

**REGISTRAR'S
OFFICE**

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2016**

MAY 06 2016 *11:56*

ANGUILLA

Claim No: AXA/HCV 2016/0032

1. NATIONAL BANK OF ANGUILLA (PRIVATE BANK AND TRUST)
LIMITED
(in administration)
2. CARIBBEAN COMMERCIAL INVESTMENT BANK LIMITED
(in administration)

Claimants

- and -

1. NATIONAL BANK OF ANGUILLA LIMITED
(in receivership)
2. CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED
(in receivership)
3. NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED
Defendants

STATEMENT OF CLAIM

A: THE PARTIES

1. The First Claimant ("PBT") and Second Claimant ("CCI") are companies incorporated pursuant to the laws of Anguilla. At all material times, and for the purpose of the Trust Companies and Offshore Banking Act, RSA c T60 ("TCOBA"), PBT and CCI were banks licensed and regulated by the Anguilla Financial Services Commission to carry on offshore banking business in or from within Anguilla.

2. On 22 February 2016, Mr William Tacon was appointed administrator of both PBT and CCI (the "Administrator") pursuant to Section 31 of the Financial Services Commission Act, on and subject to the terms of the Order of the Court appointing him.
3. The First Defendant ("NBA") and the Second Defendant ("CCB") are companies incorporated pursuant to the laws of Anguilla. At all material times, NBA was the sole shareholder in PBT and CCB was the sole shareholder in CCI and, for the purpose of the Banking Act, RSA c B11, NBA and CCB were banks licensed by the Minister of Finance of Anguilla and regulated by the Eastern Caribbean Central Bank ("ECCB") to carry on banking business in or from within Anguilla.
4. Between 12 August 2013 and 22 April 2016, pursuant to powers conferred on the Eastern Caribbean Central Bank (the "ECCB") by the Eastern Caribbean Central Bank Agreement Act, the affairs of NBA and CCB were subject to the control of the ECCB through a process of conservatorship.
5. On 22 April 2016, the ECCB appointed a receiver over NBA and CCB under Section 137 of the Banking Act, N 6 of 2015.
6. On 22 April 2016 at 4:00pm, NBA and CCB ceased carrying out banking business in Anguilla. According to a press release dated 22 April 2016 issued by the ECCB, the banking operations of NBA and CCB were transferred on 22 April 2016 to a newly established bank, the National Commercial Bank of Anguilla Ltd ("NCBA"). NCBA is wholly owned by the Government of Anguilla. As at the time of drafting this Statement of Claim, the terms upon which any such transfer purported to operate, and the terms of any wider plan

of resolution which is to be implemented in respect of NBA and CCB, are unknown to the Claimants and the Administrator.

B: CONTROL OF PBT AND CCI

7. Between 12 August 2013 and 24 March 2016 (the “Relevant Period”), the affairs of PBT and CCI were conducted in accordance with instructions given by, and under the management control of, individuals appointed by the ECCB as conservators in respect of NBA and CCB from time to time (being Mr Martin Dinning, Mr Hudson Carr and Mr Shawn Williams – collectively, the “Conservator Directors”). In particular:
 - (1) On or around 15 August 2013, the ECCB and/or conservator acting on behalf of NBA and CCB at that time, Mr Martin Dinning, dismissed the appointed directors of PBT and CCI. Despite requests made by the Administrator, the ECCB (through its Deputy Governor Mr Trevor Braithwaite) and Mr Williams, the then conservator, have refused to clarify the basis upon which such action was taken or the rationale for the dismissal;
 - (2) In the period 15 August 2013 until 22 February 2016, PBT had no *de jure* directors and therefore acted solely in accordance with the instructions of, and under the management control of, the NBA conservator acting from time to time;
 - (3) In the period 15 August 2013 until 15 January 2015, CCI had no *de jure* directors and therefore acted solely in accordance

with the instructions of, and under the management control of, the CCB conservator acting from time to time;

- (4) In the period 15 January 2015 until 22 February 2016, Mr Hudson Carr (the ECCB appointed conservator of CCB) was the sole *de jure* director of CCI, which acted solely in accordance with his instructions, and under his management control;
 - (5) In the period 22 February 2016 until 24 March 2016, and insofar as relevant for the purpose of this claim, the Administrator (in accordance with the terms of his appointment) sub-contracted the management of the day-to-day operations of PBT and CCI to Mr Williams as conservator of NBA and CCB. As a consequence, the day-to-day banking business of PBT and CCI (including deposit-taking) continued to be conducted solely in accordance with the instructions of, and under the management control of, the then conservator Mr Williams.
8. In the premises, the Conservator Directors acted as *de facto* directors of PBT and CCI (save that Mr Hudson Carr acted as a *de jure* director of CCI for the period 15 January 2015 until 22 February 2016) by reason of the fact that, *inter alia*:
- (1) During the Relevant Period, management, trading and administrative decisions of PBT and CCI were made by, or subject to the control of, the Conservator Directors. Personnel within PBT and CCI took instructions and directions from the Conservator Directors, who established the policy to be adopted by PBT and CCI during the Relevant Period for making deposits and permitting withdrawals;

- (2) The Conservator Directors assumed to act as directors of PBT and CCI and as part of the corporate governing structure, and were the sole persons exercising the powers of, and discharging the functions of directors of, PBT and CCI, when causing PBT and CCI to continue conducting banking business; and
- (3) The Conservator Directors undertook functions which could only be discharged by a director of PBT or CCI.

Prior to discovery, the above particulars are the best particulars that the Claimants are able to provide of the Conservator Directors' involvement in the corporate governing structure of PBT and CCI during the Relevant Period. The above particulars are provided without prejudice to whether any other persons were acting as *de facto* or shadow directors of PBT and CCI, including the ECCB itself.

C: DUTIES OWED TO PBT AND CCI

9. By reason of acting as *de facto* or *de jure* directors of PBT and CCI, alternatively and in any event by reason of the role assumed by the Conservator Directors in relation to the affairs of PBT and CCI during the Relevant Period, the Conservator Directors owed the following fiduciary duties to each of PBT and CCI:
 - (1) To act in good faith in the interests of, respectively, PBT or CCI;
 - (2) To exercise their powers, and apply PBT and CCI's assets, only for the proper purposes of, respectively, PBT and CCI; and

(3) Not, without the informed consent of principals, to put themselves in a position where there was or would be a conflict between their duties to PBT and CCI, and any other interests or duties which they owed to NBA,CCB or the ECCB respectively or any other person.

D: BREACH OF DUTY

10. Throughout the Relevant Period, NBA and CCB were insolvent and unable to pay their debts. It is to be inferred from their office and appointment by the ECCB in respect of NBA and CCB that the Conservator Directors were at all times aware that NBA and CCB were insolvent and unable to pay their debts.
11. Notwithstanding the insolvency of NBA and CCB, during the Relevant Period, the Conservator Directors (acting on behalf of PBT and CCI) procured or permitted the payment to, respectively, NBA and CCB of all monies received by PBT and CCI from depositors, and the proceeds of all assets of PBT and CCI realised or collected during the Relevant Period (the "Funds").
12. The terms upon which the Conservator Directors procured (i) the making of further deposits by creditors with PBT and CCI; and (ii) the payment over of the Funds to, respectively, NBA and CCB, are the subject of further investigation by the Administrator, and this claim is made without prejudice to any rights of PBT and CCI (or the rights of depositors) which may arise from the terms upon which such deposits were made.
13. The total amount of the Funds paid to or collected by, respectively, NBA and CCB during the Relevant Period amounted to

US\$174,959,675.75 and US\$26,983,662.05 as set out in Schedules 1 and 2. Due to the volume of data, and by way of voluntary particulars, details of the transactions making up these totals are provided to the Defendants under separate cover in electronic format.

14. In causing the Funds to be paid to NBA and CCB, the Conservator Directors acted in breach of the fiduciary duties owed to PBT and CCI, as set out in paragraph 9 above.

PARTICULARS OF BREACH

- (1) The Conservator Directors caused or permitted the Funds to be paid to the known insolvent entities NBA and CCB rather than an alternative solvent third party bank;
- (2) The Conservator Directors failed to put in place any, or any sufficient, security arrangements providing for repayment of the Funds;
- (3) The Conservator Directors failed to consider whether, and if so why, payment of the Funds to NBA and CCB was in the interests of, respectively, PBT and CCI, alternatively failed to take into account all matters relevant to that decision such as NBA and CCB's insolvency, and the lack of any or any sufficient security arrangements to ensure repayment. Payment of the Funds to NBA and CCB was, in the circumstances of NBA and CCB's known insolvency, a transaction that no intelligent and honest man in the position of a director of PBT or CCI could have reasonably believed was for the benefit of PBT or CCI absent sufficient security arrangements to ensure repayment; and

- (4) If and to the extent that the Conservator Directors did consider whether payment of the Funds to NBA and CCB was in the interests of, respectively, PBT and CCI, and did take into account all matters relevant to that decision, they wrongly gave precedence to NBA and CCB's need for liquidity, acted in conflict of their duties owed to PBT and CCI, and gave insufficient thought to the consequences of NBA and CCB's insolvency. The Conservator Directors could not in good faith have believed that permitting payment of the Funds to NBA and CCB was, in all the circumstances, in the interests of PBT and CCI.

Prior to discovery, the above particulars are the best particulars that the Claimants are able to provide of the Conservator Directors breach of duty.

E: CONSEQUENCES OF BREACH – PROPRIETARY CLAIMS

15. The payment of the Funds to NBA and CCB in breach of fiduciary duty amounted to a breach of trust by the Conservator Directors, such that the Funds were received and held by NBA and CCB on trust for PBT and CCI.
16. NBA and CCB did not receive the Funds as *bona fide* purchasers for value without notice of the interest of PBT and CCI. No value was provided to PBT and CCI in return for the payment to NBA and CCB of the Funds. Further, or in the alternative, the Conservator Directors in their capacity as conservators of NBA and CCB controlled NBA and CCB throughout the Relevant Period, and their knowledge of the circumstances in which the Funds were being paid to NBA and CCB is to be attributed to NBA and CCB such that

the Funds were received by them with notice of PBT and CCI's interests and/or with notice that the Funds were being paid over in breach of duty.

17. In the premises, the Funds which were received by NBA and CCB remained the assets of, and were held on trust for, PBT and CCI. PBT and CCI are entitled to the return of the Funds and/or their traceable proceeds, and seek an account of NBA and CCB's dealings with the Funds for the purpose of identifying such part of the Funds and/or their traceable proceeds as remain in the possession or control of NBA and CCB.
18. If and to the extent that the Funds or their traceable proceeds have been transferred by NBA or CCB to NCBA, NCBA received the Funds or their traceable proceeds with notice of PBT and CCI's claim to the same by reason of a letter dated 19 April 2016 from the Administrator's Counsel setting out the basis of PBT and CCI's claim, the contents of which NCBA had notice of prior to the implementation of the Plan of Resolution relating to NBA and CCB. In the premises, any part of the Funds and/or their traceable proceeds which were received by NCBA remained the assets of, and were held on trust for, PBT and CCI. PBT and CCI are entitled to return of the Funds and/or their traceable proceeds, and seek an account of NCBA's dealings with the Funds for the purpose of identifying such part of the Funds and/or their traceable proceeds as remain in the possession or control of NCBA.
19. For the purpose of taking any account as described above, the Court is asked to conduct the account on a willful default basis, alternatively common account basis. PBT and CCI will give credit for such part of the Funds or their traceable proceeds as have been repaid to PBT and/or CCI. The Court is asked to give such further

or other directions as are necessary in light of any defence served in order to take the account, and establish the extent of the Funds and their traceable proceeds to which PBT and CCI are entitled.

20. This proprietary claim is asserted by the Claimants without prejudice to any other claims that may be available to the Claimants against the Defendants, the ECCB or any other persons, including claims for personal liability arising by reason of breach of duty, knowing receipt or assisting in breach of trust.

AND THE CLAIMANTS CLAIM:

- (1) A declaration that, in procuring or permitting the Funds to be paid to the NBA and CCB, the Conservator Directors acted in breach of fiduciary duties owed to PBT and CCI respectively;
- (2) A declaration that such part of the Funds and/or their traceable proceeds as are held by NBA, CCB and NCBA are held on trust for, respectively, PBT and CCI;
- (3) The taking of an account on a willful default basis, alternatively common account basis, and an inquiry for the purpose of identifying such part of the Funds and/or their traceable proceeds as remain in the possession or control of NBA, CCB and NCBA, or such other purpose as the Court considers appropriate;
- (4) All further proper accounts, inquiries and directions, including such directions as are necessary in light of any defence served in order to take the account, and establish the extent of, the Funds and their traceable proceeds to which PBT and CCI are entitled;

- (5) An order that NBA, CCB and NCBA do transfer to PBT and CCI such part of the Funds and/or their traceable proceeds as remain in their possession and/or control, or otherwise transfer and pay to the Claimants any of their property as is identified as part of the account and inquiry;
- (6) Interest on the Funds as from the date of their misapplication or such other date as the Court considers appropriate, payable at the rate of one percent above ECCB base rate and compounded at half yearly intervals, alternatively at such rate and for such period as the Court considers appropriate;
- (7) Costs; and
- (8) Such further or other relief as the Court considers fit.

CERTIFICATE OF TRUTH

I Eustella Fontaine of Fontaine & Associates, Solicitors for the Claimants herein, hereby certify that:-

- (a) The Claimants believe that the facts stated in this Statement of Claim are true; and
- (b) This certificate is given on the Claimants' instructions.

The Claimants cannot give the certificate because the Administrator of the Claimants resides out of the jurisdiction. Our address for service is Fontaine & Associates of Hansa Bank Building, Landsome Road, The Valley Anguilla on behalf of the Claimants whose address for service is the same. Telephone: +1-264-497-1404; fax: +1-264-497-1044; e-mail: fontainelaw@fontainelawfirm.com

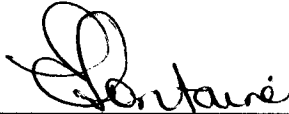
Dated the 6th day of May, 2016



Ms. Eustella Fontaine

Fontaine & Associates
Solicitors for the Claimants

Dated the 6th day of May, 2016



Ms. Eustella Fontaine
Fontaine & Associates
Solicitors for the Claimants

The Court office is at The Valley, Anguilla, Telephone number +1-264-497-2377, Fax number +1-264-497-5420. The office is open between 8:30am and 2:30pm Mondays to Fridays except Public Holidays and Court Holidays.

**Filed by Fontaine & Associates of Hansa Bank Building, Landsome Road, The Valley Anguilla on behalf of the Claimants whose address for service is the same.
Telephone: +1-264-497-1404; fax: +1-264-497-1044; e-mail: fontainelaw@fontainelawfirm.com**

Schedule 1

PBT Debits to NBA - 12 August 2013 - 23 March 2016				
Currency	Deposits	Conversion - 02/05/16	USD Converted Deposits	
USD	\$ 166,888,613.55	1	\$ 166,888,613.55	
CAD	\$ 1,574,435.20	1.28216	\$ 1,227,955.33	
EUR	€ 5,466,720.93	0.87141	\$ 6,273,420.01	
GBP	£ 393,357.39	0.69048	\$ 569,686.87	
Total			\$ 174,959,675.75	

Schedule 2

CCIB Debits to CCB- 12 August 2013 - 23 March 2016

Currency		Deposits	Conversion - 02/05/16		USD Converted Deposits
USD	\$	24,798,805.54	1	\$	24,798,805.54
CAD	\$	-	1.28216	\$	-
EUR	€	1,800,868.75	0.87141	\$	2,066,614.74
GBP	£	81,643.58	0.69048	\$	118,241.77
ANG		ANG 0.00	1.79	\$	-
Total				\$	26,983,662.05

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2016

Claim No: AXA/HCV 2016/ 0032

1. NATIONAL BANK OF ANGUILLA (PRIVATE BANK AND TRUST)
LIMITED
(in administration)
2. CARIBBEAN COMMERCIAL INVESTMENT BANK LIMITED
(in administration)

Claimants

- and -

1. NATIONAL BANK OF ANGUILLA LIMITED
(in receivership)
2. CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED
(in receivership)
3. NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED

Defendants

STATEMENT OF CLAIM

Filed by Fontaine & Associates
Solicitors for the Claimants