

Order in terms of paragraph 1 of the Defendants notice of application for court orders dated the 22nd July 2008 and filed on the 15th September 2008.

Costs to the Defendant to be taxed or agreed, special costs certificate for two Counsels granted.

Leave to appeal sought and refused.