IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 240 of 2012

COVENTRY CAPITAL INC	**CLAIMANT**
AND	
ANTIGUA OVERSEAS BANK LTD (in Receivership)	**APPLICANT/DEFENDANT**

Hearings
2012
31st October
28th November
21st December

Mr. Derek Courtenay SC and Mr. Phillip Palacio for the applicant/defendant.
Mr. Andrew Bennett for the claimant.

LEGALL J.

JUDGMENT

1. This is an application by the applicant/defendant for summary judgment under Rule 15 2(a) of the Supreme Court (Civil Procedure) Rules 2005 to dismiss the claim in this matter. Rule 15.2(a) states:

> "The court may give summary judgment on the claim or on a particular issue if it considers that:
> (a) the claimant has no real prospect of succeeding on the claim or issue …"

The claim form in this matter claims the following:

> "1. The sum of eighty six thousand one hundred and one dollars in the currency of the United States of America (US$86,101.00) being monies held in escrow for the claimant by the defendant.
> 2. Further or in the alternative a declaration that the defendant holds in escrow for the claimant the sum of eighty six thousand one hundred and one dollars in the currency of the United States of America (US$86,101.00)."

2. The general ground in support of the application is that the claim, according to Rule 15 2(a), "has no real prospect of succeeding" because the money mentioned in the claim was deposited in a US dollar chequing account, account No. 1498030 in the name of Glenn D. Godfrey & Company LLP, at the applicant/defendant bank, and not in the name of or on behalf of the claimant who did not have an account, or an escrow or trust account, at the bank, had no contract with the bank, was not a customer of the bank, and who, at no point in time, had any business relationship with the applicant/defendant bank.

Put simply, the basic ground for the application is that the claimant is the wrong party in the claim and has no standing to claim the reliefs.

3. To decide whether the application has merit, a perusal of the witness statements and the disclosures filed by both sides as a result of case management orders that were made on 23rd July 2012, is important. The witness statement of Glenn D. Godfrey for the claimant reveals that Glenn Godfrey attorney-at-law, is a director of the claimant and another company named Cascade Limited; and he, in September 2011, was contacted by the defendant, though its chairman McAlister Abbott, about Cascade Limited and the claimant purchasing shares in Barrington Bank Limited, a company incorporated in Antigua and Barbuda. Mr. Godfrey stated that the claimant and Cascade Limited expressed an interest in purchasing the Barrington shares; and that the defendant, through Mr. Abbott, confirmed that any deposit in relation to the shares was to be held in an escrow account for the purpose of purchasing the shares. Cascade Limited made a deposit of US$65,000 towards the purchase of the shares; but did not proceed with the purchase and requested the return of the US$65,000. Upon the request for the return of the deposit, the defendant, in November, 2011 returned the deposit of US$65,000 to Glenn Godfrey & Co. LLP.

4. It is to be noted, at this point, that the deposit of US$65,000 was made in the name of Glenn Godfrey & Co. LLP, in the account mentioned above, and not in any account at the defendant in the name of Cascade Limited. Mr. Godfrey, in his witness statement, said that the defendant confirmed by letter dated 21st September, 2011, through the

defendant's associate company, ABIT Trust Limited, that the deposit was to be held in an escrow account in the name of his law firm. The concluding paragraph of the letter states:

> "Further, we shall instruct the Antigua Overseas Bank Ltd to hold the refundable deposit of One Hundred and Fifty Thousand Untied States Dollars (US$150,000) in an escrow account in the name of your firm. I have no doubt that they will be in contact with your firm shortly to expedite the matter."

5. It is not known whether ABIT Trust Limited gave the instructions to the defendant. What is shown by the evidence is, as we shall see below, that the documents establishing the account at the defendant do not show the establishment of the escrow account on behalf of the claimant. Moreover, by e-mail dated 26th September, 2011, the defendant, through its employee Ruby Tang Maginley, wrote to Mr. Godfrey that on receipt of the funds, the defendant, "will credit the new account, Glenn D. Godfrey & Co. LLP." The e-mail does not speak of an escrow account.

6. It must also be further noted that Mr. Godfrey stated that all his business dealings with the defendant were conducted through Alister Abbott, the then CEO of the defendant. The business dealings are given in Mr. Godfrey witness statement in this matter, including clause 22 of the statement that the money was to be held in a "segregated escrow trust account and not to be intermingled with the

defendant's other monies, but to be used for the sole purpose of purchasing the Barrington Shares." But Mr. Abbott, whom Mr. Godfrey said he spoke to about the establishment of the escrow trust account had not made a witness statement or affidavit in this matter. At this post case management order stage, we have on the one hand Mr. Godfrey, the sole witness for the claimant on this point, in his witness statement alluding to discussion with Mr. Abbott about the establishment of an escrow trust account; and on the other hand, documentary evidence to be examined below in which there is no mention of the establishment of an escrow trust account or a trust account in favour of the claimant.

7. Cascade Limited having withdrawn from purchasing the shares, the claimant on 6th January, 2012 entered into a contract with a third party Athina Financial Services Limited, a company incorporated and resident in Cyrus, to purchase the shares. Two deposits of US$86,101.00 and US$75,000 were made in the said account above in the name of Glenn Godfrey & Co. LLP. The deposit of the amount of US$75,000 was made by a company named Cititrust International Limited. The contract with the third party was repudiated, which was accepted on the condition that the funds in the account were returned. The defendant, according to Mr. Godfrey, on or about 8th March, 2012 returned the US$75,000. The defendant denied that the claimant or any other party on its behalf at any time made a deposit of US$75,000 at the defendant bank. Pauline Wade in her witness statement, which deals only with the return of the US$75,000, swore that the amount of US$75,000 was returned, and she exhibited a wire

transfer document dated 15th March, 2012 showing that the amount was refunded and came from the defendant to Glenn Godfrey's account at Heritage Bank Belize. The amount was not refunded to the claimant.

8. The main issue in the claim is the return of the US$86,101.00. In a nutshell, the claimant's case is that taking the witness statement of Mr. Godfrey, the amount of $86,101.00 was placed in an escrow account for the purchase of the Barrington shares by the claimant; and this was known by the defendant; and the account above in the name Glenn Godfrey & Co. LLP was an escrow trust account on behalf of the claimant to purchase the shares, and this was known by the defendant. Mr. Godfrey in his witness statement at paragraph 32 said that the deposit of US$86,101.00 was made into an escrow account and that "These funds came from Ashley Limited a shareholder of the claimant and were paid into the escrow account for the benefit of the claimant."

9. In the claim form, there is no specific claim by the claimant in equity or in any trust relationship against the defendant for the above sum. The claim form does not specifically claim relief on behalf of the claimant against the defendant on the ground of an equitable lien or charge or on the ground of an equitable interest under a constructive trust. The sole claim is that the defendant held in an escrow account for the claimant the said sum. An escrow account is where money is held by a party or bank on behalf of another until the money is required, and has the characteristics of a trust account. A trust

account is an account opened by a customer acting as a trustee or fiduciary, and designated as a trust account, or in some other way, to indicate its fiduciary nature. An example of an account held in some other way to indicate its fiduciary nature is Re ***Cross, exp Adair 1871 24 LT 198***, where an account in a bank with the heading "Police Account" was held to be a heading that showed that money paid into the account was trust money belonging to the county. Lord Halsbury in Halsbury Laws of England Fourth Edition Vol 3(1) at para 155 states that: "The designation of an account as a trust account or in some equivalent way fixes the banker with notice of an existence of a trust which limits the bank's right to combine accounts, and establishes a necessary element in any claim to render the banker liable as a constructive trustee." Emphasis mine

10. But it must be noted in this case before me that the account in question was not designated a trust account in favour of the claimant nor was it designated, in any other way, a trust account in favour of the claimant to indicate its fiduciary nature. The account did have the words "Barrington Escrow Account" but, as we shall see below, the account was established in September 2011 before the claimant contracted to purchase the shares, and therefore the words could not be referring to the claimant, but to Cascade Limited. In the absence of such designation, the ordinary relationship between a banker and a customer who is acting as trustee or beneficiary is that of debtor and creditor and the banker is not vis-à-vis the customer in a fiduciary position of a trustee: see ***Foley v. Hill 1848 2 HL Cas 28,*** and

Rowlandson v. National Westminister Bank 1978 3 AER 370 and at p 378. In Foley it is recorded in the headnote as follows:

> "The relation between a banker and his customer who pays money into the bank is that of debtor and creditor, the banker being liable to repay to the customer the money which he holds for him when required to do so by the customer. When a customer pays money into his account at a bank it ceases to be his money; it becomes the banker's money and he can deal it as his own. He is not vis-a-vis the customer in the fiduciary position of a trustee or quasi-trustee holding the money for the customer as for a cestui que trust."

11. "The trade of a banker is to receive money and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, for which money he is accountable to the debtor. … I cannot confound the situation of a banker with that of a trustee and conclude that the banker is a debtor with a fiduciary character': see Lord Brougham in ***Foley*** above.

12. It was submitted for the claimant that the money was held by Godfrey & Co. LLP in a fiduciary character which had been paid by him to the account at the bank, to purchase the Barrington shares for the claimant and the person for whom he held the money, the claimant, could follow or trace it and has a charge on it: see ***Re Hallets Estate 1880 13 ch D 696***. The problem with this submission is that Mr. Godfrey, the sole witness for the claimant on the point, does not say in his witness statement that he or his firm held the US$86,101.00 in a

fiduciary character or trust relationship for the claimant. Mr. Godfrey swore that the funds came from Ashley Limited, as we saw above, who is not only a separate legal person but is also not a party to these proceedings. The deposit slips, which we will examine below also show that the money came from Ashley Limited and not Godfrey & Co. LLP. It is true that the account had the words "Glenn D Godfrey LLP (Barrington Escrow Account) but that account was established on 29th September, 2011 at which date the claimant had not contracted to purchase the Barrington shares. The claimant contracted to purchase the said shares in January 2012, so that the words "Barrington Escrow Account" could not be referring to the claimant's contract to purchase the shares, but to Cascade Limited contract to purchase the shares. Moreover, the words are "Barrington Escrow Account," not Coventry Capital Inc. Escrow Account."

13. If the account was in any way designated an escrow or trust account on behalf of the claimant, the claimant would have a case for trial. As we saw above, Mr. Godfrey stated it was an escrow trust account in favour of the claimant. The signed documents establishing the account point in a different direction. The first document is named "Customer application for a corporate account." The application is dated 29th September, 2011. It is in the name of "Glenn D. Godfrey & Co. LLP (Barrington Escrow Account)" and the nature of business of the holder of the account is stated on the application as "General Practice Law Firm." The beneficial owner of the account is stated on the application as "Glenn D. Godfrey" not the claimant; and the occupation of the beneficial owner is given as attorney-at-law. The

application is signed by Glenn Godfrey and the corporate account number is given as number 1498030. The name of the claimant does not appear anywhere on the application, not is it stated on the application that the account was an escrow trust account on behalf of the claimant, nor is the claimant mentioned on the application form as a beneficial owner of the account. It is not stated on the form that the account was an escrow account held on behalf of the claimant. The application states "Barrington escrow account" but as we saw above, at the date of the application it was Cascade Limited who had an agreement to purchase the Barrington shares, not the claimant; and the words speak of Barrington Escrow Account and not Coventry Capital Inc. Escrow Account. The application form states that the primary business activity from which account transactions will be generated is "The Practice of law," and that the reason for opening the account was "for the practice of law." It does not state the opening was for the purpose of purchasing the Barrington shares.

14. The sum of $86,101.00 was credited to the above account based on two deposits of US$72,780.00 and US$14,266.08. The credit advice slips which accompanied the said deposits have the name Glenn D. Godfrey & Company, and under the heading description, appear the words on both slips "balance due on promissory note Ashley Ltd." and "Interest due on promissory note Ashley Limited." The account number on both slip is 1498030 and they do not state promissory note Coventry Capital Inc. The other document is entitled "Declaration of Source of Funds Form" which was required to be completed as part of the process of opening a corporate account at the defendant bank. On

the form, the customer's name, which I think means the holder of the account, is given as Glenn Godfrey & Co LLP and it is signed by Glenn Godfrey and dated 28th September, 2011. The form states the amount of US$65,000, and states that the source of the funds as "Funds held in escrow for our client, Cascade Limited, pending the completion of the purchase of shares of Barrington Bank Limited." Once again there is no mention of the claimant in any capacity on this form. This document refers to an escrow account in relation to Cascade Limited, not the claimant. Mr. Godfrey in his witness statement refers to two letters, exhibits GDG 5 & 6, to show that an escrow account was in relation to the claimant, but these letters are in relation to Cascade Limited, not the claimant. As with the other documents, no mention is made of the claimant in the above slips in any capacity.

15. It is clear from the documentary information above, and the e-mails below that the account No. 1498030 in the amount namely $86,101.00 is in the name of Glenn D. Godfrey & Co LLP and not in the name of the claimant, nor in the name of Glenn D. Godfrey & Co. LLP on trust or on behalf of, or for the purpose of an escrow account in favour of the claimant. In his witness statement, Mr. Godfrey stated at paragraph 32 that the deposit US$86,101.00 was made into the escrow account and came from Ashley Limited, a shareholder of the claimant and was paid into the escrow account for the benefit of the claimant, for the purchase of the Barrington shares by the claimant. The documentary evidence above signed by Mr. Godfrey is inconsistent with the above, in that the above documents do not state

that the deposit was paid into an escrow or trust account on behalf of the claimant.

16. At paragraph 6 of his witness statement Mr. Godfrey states that all his business dealings with the defendant were conducted through Mr. Abbott. But Mr. Abbott is not a witness nor a deponent in this matter. Moreover, a witness for the claimant, Pauline Wade, in her witness statement states her many attempts by e-mails to get the defendant bank to transfer the above US$75,000 from the account at the defendant bank, to Mr. Godfrey's account at Heritage Bank Belize. In the e-mails to the defendant bank, Miss Wade speaks of Mr. Godfrey's request to "transfer of personal funds held with Antigua Bank to his Heritage Bank Account" and the "transfer of $75,000 from his ABI Account to his Heritage Bank Account" and the "undue delay to transfer Mr. Godfrey's funds." See e-mails dated 13th February, 2012; and 20th February, 2012 attached to Wade's witness statement. When the sum of US$75,000 was eventually transferred from the defendant bank, the wire transfer stated under customer name "Glenn Derick Godfrey 84 Bella Vista Belize City." The above is testimony from a witness for the claimant that the US$75,000 above were Mr. Godfrey's personal funds in the said account marked Barrington Escrow Account. In addition, Mr. Abbott, in an e-mail to Mr. Godfrey dated 19th January, 2012 in relation to the said account wrote that the "balance on <u>your</u> account is USD$161,711.08": (emphasis mine). This was prior to the refund of the US$75,000.

17. If this matter goes to trial, the above inconsistency between Mr. Godfrey's witness statement and the above documents and e-mails, and the absence of Mr. Abbott to support Mr. Godfreys' statement, would have to be considered by the court; and bearing in mind that the burden at the trial will be on the claimant to prove the case on a balance of probabilities, I am not satisfied, bearing in mind, the documentary evidence and the e-mails, and the absence of evidence from Mr. Abbott as discussed above, and the other matters mentioned above, that there is a real prospect that the claimant would succeed at the trial in proving it has a right to the amount in the claim. The documentary evidence speaks for itself. There is no allegation that the documents are not accurate or are fraudulent. Cross-examination therefore cannot change the information on the application, the deposit slips and the source of funds document. There is no indication that the claimant would want to apply to call Mr. Abbott, and his absence has not been explained.

18. But the claimant relies on ***Barclays Bank Ltd. and Quistclose Investments Ltd. v. Rolls Razor Limited 1970 AC567***. In that case, a company, Quistclose Investments Ltd., made a loan to another company, Rolls Razor Ltd., to enable it to pay dividends. Rolls Razor Ltd., by cheque for £209,719, sent the money to Barclays Bank Ltd. with instructions to credit the money in its favour in a dividend share account at the bank. Rolls Razor Ltd. subsequently went into voluntary liquidation. Quistclose Investments Ltd. demanded repayment of the sum from the bank. The question for the court was whether as between Quistclose Investments Ltd. and Rolls Razor Ltd.

there was a trust relationship, and whether the bank had notice of the trust or the circumstances giving rise to it, so as to make the trust binding on the bank. The court, on the facts before it, answered both questions in the affirmative and ruled that the bank could not retain the money against Quistclose Investments Ltd., the respondents in the case.

19. It ought to be noted that in that case the company Quistclose Investments Limited who lent the money to Rolls Razor Ltd., who deposited the money in the account at Barclays Bank Ltd. were named as parties in the case. Quistclose Investments ltd. was the respondent. In this case before me, the US$86,101.00 came from Ashley Limited, not a party to this claim, which was a shareholder of the claimant, and not from the claimant, but for its benefit. Since the claimant and Ashley Limited are two separate persons, the money did not come, according to the evidence, from the claimant. "It came from Ashley Limited for the benefit of the claimant" according to Mr. Godfrey. Secondly, Rolls Razor Ltd., who deposited the money in the bank was made a party to the claim. In this case before me the credit slips above, which have the words "credit my account as follows" and the name "Glenn D. Godfrey & Company," seem to show that Mr. Godfrey deposited the $86,101.00 which came from Ashley Limited in the account, but neither Glenn Godfrey & Co. LLP nor Ashley Limited was made a party to this claim. These matters, in my view, distinguish ***Quistclose*** from the case before me. In ***Quistclose***, the court was able to hold that the bank could not retain against the respondent ***Quistclose*** who was a party to the claim. There is, as I see

it, a procedural problem in this case before me. As with ***Quistclose***, Glenn D. Godfrey & Co. LLP; and perhaps Ashley Limited should have been included as parties in the claim. Perhaps the Receivers of the defendant mentioned below should have also been added as defendants.

20. The Supreme Court in the exercise of its powers to grant summary judgment under Rule 15 2(a) of the Rules, has to be satisfied, that (i) all substantial facts relevant to the claimant's case which are reasonably capable of being before the court, are before the court; (ii) those facts must be undisputed or there must be no reasonable prospect of successfully disputing them, and (iii) there must be no real prospect of oral evidence affecting the assessment of the facts: see ***S v. Gloucestershire Hamlets London Borough Council***, ***The Independent 24th March (CA) quoted in Lyle v. Lyle***, ***Supreme Court Jamaica Suit No. HCV002246 of 2004*** per Sinclair Haynes J. The substantial facts relevant to the claim are before the court, as shown above, including the documentary evidence as to the opening of the account in the name of Godfrey and Co. LLP, and in which the claimant's name does not in any capacity appear. The evidence is clear and undisputed that the amount of $86,101.00 was deposited in the above account. The facts on these documents do not allow for a reasonable prospect of successfully disputing them, and I do not see oral evidence in court affecting the assessment of these facts. The substantial facts as stated in the documents do not speak of an escrow account or trust account on behalf of the claimant. The account is not designated in any way an escrow account for the claimant. The claim

form does not make a specific claim on the basis of constructive trust or in equity.

21. During the hearing of this matter, learned counsel for the claimant had the opportunity to apply to amend the claim to add Glenn Godfrey & Co. LLP as a claimant, which would be consistent with the documentary evidence, and also to add the Receivers of the defendant as a second and third defendants. The Receivers are Charles Walwyn and Kathy David who were appointed as at 10th April, 2012 and have duties and powers previously vested in the Directors of the defendant. As a result of the appointment of the Receivers, customers accounts at the bank are frozen with respect to withdrawals from the bank. The opportunity to make the amendment was not taken, even though there is no dispute by the defendant that Glenn Godfrey & Co. LLP is the holder of the account in which the amount of US$86,101.00 was deposited.

22. The defendant bank received the US$86,101.00 in the above account in the name of Glenn Godfrey & Co. LLP, and the Receivers in the discharge of their duties ought to consider recommending to the Financial Services Regulatory Commission of Antigua and Barbuda payment to Glenn D. Godfrey Co. LLP of the US$86,101.00 in accordance with the laws of Antigua and Barbuda.

23. On the question of costs, the court is entitled to consider the conduct of the parties. I make no order as to costs in this matter.

24. For all the reasons above I make the following orders:

(1) The claim in this matter is dismissed under Rule 15.2 (a) of the Supreme Court (Civil Procedure) Rules 2005.

(2) There is no order as to costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
21st December, 2012