EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2010/0025

IN THE MATTER of the Banking Act No. 19 of 2005

IN THE MATTER of the appointment by the Minister of Finance of David Holukoff as receiver of Capital Bank International Limited

BETWEEN:

CAPITAL BANK INTERNATIONAL LIMITED

Appellant

and

[1] V. NAZIM BURKE (Minister of Finance in the Government of Grenada)
[2] THE ATTORNEY GENERAL

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Paul A. Webster — Justice of Appeal [Ag.]

Appearances:

On the written submissions filed on behalf of the Appellant
On the written submissions filed on behalf of the Respondents

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2014: June 17.

Civil appeal – Section 43 of the Banking Act – Appointment of receiver – Whether revocation of receiver's appointment is sole or exclusive remedy available to financial institution – Claim for declaratory relief and damages

The Minister of Finance, pursuant to the powers conferred by section 43 of the Banking Act ("the Act"), appointed a receiver over the appellant. The appellant challenged the appointment by filing a claim, which was later amended, seeking various declarations, damages and other relief. An application to revoke the appointment of the receiver was also filed. The learned trial judge on hearing the application concluded that the appointment of the receiver was invalid and revoked the appointment.

The appellant subsequently applied for permission, under rule 12.3(1) of the Civil Procedure Rules 2000 ("CPR"), to enter default judgment on the amended claim for failure by the respondents to file a defence and also on the basis that the court had previously ruled that the appointment of the receiver was invalid. The learned trial judge refused permission to enter judgment by default holding that section 45 of the Act provides both the right and the remedy and therefore the appellant cannot go outside of the remedy provided. The appellant appealed alleging that all the requirements for entry of default judgment were satisfied; that the learned judge misapplied the principles in Century National Merchant Bank Limited and Others v Omar Davies and Others (Jamaica) in that she equated "exclusive remedy" as identified in that case with "exclusive relief"; and that the learned trial judge erred in failing to consider whether section 45 of the Act provides an exclusive remedy in circumstances where the Minister acts in excess of jurisdiction, as conferred by the Act, to appoint a receiver.

Held: allowing the appeal; setting aside the order and remitting the matter to the court below and ordering the respondents to pay the appellant's costs on appeal to be assessed unless agreed within twenty one days, that:

1. There is no provision in CPR 12.3(1) which requires a claimant to first obtain the court's permission before judgment in default can be entered against the Crown. The reference in CPR 12.3(1)(b) is to a State rather than to the State or the Crown.

   Rule 12.3(1)(b) of the Civil Procedure Rules 2000 applied; Ministry of Communications & Works et al v Clement Cassell Montserrat, High Court Civil Appeal MNIHCVAP2008/0006 (delivered 19th June 2008, unreported) followed.

2. The term "exclusive remedy" as defined in the Century case did not create a limitation on the court's power as to the nature and type of relief which may be granted. Moreover, Century was distinguishable from the circumstances of this case. The learned judge erred in applying the Century decision to this case by misconstruing the sense in which the term "exclusive remedy" was used in that decision.

   Century National Merchant Bank Limited and Others v Omar Davies and Others (Jamaica) [1998] UKPC 12 distinguished.

3. Section 45 of the Act speaks to a specified period within which a financial institution may institute proceedings in the High Court to have a receiver's appointment revoked. It did not create any fetter on the court's power as to the nature and type of relief which may be granted after such a claim has been instituted. In that regard, section 45 does not preclude the appellant from claiming damages as it has claimed in its amended claim.

   Section 45 of the Banking Act, Cap. 26A, Revised Laws of Grenada 2010 applied.

JUDGMENT

[1] PEREIRA, CJ: This appeal is yet another, flowing from the appointment of a receiver on 15th February 2008, over the appellant ("the Bank") by the second respondent. The essential issue raised in this appeal is whether the revocation of a receiver's appointment is the sole or exclusive remedy available to a financial institution where a receiver has been appointed under section 43 of the Banking Act ("the Act")[1] of Grenada.

Procedural Matters

[2] In August 2012, the parties filed consent pursuant to rule 62.6 of the Civil Procedure Rules 2000 ("CPR") for the appeal to be heard and determined as a summary appeal. Following directions and orders given by a single judge of the Court on 23rd January 2013, a certificate pursuant to CPR 62.6(1)(a) was filed on 25th January 2013 and the appeal came up for further directions before the Court on 28th January 2013. On that date, the Court gave directions for the filing and service of submissions by the parties. The respondents' submissions which were directed to be filed on 12th February 2013 were not filed until 21st February 2013. The respondents have sought an extension of time to deem the written submissions filed on 21st February 2013 to be properly filed. We are satisfied from the affidavit of service of the application for an extension of time that the same was served on the solicitors for the appellant on 25th February 2013. That application has not been opposed by the appellant and we conclude that the late filing has caused them no prejudice. Based on the information contained in the affidavit, filed in support of the application for extension of time, the Court is satisfied as to the reasons given for the delay. Further, the Court considers that the written submissions of the respondents addressing the question raised by this appeal which raises a question of law, would assist the Court in a determination of the question. Accordingly, the Court deems the written submissions filed on behalf of the respondents to have been properly filed. The appellant had been granted liberty to file written submissions in reply. No reply submissions have to date been

[1] Cap. 26A, Revised Laws of Grenada 2010.

filed, and we infer from this that the appellant did not consider it necessary to file and serve a reply. In the interim, the appellant took steps to sort out its legal representation in relation to the various pending legal proceedings and, on 28th April 2014, a copy of notice of change of solicitor was filed with the court. No further submissions have been filed following the change of legal practitioners and the Court accordingly concludes that the question may now be determined by the Court without the need for further submissions.

The background

[3] A background summary giving rise to this issue is set out so as place it within context:

(1) Pursuant to the powers conferred by section 43 of the Act, the Minister of Finance, on 15th February 2008 appointed a receiver over the Bank.

(2) 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.

(3) The Bank also filed on the same date of filing the claim, 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, the surrender to the court (subject to confidentiality safeguards) of all documents made or prepared by the receiver following his entry upon the Bank's premises on 15th February 2008.

(4) The Bank filed an amended claim on 5th March 2008, seeking various declarations, damages for breach of statutory/and or common law duties, as well as damages for unlawful interference with the business of the Bank. The Bank's amended claim is not stated to be pursuant to section 45 of the Act. Indeed the Bank had already accomplished the removal of the receiver by way of their application of 25th February 2008.

(5) The trial judge on hearing the application, in her decision delivered on 7th May 2008, 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, papers 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.

(6) An appeal was filed and subsequently abandoned. Nothing turns on this. The respondents failed to file any defence to the claim.

(7) On 12th November 2008, the Bank applied for permission (it said pursuant to CPR 12.3(1))[2] to enter default judgment on the amended claim for failure by the respondents to file a defence and also on the basis that the court had previously ruled (on the application) that the appointment of the receiver was invalid. Indeed the Bank had already accomplished the removal of the receiver.

(8) The respondents opposed the application, arguing in essence that the only remedy available to the Bank pursuant to section 45 of the Act (i.e. revocation of the receiver) had already been granted; that the Bank suffered no actionable wrong - the acts of the receiver being valid notwithstanding the defects in his appointment; and that damages are not available to the Bank. It was not sought to be argued that the pre-conditions set out in CPR 12.5 for entry of default judgment in the normal course had not been satisfied. The difference here is that the respondents (defendants) were officials of the Crown, namely the Minister of Finance and the Attorney General.

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[2] CPR 12.3 (1) A claimant who wishes to obtain a default judgment on any claim which is a claim against a
(a) minor or patient … or
(b) State as defined in any relevant enactment relating to state immunity;
must obtain the court's permission.

(9) On 23rd September 2010, the learned judge, in essence relying on the Privy Council decision in Century National Merchant Bank Limited and Others v Omar Davies and Others (Jamaica),[3] which she considered to be analogous, held at paragraph 11 that the Act (section 45) "provides both the right and the remedy and therefore the aggrieved party cannot go outside of the remedy provided". She therefore refused the permission sought by the Bank to enter judgment by default.

(10) It is this ruling which the Bank challenges on appeal.

The Appeal

[4] The Bank, in its grounds of appeal, says that:

(1) the learned judge did not have the power to refuse permission to enter default judgment where all the requirements for entry of default judgment were satisfied;

(2) the learned judge in essence misapplied the Century decision in that in applying the principles of the case, she equated "exclusive remedy" as identified in that case with "exclusive relief"; and

(3) the learned judge erred in failing to consider whether section 45 of the Act provides an exclusive remedy in circumstances where the Minister acts in excess of jurisdiction, as conferred by the Act, to appoint a receiver.

[5] As to the first ground, the Bank was clearly of the view and the matter proceeded on the assumption that permission of the Court was required before default judgment could be entered. As to whether such permission was needed, it appears that all concerned may have been unaware of the decision of this Court in the case of Ministry of Communications & Works et al v Clement Cassell[4] in which the issue of permission under CPR 12.3(1)(b) was squarely before the Court. In that case the intended appellants contended that CPR 12.3(1)(b)

[3] [1998] UKPC 12.
[4] Montserrat, High Court Civil Appeal MNIHCVAP2008/0006 (delivered 19th June 2008, unreported).

required a claimant to obtain the permission of the court before applying for judgment in default of defence against the Crown. Barrow JA giving the decision as a single judge of the Court concluded in essence that:

> "(1) Rule 12.3(1)(b) of the CPR 2000 did not require a claimant to obtain the permission of the court before applying for judgment in default of defence against the Crown.
>
> "(2) The reference in rule 12.3(1)(b) was to a State rather than to the State or the Crown. Rule 12.3(1) referred to four classes of defendants for whom special provision was made, namely, minors, patients, states and diplomatic agents; it made no provision for the Crown. The rules that made special provision in respect of the Crown were contained in Part 59 and there was no provision in this Part to the effect that permission first had to be obtained before judgment in default of defence could be entered against the Crown…"

This Court fully endorses the conclusions of Barrow JA in Ministry of Communications & Works et al v Clement Cassell. On the facts of this case no such permission was necessary. This, in our view, is sufficient to dispose of the first issue without the need for a discourse as to the considerations which would have guided the exercise of the learned judge's discretion under CPR 12.3. Suffice it say that such an exercise would not involve a consideration as to whether the conditions set out under CPR 12.5 have been satisfied without more.

The Act

[6] Before engaging in an analysis of the decision in Century, I think it useful to set out section 45 of the Act. It states:

> "Within a period of ten days after the date on which the Minister has appointed a receiver, the financial institution may institute proceedings in the High Court to have his appointment revoked."

Does the wording of this section connote that the sole and exclusive remedy available to a financial institution is the revocation of the receiver in the sense that this is the only relief which can be granted by the court? In essence, if it turned out that the financial institution suffered loss and damage by virtue of the appointment does it mean that it is debarred or precluded from recovering for the loss and damage sustained?

The Century Decision

[7] In Century, the Minister of Finance, acting under the powers of the Banking Act of Jamaica, section 25 and Part D of the Second Schedule to the Act, served a notice on Century National Merchant Bank and Trust Co., (which operated by licence as a commercial bank in Jamaica). Under section 25 of the Banking Act, the Minister was empowered to take such steps as he considered best calculated to serve the public interest, where it was or appeared that a bank was likely to become unable to meet its obligations, or in relation to which the Minister had reasonable cause to believe that any of the conditions specified in Parts A and B of the Second Schedule existed. Section 25(c) permitted the Minister to assume the temporary management of the bank in accordance with Part D of that Schedule. The Minister assumed temporary management of the bank with effect on the same day of service of the notice under paragraph 1 of Part D of the Schedule and appointed Mr. Downer as the Temporary Manager of the bank. Assumption of temporary management of the bank was one of the permissible actions the Minister was required to take where the bank "is engaging ... in an unsafe or unsound practice in conducting the business of the bank"[5]. The Minister also instructed the Temporary Manager to discontinue the operations of the bank. Paragraph 2.1 of Part D of the Second Schedule provided as follows:

> "A bank which is served with a notice under paragraph 1 may, within ten days after the date of such service, appeal to the Court of Appeal and that court may make such order as it thinks fit." (Emphasis added).

[8] The bank did not appeal to the Court of Appeal under paragraph 2(1) of Part D. The Temporary Manager brought various claims and the Bank and its sister institutions, which had been similarly treated and affected, also brought claims in the Supreme Court seeking declarations that the assumption of temporary management of each institution was unlawful. They also claimed damages for trespass, conversion and wrongful interference in the business of the institutions. The actions were struck out and the bank and its sister institutions appealed to the Court of Appeal. One of the issues in that appeal, as it relates to the instant appeal, was whether the remedy

[5] At para. 5.

under paragraph 2(1) of Part D of the Banking Act of an appeal by the bank to the Court of Appeal is an exclusive remedy and, if so, what are the consequences.

[9] At paragraph 11 of the judgment the Privy Council stated as follows:

> "The question whether the appeal to the Court of Appeal is an exclusive remedy is an issue of statutory construction. The starting point must be to focus on the language and context of the statute. Paragraph 2(1) of Part D is cast in language of width and generality. Prima facie any issue regarding the service of the notice is within the scope of the right of appeal. And paragraph 2(1) expressly provides that the Court of Appeal "may make such order as it thinks fit". It is plainly competent for a bank to contend on such an appeal that the notice was invalid for procedural or substantive reasons. And the Court of Appeal would be bound to rule on the merits of such contentions. Thus the bank could have appealed on the ground that the Minister gave no prior notice of his intention and that the Minister resolved to assume temporary management in circumstances when that was under the statute an inappropriate remedy, leaving it to the Court of Appeal to rule on the merits or demerits of those arguments. Indeed every complaint, substantial or insubstantial, advanced by the appellants before the Privy Council could have been raised before the Court of Appeal by way of an appeal under paragraph 2(1) of Part D. This is therefore not a case of an ouster of jurisdiction in whole or in part, as was considered in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147. It is a time limited provision vesting, exceptionally, original jurisdiction in the Court of Appeal to hear an appeal by the bank in respect of the notice announcing the Minister's intention to assume temporary management of the bank." (Emphasis added).

[10] At paragraph 13 the Privy Council concluded thus:

> "It is true that Part D does not expressly provide that the right of appeal will be an exclusive remedy. But a necessary or plain implication to the same effect, derived from the language and context of the statute, is enough: see: Barraclough v. Brown [1897] A.C. 615 and Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1960] A.C. 260. There are cogent factors pointing towards a necessary implication that the appeal is an exclusive remedy. One only has to ask the question whether the legislature, having provided for a speedy general right of appeal to the highest court in Jamaica, intended to leave intact the unfettered right of the directors of the bank to challenge the validity of the assumption of temporary management years later in a private law action at first instance. The language and the context of the statute rules out such an impractical interpretation. After all, as Part D shows, a Temporary Manager may continue or discontinue the business; stop or

limit payment of obligations; dismiss or employ officers or employees; and so forth. He must be able to deal with third parties and they need to know where they stand. Moreover, a lengthy period of uncertainty about the status of temporary management of the bank will greatly complicate, for example, the possibility of working towards a scheme of arrangement with creditors or reconstruction of the bank. The need for certainty and finality about the temporary management in the public interest is manifest. For these reasons, in agreement with the Court of Appeal, their Lordships are satisfied that the appeal under paragraph 2 of Part D is an exclusive remedy." (Emphasis added).

[11] I return to the case at bar. It is common ground that the Bank instituted proceedings in the High Court as provided by section 45 of the Act and within the ten-day period after the appointment of the receiver by the Minister of Finance. What the respondents assert, in essence, is that on instituting those proceedings, the only relief available to the Bank is the removal of the receiver and no further or other relief can be claimed.

[12] In my view the Century case is distinguishable in a number of respects from the case at bar:

(a) Firstly, the comparable provisions of the Banking Act of Jamaica are not on all fours with the provisions of the Act.

(b) Secondly, the Banking Act of Jamaica created a right to directly appeal to the Court of Appeal. As the Privy Council held, the Banking Act vested in the Court of Appeal, an original jurisdiction to hear the bank's complaints. Century and its sister institutions had however, brought its claims to the Supreme Court rather than the Court of Appeal. In the instant case, section 45 of the Act provides for the institution of proceedings in the High Court. Here, this is what the Bank did.

(c) Thirdly, paragraph 2.1 of Part D of the Banking Act of Jamaica provided for the Court of Appeal to "make such order as it thinks fit". Importantly, the Privy Council carefully noted the "width and generality" of the language used in paragraph 2.1, and further noted the breadth of the power given to the Court of Appeal to "make such order as it thinks fit". In this regard they

further opined that "every complaint, substantial or insubstantial, advanced by the appellants before the Privy Council could have been raised before the Court of Appeal by way of an appeal under paragraph 2(1) of Part D". It is to be remembered that Century sought declaratory relief as well as damages and thus, given the wide breadth of the Jamaican legislative provision, these could have all been addressed before the Court of Appeal in the exercise of the original jurisdiction given to it. The same does not hold here. Section 45 of the Act contains no similar provision. It merely states that the Bank may institute proceedings in the High Court to have the receiver's appointment revoked. Does this mean that the Bank is precluded in those proceedings in which they sought the removal of the receiver from making a claim for damages?

[13] I understand Century as being authority for the proposition that the Banking Act of Jamaica created an exclusive remedy in the sense of providing for an exclusive process – i.e. by way appeal to the Court of Appeal. It is not in my view, based on the tenor of the judgment, authority for the proposition that the Banking Act provision provided an "exclusive remedy" in the sense of a limitation on the court's power as to the nature and type of relief which may be granted. Indeed the provision in the Banking Act of Jamaica made plain that the Court of Appeal could "make such order as it thinks fit". Accordingly, if the Court of Appeal considered it fit that an order for compensation or damages be made, the court was empowered to make such an order.

[14] In my view the learned judge erred in applying the Century decision to the case at bar by misconstruing the sense in which the term "exclusive remedy" was used in that decision. She construed it to mean "exclusive relief" when it is plain within the context of the reasoning of the judgment that the reference to an "exclusive remedy" was being used in the sense of an "exclusive procedure" or "exclusive process". There is nothing in the Century decision suggesting that the Privy Council was there suggesting that the provision in the Banking Act of Jamaica had provided for an exclusive type of relief - say the removal of the Temporary Manager but precluded

the making of an order for compensation. Were that the case then to my mind it would be a case of ouster of jurisdiction, if not in whole then at least in part, as was considered in Anisminic Ltd. v Foreign Compensation Commission and Another.[6] As such, clear words would be required to construe section 45 of the Act as ousting the court's jurisdiction as to the type of relief, which may be granted on the institution of proceedings. It would be expected given the intrusive nature of a receivership appointment over a bank, that where it was intended to limit the relief to the removal of the receiver and nothing more, the language used would have to be so clear as to compel the conclusion that the court's jurisdiction had been so curtailed. The Privy Council held that Century was not an "ouster of jurisdiction" case. Similarly, I do not read section 45 of the Act as being an "ouster of jurisdiction" provision. All that it says, in my view, is that if the Bank wishes the removal of the receiver, it must bring High Court proceedings for that purpose within ten days of the appointment. It says nothing about the court's power, once proceedings have been so instituted, being limited only to the making of an order for removal of the receiver. If that was the intention, then Parliament ought to have said so in clear terms (express or implied) within the context and scheme of the Act. While I agree with the respondents that section 45 provides for swift action, the swiftness of the action does not equate to nor justify a limitation of jurisdiction in terms of the relief which the court is empowered to grant. Century certainly did not so decide. To the contrary, it expressly drew attention to the width and generality of the language and the plenitude of the court's powers reserved therein.

[15] The fact that an Act of Parliament sets out a remedy does not thereby make that remedy exclusive without more. It is a matter of construction of the statute in determining whether the statute has that effect.[7] In Croydon Corporation v Oldaker it was held that the fact that the statute provided a penalty for breach of duty, it could not have been the intention of Parliament to deny the remedy of damages to the claimant who had suffered illness as a result of the breach of statutory duty on the part of the defendant. Likewise, it could not have been intended

[6] [1969] 2 AC 147.
[7] See Croydon Corporation v Oldaker [1936] 3 All ER 360.

by Parliament that a bank could obtain no relief in the nature of compensation or damages where it could be shown that such loss and damage had been suffered by a bank flowing from the appointment (and in this case invalid appointment) of a receiver over its business, and assets.

[16] The Bank contends that it would be a startling result if a Minister of Government could appoint a receiver in violation of the Act, and thereby seize property and cause substantial loss and an aggrieved bank is precluded from receiving compensation, but may only set aside the appointment or remove the receiver. I agree. I hasten to make clear however, that I am not here agreeing or making any finding of loss and/or damage suffered by the Bank. What I do say is that the Bank is not precluded by section 45 of the Act from claiming damages as it has claimed in its amended claim.

[17] The Bank contends that the Act created no new right in the sense that even if section 45 was not enacted, the Bank would have had the right to apply to the High Court for relief, inter alia, to have the receivership revoked. I agree for the same reasons given above. However, what section 45 of the Act does is to ensure that where it is sought to remove the receiver, those steps are be taken swiftly for all the policy reasons adumbrated by the Privy Council in Century at paragraph 13. If there is delay in moving to remove a receiver then it may be just too late. The egg cannot be unscrambled.

Conclusion

[18] For the reasons given above I conclude that section 45 of the Act does not create an "exclusive remedy" in the sense that the Bank is precluded from seeking and being granted other relief where a case for such relief has been made out. The learned judge erred in so finding, having erred in her application of the Century decision to this case. I would allow the Bank's appeal on this ground. This is sufficient to dispose of this appeal. Accordingly, I do not consider it necessary to address the remaining ground of appeal.

Costs

[19] The general rule is that the successful party is entitled to its costs. There is no reason in this case to deviate from the general rule. Accordingly, the respondents shall bear the appellant's costs of this appeal to be assessed unless agreed within twenty one days.

[20] It is hereby declared and ordered as follows:

(1) The appeal is allowed. Section 45 of the 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.

(2) The order dated 23rd September 2010 refusing the application for permission to enter default judgment is set aside and the matter is remitted to the court below to take its course in accordance with the rules of court.

(3) The respondents shall bear the appellant's costs of this appeal to be assessed unless agreed within twenty one days.

Dame Janice M. Pereira, DBE
Chief Justice

Davidson Kelvin Baptiste
Justice of Appeal

Paul A. Webster, QC
Justice of Appeal [Ag.]