IN THE HIGH COURT OF BELIZE, A.D. 2022

Claim No. 194 of 2021

BETWEEN

YM BELIZE LIMITED	**CLAIMANT/RESPONDENT**

AND

THE LIQUIDATOR OF CHOICE BANK LIMITED (In Liquidation)	**1st DEFENDANT/APPLICANT**
CENTRAL BANK OF BELIZE	**2nd DEFENDANT/APPLICANT**

Before the Honourable Madam Justice Geneviève Chabot

Date of Hearing: October 24th, 2022

Appearances:

William A. Lindo, for the Claimant/Respondent

Ashanti Arthurs-Martin, for the Defendants/Applicants

RULING ON APPLICATION TO STRIKE OUT

Introduction

1. The Claimant (the "Respondent" in this Application) is an International Business Company incorporated pursuant to the *International Business Companies Act*[1] for the sole purpose of establishing a co-branded pre-paid card program with Choice Bank Limited ("Choice Bank" or the "Bank"). Choice Bank provided banking services until its licence was revoked on June 28th, 2018. The 1st Defendant is the Liquidator of Choice Bank. The 2nd Defendant

[1] Chapter 270 of the Substantive Laws of Belize.

is a regulator under the *International Banking Act*[2] and the *Domestic Banks and Financial Institutions Act*[3] (together, the "Applicants").

2. On March 19th, 2021, the Claimant/Respondent filed a Fixed Date Claim Form against the Defendants/Applicants. The Fixed Date Claim Form was amended on May 5th, 2022. The Claimant/Respondent seeks the following reliefs in the Claim:

    1. A declaration that the decision of the Defendants to transfer the sum of USD $3,597,534.06, which stood in Account No. 102521 and held in the name of Mariano Pablo Ferrari, amounted to a preference;

    2. A declaration that the 2nd Defendant was negligent in allowing the preferential transfer of the funds standing to the credit of Mariano Pablo Ferrari to the detriment of the creditors of Choice Bank Limited;

    3. A declaration that the monies Choice Bank Limited collected from MasterCard on behalf of the Claimant for Service fees, MasterCard Interchange fees, Currency Conversion Assessment fee and rebates on foreign exchange under the Co-Branding Agreement was impressed with resulting/*Quistclose* trust for the Claimant;

    4. A declaration that the Claimant is entitled to payment of the sums of USD $200,185.88 and Euro €333,139.75 due as Service fees, MasterCard Interchange fees, Currency Conversion Assessment fee and rebates on foreign exchange under a Co-Branding Agreement entered between the Claimant and Choice Bank Limited on the 15th day of October, 2014 which Choice Bank Limited held on a resulting/*Quistclose* trust for the Claimant;

    5. An order directing the Defendants to forthwith pay the Claimant the respective sums of USD $200,185.88 and Euro €333,139.75;

    6. Any other accounts, enquiries or directions that may be necessary;

    7. Costs; and

    8. Such further or other relief as the Court sees fit.

3. The Defendants/Applicants filed on June 9th, 2022, the First Affidavit of Hollis Parham and the Third Affidavit of Julian Murillo in response to the Amended Fixed Date Claim Form.

[2] Chapter 267 of the Substantive Laws of Belize.
[3] Chapter 263 of the Substantive Laws of Belize.

The Application

4. The Defendants/Applicants filed on June 29th, 2021, a Notice of Application to Strike Out the Claim. The Notice of Application to Strike Out the Claim was amended on June 17th, 2022 in response to the filing of the Amended Fixed Date Claim Form. The Applicants seek an Order that the Amended Fixed Date Claim Form and supporting Affidavit of Odway Flowers be struck out in their entirety.

5. The grounds of the Application are the following:

    1. The Liquidator has been improperly joined as a party to the proceedings. Any claim against the liquidation estate should be made against Choice Bank Limited (in liquidation), not the Liquidator;

    2. The Claimant is a stranger to the account of Mariano Pablo Ferrari, and so has no *locus standi* to pursue any declaratory relief in relation to the said account;

    3. The Claim discloses no reasonable grounds for the Claimant to bring a claim against the Defendants for declaratory relief in relation to the funds of Mariano Pablo Ferrari;

    4. The institution of the claim is prohibited by section 109(13)(e) of the *Domestic and Financial Institutions Act*, which expressly prohibits the institution of legal proceedings to recover a debt, or to perfect security interest in 2nd Defendant's assets;

    5. The Claimant has sought, by this claim, a declaration that funds are held in trust for it by the 1st Defendant, and an order for payment of the said funds. The declaration and order seek the recovery of monies collected by Choice Bank Limited and owed to the Claimant under a Co-Branding Agreement. The monies claimed were never held in trust by Choice Bank Ltd and based on its own claim, the Claimant was owed those sums as a creditor. The Claimant has in fact already made a claim in the liquidation as "unsecured general creditor". The claim is therefore for a debt, and has been instituted in violation of the express prohibition set out in the *Domestic and Financial Institutions Act*;

    6. The Claim, being prohibited by statute, is an abuse of process.

6. The Application is supported by the Fourth Affidavit of Julian Murillo.

Submissions

Applicants' Submissions

7. The Applicants submit that the Liquidator has been improperly named as a party to the proceedings. Under sections 109(1) and (2)(viii) of the *Domestic and Financial Institutions Act*, any claim in the liquidation related to the liquidation estate should be instituted against the Bank (in liquidation), and not against the Liquidator. The Liquidator is the legal representative of the Bank, but does not take on the liability of the Bank. Section 109(3) of the *Domestic and Financial Institutions Act* provides that the Liquidator is only answerable to the Central Bank. Any fiduciary duty owed by the Liquidator would be owed to the Central Bank. As such, it is the Bank that should be named as a party to the proceedings.

8. The Applicants dispute that the Respondent has the *locus standi* to bring this Claim. Citing *Fritz Pinnock et al. v His Honour Chest Brooks*,[4] the Applicants argue that the Respondent has no proprietary interest in the funds held in the account of Mariano Pablo Ferrari (the "Ferrari Account"). The Respondent's interest, if any, is indirect and remote.

9. The Applicants submit that the Claim discloses no reasonable grounds and will fail as a matter of law because the transfer of the Ferrari funds was not done by the Liquidator in the exercise of his discretion, but rather pursuant to an Order of the Court. The evidence before this Court is that the funds held in the Ferrari Account were frozen by Choice Bank pursuant to an Order of the Belize Supreme Court made on October 24th, 2014. Choice Bank was placed in liquidation on June 28th, 2018. The funds in the Ferrari Account were transferred to the Central Bank pursuant to a further Order of the Belize Supreme Court dated December 16th, 2019, which was issued as a result of proceedings and investigations in the United States. The Ferrari funds were not treated as a part of the liquidation estate because the funds have been frozen in a reserve account since 2014. The Applicants argue that the Liquidator had no choice but to comply with the Order of the Court to transfer the funds to the Central Bank. The transfer of the Ferrari funds did not, and could not amount to a preference since it was done pursuant to an Order of the Court.

10. The Applicants further argue that the Respondent has failed to particularize any negligence on the part of the Liquidator or the Central Bank. Negligence cannot be proven since the Liquidator at all times acted pursuant to a Court Order, and the Central Bank was not part of the Order. In any event, pursuant to section 109(3) of the *Domestic and Financial Institutions Act*, the Liquidator is only accountable to the Central Bank, and not to the Respondent.

11. With respect to the Respondent's claim that the funds are held on a resulting/*Quistclose* trust for the Respondent, the Applicants argue that this cannot be proven. The Respondent

[4] [2022] JMSC Civ. 23.

has not pleaded that Choice Bank could carry on a trust business. Any monies paid to the Bank, whether by way of deposit or under a Co-Branding Agreement, entitle the Respondent to make a claim as an unsecured creditor in the liquidation. Pursuant to section 116(2)(j) of the *Domestic and Financial Institutions Act*, unsecured creditors rank tenth in the liquidation estate.

12. Finally, the Applicants argue that under section 109(13)(e) of the *Domestic and Financial Institutions Act*, the Central Bank is protected from suit in respect of any debt owed to any creditor. The Respondent submitted a claim to the Liquidator as an "Unsecured General Creditor". By participating in the liquidation proceedings, the Respondent has put beyond a doubt its assertion that it is a creditor in the liquidation, and is therefore precluded from bringing any claim in respect of that debt. According to the Applicants, even if the Respondent is successful in establishing the existence of a trust, the Respondent would nonetheless be a creditor of the Bank and would therefore still be barred from proceeding with the Claim under section 109(13)(e) of the *Domestic and Financial Institutions Act*.

Respondent's Submissions

13. The Respondent argues that its claim is against the negligent action of the 1st Applicant, the Liquidator, in allowing the whole of the monies in the Ferrari Account to be transferred to the 2nd Applicant's account.

14. According to the Respondent, the evidence shows that on December 16th, 2019, the Liquidator consented to the preferential transfer of the whole of the funds in the Ferrari Account. However, Mariano Pablo Ferrari, as a depositor of Choice Bank, was in no better position than an unsecured creditor of the Bank. Citing *Joachimson v Swiss Bank Corpn*,[5] the Respondent submits that once funds are deposited into the account at the Bank, title to those funds is transferred to the Bank and the customer gains a chose in action against the Bank. The freezing of the funds in the Ferrari Account did not elevate them to being "secured" funds. The grant of a freezing order did not change the classification of the Ferrari funds as being funds of Choice Bank (in liquidation), did not confer a security interest, and did not constitute a forfeiture order. Therefore, the act of paying the whole of the funds in the Ferrari Account to the 2nd Applicant amounted to an unlawful preference which could not be made lawful by the blessing of any court of law.

15. As a result, the Respondent contends that its claim is against the action of the 1st Applicant, and not against Choice Bank (in liquidation) itself. However, if the Court finds that the Bank ought to be the proper party to the Claim, the Respondent seeks the leave of the Court for the Bank to be joined or substituted as a party to the Claim.

[5] [1921] 3 KB 110 at 127.

16. On the basis of the above, the Respondent submits that it has *locus standi* because the claim is not in relation to the Ferrari Account *per se*, but in relation to the actions taken by the Applicants in respect of the Ferrari Account. The Respondent argues that as a regulator, the Central Bank has a duty of care towards customers of the banks.

17. The Respondent adds that its Claim is not a claim to recover a debt or to perfect security. Rather, it is a claim that the funds which Choice Bank held in its MasterCard operation/settlement account were impressed with a resulting/*Quistclose* trust. Thus, section 109(13)(e) is not applicable to this Claim. This Court can only make a determination of how Choice Bank treated these funds by examining the facts after receiving evidence from both parties as to how the payments under the Co-Branding Agreement were treated and subsequently made to the Respondent.

Applicants' Reply

18. In reply, the Applicants note that the ownership of the Ferrari funds has not changed. In addition, because the Ferrari funds are frozen, whether they remain with Choice Bank (in liquidation) or with the Central Bank, the Ferrari funds are not at the disposal of the Liquidator to be distributed. If the courts in the United States determine that these funds are the proceeds of crime, these funds were never validly held by Choice Bank. If these funds are found not to be the proceeds of crime, they will remain in the liquidation estate to be distributed. The Respondent's Claim is therefore premature and speculative.

Analysis

19. Rule 26.3 of the *Rules* empowers this Court to strike out a claim in any of the following circumstances:

> 26.3 (1) 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 -
>
> > (a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;
> >
> > (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
> >
> > (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
> >
> > (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.

20. This Court finds that the 1st and 2nd declarations sought in the Claim, namely the declarations related to the Ferrari funds, must be struck out.

21. Although Respondent's counsel argues that the claim against the 1st Defendant, the Liquidator, is a claim in negligence, no negligence is pleaded against the 1st Defendant. Negligence is pleaded against the 2nd Defendant, but no particulars of the negligence are pleaded. Even if the Respondent was granted leave to amend its Fixed Date Claim Form to particularize the claim in negligence, the claim against both Defendants with respect to the Ferrari Account is bound to fail.

22. The 1st Defendant, as the Liquidator, owes no duty of care to the Respondent, whether statutory or at common law. As noted by the Applicants, pursuant to section 109(3) of the *Domestic and Financial Institutions Act*, the Liquidator is accountable to the Central Bank only. Section 109(3) of *Domestic and Financial Institutions Act* makes no distinction as to the type of claim, whether in tort or otherwise, to which it applies, as long as the Liquidator acts in the performance of his duties and the exercise of his powers:

> (3) The liquidator shall act in accordance with the regulations and practice directions made pursuant to this Act at any time in the course of the liquidation, and shall be accountable only to the Central Bank for the performance of duties and the exercise of powers as liquidator.

23. There is no allegation in the Claim that the Liquidator acted outside of his duties or powers.

24. Similarly, the Liquidator owes no common law duty of care to the Respondent. In *Hague & Anor v Nam Tai Electronics (British Virgin Islands)*,[6] the Privy Council held that absent a "special relationship", a liquidator owes no duty of care to the individual creditors of the liquidation:

> […] the breaches of duty alleged in the Statement of Claim are not breaches of a duty owed to individual creditors of TAI but of a duty owed to TAI in liquidation. It is well arguable that the duties owed by a liquidator in an insolvent liquidation are owed also to the creditors as a class. Nam Tai may be the most substantial creditor of TAI by some distance but is nonetheless only one member of the class. A culpable failure by a liquidator to collect in or preserve or take control of the assets of a company in liquidation may diminish the value of the fund available for distribution pro rata among the creditors but is not, in their Lordships' opinion, a breach of a duty owed to each creditor as an individual.

[6] [2008] UKPC 13.

> Case law establishes that that is so. In *Kyrris v Oldham* [2004] 1 BCLC 305 Jonathan Parker LJ (with whose judgment Thorpe LJ and Dyson LJ agreed) held, at 329, that absent some special relationship an administrator of an insolvent partnership appointed under the Insolvency Act 1986 owed no common law duty of care to unsecured creditors in relation to his conduct of the administration. (See also *Peskin v Anderson* [2001] 1 BCLC 372). There is no special relationship between Nam Tai and Mr Hague in the present case, either pleaded or referred to in the evidence, that could give rise to a common law duty of care. The duties Mr Hague owed were the statutory duties owed by all liquidators under the statutory regimen established by the BVI Companies Act and referred to by Gordon JA. In *Grand Gain Investment Ltd v Borrelli* [2006] HKCU 872 liquidators were sued by a creditor for an alleged failure to obtain a proper price for the sale of an asset of the company in liquidation. Barma J, following *Kyrris v Oldham*, ordered the creditor's claim to be struck out as being "plainly and obviously unsustainable" (para.62). In their Lordships' opinion Barma J's ruling was correct.

25. The Respondent disputes that it is a creditor of the liquidation, an argument which will be addressed later. However, whether the Respondent is a creditor or has some other status in the liquidation, the Respondent has not pleaded any special relationship with the Liquidator that could give rise to a duty of care. That is especially so since, as noted by the Applicants, the Respondent's interest in the Ferrari funds, if any, is indirect and remote. As a result, the declarations sought against the 1st Defendant must be struck out.

26. While Respondent's counsel referred, without pleading it in the Claim, to the duty of care owed by the 2nd Defendant, as a regulator, to the Respondent, this claim is bound to fail. Indeed, the 2nd Defendant had no role to play in obtaining either the Freezing Orders dated October 24th, 2014 and December 19th, 2014, or the Order dated December 16th, 2019 transferring the Ferrari funds to the Central Bank. There is therefore no basis for the Respondent's claim in negligence. The declarations sought against the 2nd Defendant must also be struck out.

27. The declarations and order sought by the Respondent with respect to the monies collected from MasterCard by Choice Bank on behalf of the Respondent for Service fees, MasterCard Interchange fees, Currency Conversion Assessment fees, and rebates on foreign exchange under the Co-Branding Agreement will not be struck out. An assessment of the evidence is required to determine whether collection of those monies created a resulting/*Quistclose* trust, as alleged by the Respondent, and if so, how those monies were treated by Choice Bank.

28. The parties disagree as to whether monies collected in trust would result in those funds being paid in priority under the *Domestic and Financial Institutions Act*. Section 116(2) of

the *Domestic and Financial Institutions Act* provides the order of priority against the general assets of a bank in liquidation, but is silent as to the status of funds held in trust. That is because funds held in trust are not part of the "general assets" of the bank.

29. In *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd (Bahamas)*,[7] the Privy Council held that unless the trust instrument provides otherwise, a trustee has no power to use trust money for its own benefit. However, in the case of a bank, the money held in trust may be treated as all deposit monies for the general purposes of the bank. Because it becomes impossible for the beneficiaries of the trust to trace their money, as they would in any other trust, an equitable charge is created over all of the assets of the bank and creates a priority in the liquidation:

> A bank in fact uses all deposit moneys for the general purposes of the bank. Whether a bank trustee lawfully receives deposits or wrongly treats trust money as on deposit from trusts, all the moneys are in fact dealt with and expended by the bank for the general purposes of the bank. In these circumstances it is impossible for the beneficiaries interested in trust money misappropriated from their trust to trace their money to any particular asset belonging to the trustee bank. But equity allows the beneficiaries, or a new trustee appointed in place of an insolvent bank trustee to protect the interests of the beneficiaries, to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank. Where an insolvent bank goes into liquidation that equitable charge secures for the beneficiaries and the trust priority over the claims of the customers in respect of their deposits and over the claims of all other unsecured creditors. This priority is conferred because the customers and other unsecured creditors voluntarily accept the risk that the trustee bank might become insolvent and unable to discharge its obligations in full. On the other hand, the settler of the trust and the beneficiaries interested under the trust, never accept any risks involved in the possible insolvency of the trustee bank. On the contrary, the settler could be certain that if the trusts were lawfully administered, the trustee bank could never make use of trust money for its own purposes and would always be obliged to segregate trust money and trust property in the manner authorised by law and by the trust instrument free from any risks involved in the possible insolvency of the trustee bank. It is therefore equitable that where the trustee bank has unlawfully misappropriated trust money by treating the trust money as though it belonged to the bank beneficially, merely acknowledging and recording the amount in a trust deposit account with the bank, then the claims of the beneficiaries should be paid in full out of the assets of the

[7] [1986] UKPC 1 ("*Space Investments"*).

> trustee bank in priority to the claims of the customers and other unsecured creditors of the bank [emphasis added].

30. I disagree with Applicants' counsel that *Space Investments* cannot be relied upon because it deals with an issue of breach of trust. *Space Investments* was rendered in a context where a trust instrument authorised a bank to use the trust money for its own benefit. While *Space Investments* does discuss the issue of breach of trust, the passage reproduced above applies equally to lawful deposits, as evidenced by the second sentence of the paragraph underlined above. This Court understands this passage as holding that the equitable charge created in the case of a breach of trust gives the wronged beneficiary the same priority than the beneficiary would otherwise have been entitled to should the funds have been lawfully dealt with and kept segregated from the general assets of the bank.

31. An assessment of the evidence is therefore required to determine whether a resulting/*Quistclose* trust has, in fact, been created by the Co-Branding Agreement entered into by the parties, and how the monies collected by Choice Bank was handled. The claims in relation to the monies collected from MasterCard by Choice Bank on behalf of the Respondent will not be struck out.

32. Finally, I have not been persuaded that the Claim is statute-barred under section 109(13)(e) of the *Domestic and Financial Institutions Act*. Section 109(13)(e) provides as follows:

> (13) As of the date of appointment of a liquidator– […]
>
> > (e) no creditor may attach, sell or take possession of any assets of the licensee as a means of enforcing his claim or initiate or continue any legal proceeding to recover the debt or perfect security interests in the licensee's assets;

33. The Respondent maintains that the money held in trust is not a "debt" or a "security", and that the Respondent is not a "creditor" of the Bank. The *Domestic and Financial Institutions Act* does not define either of these terms. However, section 2 of the *Trusts Act*[8] defines a trust as follows:

> 2. A trust exists where a person, known as "a trustee", holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his own estate–
>
> > (*a*) for the benefit of any person, known as "a beneficiary", whether or not yet ascertained or in existence;

[8] Chapter 202, Substantive Laws of Belize.

(*b*) for any valid charitable or non-charitable purpose which is not for the benefit only of the trustee; or

(*c*) for such benefit as is mentioned in paragraph (a) and also for any such purpose as is mentioned in paragraph (b).

34. Since property held in trust does not form part of the estate of the trustee, I agree that it does not constitute a debt or security of the trustee. As a result, it does not appear that section 109(13)(e) of the *Domestic and Financial Institutions Act* applies to bar this Claim.

35. Finally, the fact that Mr. Odway Flowers, as the Respondent's representative, filled out a form in the liquidation as an "Unsecured General Creditor" is not determinative of the issue and does not preclude this Claim.

IT IS HEREBY ORDERED

(1) The Application is granted in part.

(2) The following claims for relief are struck out:

1. A declaration that the decision of the Defendants to transfer the sum of USD $3,597,534.06, which stood in Account No. 102521 and held in the name of Mariano Pablo Ferrari, amounted to a preference.

2. A declaration that the 2nd Defendant was negligent in allowing the preferential transfer of the funds standing to the credit of Mariano Pablo Ferrari to the detriment of the creditors of Choice Bank Limited.

(3) Each party shall bear its own costs.

Dated December 30th, 2022

Geneviève Chabot
Justice of the High Court