EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO.: AXAHCV2017/0047 and 0048

BETWEEN: **National Bank of Anguilla (Private Banking and Trust) Limited**
(In Administration)

Claimant/Respondent

and

Clayton Joseph
Lorna Joseph

Defendants/Applicants

Caribbean Commercial Investment Bank Limited
(In Administration)

Claimant/Respondent

and

Clayton Joseph
Lorna Joseph

Defendants/Applicants

Appearances:

Ms. Jacinth Jeffers of Counsel for the Defendants/Applicants
Ms. Yanique L. Stewart of Counsel for the Claimant/Respondent

---

2018: February 26th;
March 20th.

JUDGMENT

[1] **MOISE, M**.: I wish to first of all apologise to the parties for the delay in delivering this judgment. On 26th February, 2018 at the conclusion of the hearing I granted certain orders and undertook to

deliver my written reasons within 14 days. However, due to circumstances beyond my control the delivery of this decision was delayed by one week and for that I apologise for any inconvenience it may have caused for the parties involved.

[2] This is an application to set aside judgments in default of acknowledgment of service dated 8th November, 2017 entered against the Applicants in both cases captioned above. The applications are consolidated for the purpose of this decision as they arise from generally similar, if not the same, facts and raise the same issues for determination. The applicants apply to set aside the judgments in default pursuant to Rule 13.3(1) of the Civil Procedure Rules 2000 (CPR). I have denied both applications after considering the affidavits and submissions from both parties. These are my reasons for doing so.

The Facts

[3] By loan agreement dated 12th August, 2013 the applicants were granted a loan facility with the Caribbean Commercial Investment Bank Limited (CCIB). The applicants borrowed a total of **One Hundred Thousand United States Dollars ($100,000.00US)** From CCIB and agreed to repay the loan in monthly instalments of **Two Thousand and Fifty One United States Dollars and Sixty-five Cents ($2,051.65US)** at an annual interest rate of **eight point five percent (8.5%).** This loan was secured by term deposit number 1000266 in the sum of **Eighty-six Thousand, Seven Hundred and Three United States Dollars ($86,703.00US)** and term deposit number 1002580 in the sum of **Thirteen Thousand, Two Hundred and Ninety-seven United States Dollars ($13,297.00US).**

[4] On 28th April, 2015 the applicants successfully negotiated a **Sixty-eight Thousand US Dollar ($68,000.00US)** loan facility with the National Bank of Anguilla (Private Banking and Trust) Limited (PBT). It is accepted by both parties that the loan was secured by term deposit number 1022057 in the sum of **Seventy-eight Thousand, Eight Hundred and Ninety United States Dollars and Ninety-one Cents ($78,890.91US)**. These deposits represented money belonging to the Applicants which were deposited with **PBT**. The applicants were obligated to repay the sum of money at an annual interest rate of **seven percent (7%)** by monthly instalments of **One Thousand, Three Hundred and Fifty-eight United States Dollars and Thirty-six cents ($1,358.36US).**

[5] Both agreements speak to the issue of default of payments by the applicants in identical terms and state that if there was any default made ***"in payment of any part of the installment of principal or on interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the lender without notice."***

[6] Further to this, and of relevance to this case, is that the loan agreement with PBT contained an express right of set-off in favour of the Bank. The agreement states that if the applicants were to fail to pay the principal, interest, costs and fees when due, the respondent Bank reserved a right to ***"set off or transfer said funds from any monies standing in the credit of any account held by the borrower at the Lender's office in or towards satisfaction of the borrower's liabilities and obligations hereunder."*** This right of set off is not limited to the deposits used as security for the loan, but also extends to any funds standing in the applicants' credit at the respondent's office. In

the evidence presented to me I observe that no corresponding right was contained in the express provisions of the contract exhibited between the applicants and CCIB.

[7] Initially, the applicants duly met their obligations to the banks. However, on 20th April, 2016 they received a letter from Mr. William Tacon who represented himself as the Administrator of PBT having been appointed by High Court order dated 22nd February, 2016. On 5th May, 2016 the powers of the Administrator were extended by court order to include the powers of a liquidator pursuant to section 31(3) of the Financial Services Act. A similar letter was served on the Applicants in relation to CCIB on 10th May, 2016.

[8] In these letters to the applicants Mr. Tacon informed them of this change in circumstance and gave instructions to the effect that payments towards the loans were not to be made to the usual account and informed the applicants of the new account into which monthly payments ought now to be deposited. The details of the new payment arrangements were annexed to letters dated 20th April, 2016 and 10th May, 2016 addressed to the applicants.

[9] The applicants objected and upon receiving this letter wrote to the Administrator, through their solicitors, on 10th June, 2016 advising that they would no longer be making payments towards the loans and requested that their deposits should be used to pay off the outstanding balances and remit the remainder of the funds in these deposits to them. They further insisted that they would not accept responsibility for any accrual of interest after 31st May, 2016.

[10] Mr. Tacon responded to this letter on 30th June, 2016 stating that due to the current position of the bank, the funds contained in the accounts were no longer available. In particular, Mr. Tacon stated the following in his letter:

> ***"As part of my role as administrator of the Bank, I have taken legal advice with respect to the right of the Borrowers to apply term deposit balances against their loans. I am advised that neither the loan agreements nor Anguillan law generally provides your clients with any right of set off of their term deposits against the loans.***
>
> ***As I have set out in previous correspondence to depositors, PBT and CCIB held their liquid, i.e. cash assets in their respective parent banks. The parent banks are now in receivership and according to publicly available information the assets of the parent bank, but not all of their liabilities, have been transferred to the National Commercial Bank of Anguilla ("NCBA"). These assets are therefore no longer available to PBT and CCIB."***

[11] Despite the express threat contained within Mr. Tacon's letter that the respondents would commence legal action should the applicants fail to fulfill their obligations under the loan agreements, the applicants made no further payments towards the loans to the respective banks. Insofar as the loan from CCIB was concerned the last payment made by the applicants was on 14th June, 2016. The loan from PBT was last paid on 20th April, 2016. As a result of this the respondents commenced these proceedings for recovery of the debts on 5th July, 2017. Given that the Applicants resided in St. Maarten the time for filing an acknowledgement of service, as stated in the Claim Form was 35 days from the date of service. It is the applicants' contention that the claim

was not served on them until 18th August, 2017. The respondents argue that it was served on 4th August, 2017.

[12] However, on 5th and 6th September, 2017 both the islands of Anguilla and St. Maarten were severely damaged by Hurricane Irma. Further to this, the applicants contend that one of their firm of solicitors with whom they consulted in this matter operated out of the British Virgin Islands which was hit by Hurricane Maria a few days later. For this reason, the applicants contend that they were not able to communicate with their legal practitioners until November, 2017.

[13] However, despite the passage of the hurricanes a request for entry of judgment in default was filed by the respondents on 26th October of that year. These requests were granted on 8th November, 2017 when judgments in default of acknowledgement of service were entered by the Registrar of the High Court in Anguilla in relation to both claims. This was served on the applicants in St. Maarten on 17th November, 2017. On 8th December, 2017 the applicants applied to the court to have these judgments set aside.

The Law and its Application

[14] The criteria for setting aside a judgment in default as contained in Part 13.3(1) of the Civil Procedure Rules 2000 is that ***the court may set aside a judgment entered under Part 12 only if the defendant –***

> ***(a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;***
>
> ***(b) Gives a good explanation for the failure to file an acknowledgement of service or a defense as the same case may be; and***
>
> ***(c) Has a real prospect of successfully defending the claim.***

[15] It is now well established that the criteria set in Part 13.3(1) is conjunctive and that an Applicant wishing to rely on this Rule must satisfy all 3 requirements in order to succeed in his application. In that regard I will examine this application by considering each limb of the rule in turn.

Have the applicants applied to the court as soon as reasonably practicable after finding out that judgment had been entered?

[16] There is no set period of time within the rules as to what satisfies this particular requirement. The court is called upon to consider the individual circumstances of the case. In the instant case the applicants were served a copy of the judgments in default on 17th November, 2017 and filed an application to set them aside on 8th December, 2017. A total of 21 days elapsed between service of the Judgment in default and the filing of the application. This is not an extensive period of time and there are, in my view, two other factors which must be considered:

(a) It must be noted that the applicants are resident in Saint Maarten. In normal circumstances, the

rules extend the period within which a party residing abroad may comply with certain requirements contained therein. In that regard, it can be said that the normal court procedures do take into account the fact that an individual resides abroad as a factor when considering the time prescribed for his compliance with the rules. In my view, given that the applicants reside in another jurisdiction, a period of 21 days is not an unreasonable amount of time within which to respond to the service of a judgment in default by filing an application to have it set aside;

(b) The applicants have also requested that I consider the fact that both the island of St. Maarten where they reside, and Anguilla where the claim has been filed, were recovering from the effects of a category 5 hurricane even as late as November, 2017. The hurricane in question caused extensive damaged to these islands on 5th and 6th September, 2017 making it difficult for them to adequately communicate with their attorneys and give instructions to file an application to have the judgment set aside. One of the applicants' attorneys also operate out of the British Virgin Islands which itself suffered the impact of Hurricane Maria, further hampering the applicants' ability to give instructions regarding their application to set aside the judgment in default.

[17] I accept this as a valid explanation in assisting the applicant in this aspect of the criteria set by rule 13.3(1) of the CPR. In the circumstances, I find that the applicants have filed this application as soon as was reasonably practicable after finding out that the judgments in default were entered against them.

Have the Applicants provided a good explanation for the failure to file an acknowledgment of service or a defense within the stipulated time?

[18] This is yet another element of the rule which depends on the circumstances of the case. The question is why didn't the applicants comply with the rules by filing the acknowledgment of service on time and whether that reason is a sufficiently good explanation to warrant setting aside the judgment in default.

[19] In keeping with the provisions of Part 5.17 of the CPR the claim form and statement of claim served on the applicants stated that an acknowledgment of service was to be filed within 35 days from the date of service. According to the applicants, these documents were served on them on 18th August, 2017 in St. Maarten. The time for filing an acknowledgment of service would therefore expire on 22nd September, 2017. Even if I accept the respondent's version that the documents were served on 4th August, 2017 then the time for filing an acknowledgment of service was 8th September, 2017.

[20] As I have stated above, the applicants state that on 5th and 6th September, 2017 Hurricane Irma caused extensive damage to both the islands of Anguilla and St. Maarten. Further to this, they contend that one of their attorneys reside and operate out of the British Virgin Islands which was also hit by a category 5 Hurricane Maria on 11th September, 2017. It is common knowledge that these islands suffered significant infrastructural damage making communication and other daily functions difficult, if not altogether impossible, for quite some time.

[21] The respondents have asked me to consider that the applicants admitted that they gave

instructions to their attorneys to file an acknowledgment of service on their behalf but failed to state exactly when these instructions were given and why the acknowledgment of service was not filed in accordance with these instructions. However, I am not of the view that the court is obligated to request that much detail from the applicants. What is important to note is that the rules gave the applicants a period of time within which to file the acknowledgment of service. More than two weeks prior to the expiration of that time (by the applicants' version) a major hurricane caused enough damage to significantly hinder the Applicants' capacity to comply with the rules insofar as it related to the filing of the acknowledgment of service. Essentially, at the time the hurricanes hit both islands the time for filing the acknowledgment of service had not yet elapsed.

[22] I have little difficulty in finding that the applicants would not have been able to file the acknowledgement of service in the immediate aftermath of this disaster. In fact, the registry of the High Court in Anguilla did not resume operations until after the requisite dates. The applicants state that they were unable to communicate with their solicitors until November, 2017 and I have no difficulty in accepting this as a matter of fact given what is now common knowledge about the condition of those islands in the weeks and months subsequent to the passage of the hurricanes.

[23] In the circumstances, I am of the view that the applicants have provided a good explanation as to why the acknowledgment of service was not filed within the requisite time.

Do the applicants have a real prospect of successfully defending the claim?

[24] It is on this limb of the criteria in Rule 13.3(1) that I have difficulty in accepting the submissions of the applicants. Notwithstanding the fact that I have concluded that the defendants have satisfied the first two requirements of the test in Rule 13.3(1) I must consider whether there is a real prospect of successfully defending this claim. The burden rests on the defendants/applicants to satisfy this criteria and I am not of the view that it has been satisfied.

[25] Our courts have applied with some consistency the test outlined in the case of **International Finance Corporation Utexafrica S.P.R.I13.** It states as follows:

> ***"The fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying it is hopeless, whereas to say that the case has a realistic prospect of success suggests something better than that it is merely arguable. That is clearly the sense in which the expression was used in the Saudi Eagle and, in my view, it is also the sense in which it was used in Rule 13.3.1(a). There are good reasons for that. A person who holds a regular judgment, even a default judgment, has something of value, and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside. In my view, therefore, Mr. Howard is right in saying the expression "realistic prospect of success" in this context means a case which carries a real conviction."***

[26] The courts have accepted that an individual who has the benefit of a judgment in default should not be deprived of it without good reason. On that basis the burden rests on the defendant to show that he can tip the balance in his favour in proving that he has more than a mere arguable defense. The

court is not to embark on a trial at this stage. However, I am obligated to consider the nature of the draft defense put forward and to determine whether the defendants have presented more than a mere arguable case in their favour. In doing so I am not to decide on the issues of fact by preferring one set of pleadings to the other. My task, according to Singh J in the case of ***Gregory Bowen v. Dipcon Engineering Services Ltd***.[1] is ***"not to be satisfied that the Appellant has a defence which is likely to succeed."*** According to his Lordship, it would be enough, if I ***"found that there was, with some degree of conviction, an arguable case for the defense."***

[27] A draft defense was not attached to this application. However, the applicants filed their written submissions on 10th January, 2018 and attached a draft defense and counterclaim as part of the bundle. The respondents argued that the court should give no consideration to the defense as it should have been exhibited by way of affidavit attached to the notice of application. However in considering the overriding objective to do justice in this case and the fact that counsel for the respondent had sufficient time to review the document and make whatever representation they deemed necessary, I considered the draft defense and counterclaim to be properly before the court and worthy of consideration.

[28] The facts contained in the draft defense and counterclaim presented do not generally differ with those contained in the statement of claim. For the purposes of this judgment I will repeat paragraphs 11 and 12 of this defense in the PBT Claim and note that similar pleadings are contained in the case with CCIB. They state as follows:

> ***"The Defendants admit as stated in paragraph 7 that their last payment on the loan was made on 14th June, 2016 in the amount of $1,693.20US. However, the Defendants note that the Claimant omitted to state in its Statement of Claim the Defendants' position that the outstanding balance should be taken from their term certificates of deposits which the Claimant had demanded and which the Defendants had assigned as security for the loan.***
>
> ***Although the Defendants admit that they had been served with the notice of their being outstanding balances on the loan, they do not, and are of the firm belief that they should not be, and are not in breach of the loan agreement. The Defendants reiterate that at all material times the Claimant exercised sufficient control over the security pledged in satisfaction of the loan and the Claimant ought to have ensured that not only the Defendants' deposits were safe from dissipation, but that the Claimants ought to have sought to enforce the security under the assignment of term certificate deposits in satisfaction of the loan."***

[29] From the onset it is difficult to understand the applicants' assertion that they are not in breach of the agreement on the one hand and yet assert that the respondent banks were to have **"enforced the security under the assignment of the term certificate deposits"** on the other. The agreement, at least in relation to the loan with PBT, expressly states that the right to set off exists in circumstances where the borrowers have not fulfilled their obligations to make the monthly payments under the terms of the agreement. Essentially, when one examines the terms set out in the draft defense and counterclaim the basis of the case for the applicants in grounded in the right

[1] Civil Appeal No. 9 of 2001 (Grenada)

of the respondents to set off the outstanding balance due and owing by the applicants against the funds contained in the term deposits which were used as security for the loans. The respondents argued that the right to set off creates no obligation on the part of the Bank to do so and is in essence merely one way of enforcing the terms of the agreement should the borrower find himself in breach of the agreement. I agree with that submission.

[30] In the case of ***Cletus Hippolyte v. Bank of Saint Lucia Limited***[2] Cenac-Phulgence J stated that ***"the basic position is that a bank has a right - but not a duty - to look at a customer's overall position and to "combine" the accounts held by that customer."*** This is what is referred to as the right to set off. Essentially, if a customer holds an account with the bank which is no longer in credit the bank may combine this account with another account with the same bank which is in credit as a means of offsetting the outstanding arrears. However, though there may be a right in law or under the contract to set off, the bank has no obligation to do so in either case.

[31] At paragraph 35 of the applicants' written submissions it is stated that the claimant was ***"entitled to exercise the right of set off, and it could have done so at any time well before the drastic appointment of Mr. Tacon as Administrator."*** Counsel for the applicants goes on to argue that although the right to set off does not create an obligation on the part of the bank to do so, the circumstances of the present case ***"warranted there being a compelling case for the Claimant to exercise its right to set off as a duty to its customers."***

[32] In my view, there is much to be said about the basis of this argument. The facts suggest that up until letter dated 20th April, 2016 from Mr. William Tacon, the Applicants were not in breach of the loan agreement. In fact, the letter was sent to the Applicants for the specific purpose of informing them of the fact that Mr. Tacon was appointed as the Administrator of the banks and a new account was set up for the purpose of repaying the loans. It is difficult to see the circumstances under which the respondents ought to have simply set off the outstanding balance on loans which were at the time not in arrears. It was only after the applicants became aware that the banks were under judicial management did they seek to open negotiations with a view to paying off the loans from funds in their deposits; at which time the bank did not agree to do so, given the current status of its operations. These facts are not in dispute; at least not on the facts presented to me.

[33] Further, the applicants contend in their written submissions that the claimant ought to have exercised their right to set off as a duty to their customers. I do not accept this submission as being well grounded based on the facts presented so far. Not only is there no duty in law to do so but to compel the bank to set off in this instance may very well adversely affect the interest of other customers. It is inescapable that PBT and CCIB are under liquidation and part of the responsibility of a liquidator is to realise as much of the assets of the Bank as possible so as to at least attempt a fair distribution of those assets to creditors, which would include the applicants as depositors with the bank. The applicants have not satisfied me that there is anything in law which provides that the court can compel a set off in these circumstances sufficient to draw me to the conclusion that the defenses presented has a real prospect of success.

[34] The applicants also argue in their written submissions, that the appointment of Mr. Tacon as Administrator of both PBT and CCIB was ineffective. In fact, on 12th August, 2013, by way of

[2] SLUHCV2013/0405

publication in the Gazette in Anguilla, members of the public were informed that the Eastern Caribbean Central Bank (ECCB) had assumed a certain measure of control over the affairs of both PBT and CCIB. Under this measure, the ECCB appointed a conservator for the two banks. This matter was considered in the decision of Master Raulston Glasgow in the case of ***Satay Limited et al v. Martin Dinning et al***[3]***.*** In that case Glasgow M. did comment that the ECCB had in fact exceeded the authority granted under the provisions of the legislation in question. On that basis, the applicants contend at paragraph 30 of their written submission that Mr. Tacon's act in demanding that the applicants pay loan monies into a new administrative account was ineffective.

[35] What is to be observed however, is that the facts clearly show that by the time of the communication between the applicants and the respondents and the subsequent filing of the cases against them, the powers exercised by Mr. Tacon were in keeping with those conferred upon him, not by the actions of the ECCB but by High Court order dated 22nd February, 2016 and subsequently extended in May of that year. In fact, this very point was made by Master Glasgow at paragraph 59 in the ***Satay*** decision. As such I do not accept that there is any issue to be made in this case of the effectiveness of Mr. Tacon's powers as administrator of the Respondent banks. There is nothing in the facts presented by either party to this Claim which suggests any defect in the High Court orders appointing Mr. Tacon as Administrator and subsequently extending those powers to include the powers of a liquidator. The applicants have certainly not attempted to undermine the orders of the High Court in the draft defense presented to me. In my view, the facts clearly show that Mr. Tacon was duly appointed by a judge of the High Court and had the authority as well as the responsibility to communicate with the applicants regarding the status of the banks and the new requirements for fulfilling their obligations to the banks.

[36] Further to this, the facts clearly show that the applicants' obligation to repay the loan did not arise as a result of Mr. Tacon's demand but was an express term of the loan agreements which they signed. By the time of the filing of the Statement of Claim it would have been clear to the Applicants that PBT and CCIB were under judicial management and that Mr. Tacon was duly appointed by an order of a judge of the High Court to exercise the powers he undertook in relation to their loans. The decision of Glasgow M. therefore is, to my mind, of little assistance to the applicants in the present case given the undisputed facts which are currently before me.

[37] I wish to note however, that during the initial hearing of this matter in January, 2018 Counsel for the applicants requested leave to file additional submissions to supplement the submissions already filed in the matter. The respondents objected. However, given the nature of the matter I granted leave and adjourned the hearing for continuation on 26th February, 2018. The applicants filed supplementary submissions on 22nd January, 2018. In these submissions the applicants raised for the first time the doctrine of Unjust Enrichment. At paragraph 10 in particular, it was argued that ***"The Respondent would be unjustly enriched in that they would have judgment for the loans and they would have had the benefit of the deposits, as well as the difference in sum which exceeds the amount of the loan."***

[38] I wish firstly to observe that not only is this argument being raised for the first time in these supplementary written submissions, but nothing in the draft defense and counterclaim presented by the Applicants speaks to this issue. The draft defense and counterclaim on which the Applicants

[3] AXAHCV 2016/0051

currently rely does not plead unjust enrichment at all. In the case of ***Ashandi Edwards v. Rholda Bhola***[4] Master Taylor-Alexander (as she was then) stated the following at paragraph 44 of her decision:

> ***"I am satisfied that the Defendants obligation is to show not merely an arguable defence but a real prospect of successfully defending the claim, as they are seeking to deprive the Claimant of a regular judgment validly obtained. … I am not satisfied that the draft defence as disclosed has satisfied this criteria and has provided the court with reason sufficient to conclude a real prospect of the successful prosecution of the claim."***

[39] My emphasis on this paragraph is in reference to the master's reliance on the draft defense in coming to her conclusion. This, to my mind, is the correct approach which ought to be taken in applications such as the present. Rule 13.4 of the CRP requires that a draft defense be exhibited as part of the application to set aside a judgment in default. In my view, this requirement serves the purpose, at least partially, of allowing the court to give a fair assessment of the pleadings on which the Defendant intends to rely and to be able to determine whether there is a real prospect of success by examining this draft defense. It cannot therefore be proper for the applicants to raise issues of law in legal submissions which are not at all pleaded in the draft defenses. As I have stated earlier the draft defenses speak primarily to the issue of set-off. There are indeed counterclaims attached to both defenses, but insofar as that is the case, in the claim against PBT the Applicants have simply stated as follows (the terms of the counterclaim against CCIB are similar):

> ***"The Defendants' Counterclaim against the Claimants:***
>
> ***1. The Sum of $88,000.00EC held by term certificate of deposit account number 1026020 together with any interest accrued;***
>
> ***2. Costs;***
>
> ***3. Such other relief as this honourable court deems fit***

[40] This is the extent of the counterclaim presented to the Court. No doubt the applicants intend to rely on the facts pleaded in the defense, but these also do not speak to the issue of unjust enrichment. It appears that the applicants have gone further in their legal submissions than they have gone in the facts and cause of action which have been pleaded. Apart from unjust enrichment the legal submissions refers to the negligent dissipation of the applicants' deposits when negligence has simply not been pleaded nor particularised in the draft defense.

[41] In any event, I am not satisfied that reliance on this doctrine creates a more than merely arguable defense. What is inescapable is that the applicants contracted to repay loans borrowed from the bank. These loans were secured by deposits contained in accounts with the respective banks. Both banks are now under judicial management. It is difficult to see how anyone is unjustly enriched in these particular circumstances.

---

[4] SUIT NO. GDAHCV2006/0587

[42] The applicants rely on the case of ***World Wide Investments v. American International Bank et al***[5] for the proposition that it would be unjust to demand that the applicants repay the loan in circumstances where their term deposits were dissipated due to the negligence of the respondents. It is worth repeating that nothing in the draft defense or counterclaim presented pleads negligence on the part of the respondents. In that case, it was noted that what the Court was dealing with was a claim founded in ***"quasi contract for restitution of the monies paid twice by the Defendant."*** I am not of the view that a similar situation arises in the present case. No doubt the doctrine of unjust enrichment can be applied to a wide variety of factual scenarios. However, I am not of the view that reliance on this doctrine creates a real prospect of success for the Applicants on the peculiar facts of the present case.

[43] As I have stated earlier, there is a clear contractual obligation on the part of the applicants to repay the loans in keeping with the agreements entered into with the respondents. These loans were secured by term deposits on accounts which the applicants had with the respondent Banks. These deposits were however kept with the parent bank, the assets of which had been transferred to the National Commercial Bank of Anguilla after this company became insolvent. The foundation of the arguments, whether labelled as unjust enrichment or otherwise, is to suggest that PBT and CCIB can be compelled to set off the outstanding balances on these loans with funds contained in the deposits notwithstanding the fact that both banks are currently under liquidation. I do not accept there is a real prospect of success insofar as this argument is concerned.

[44] The order granted by the High Court on 22nd February, 2016 gave express responsibility to the administrator to ascertain the amount of funds which were held with the parent bank and to recommend a course of action to the court which in his opinion was ***"most advantageous to the general interests of the customers, clients, depositors and creditors"*** of each of those banks. The role of the liquidator is, at least partially, to address the concerns of depositors and clients such as the applicants and make recommendations to the Court on the best way to proceed. In fact, the Order of the Court at paragraph 20 states that anyone who has been served with, or is aware of, the order may apply to the court to vary or set the order aside, or any part of it which so affects such an applicant. I accept that the applicants are concerned about the status of the deposits contained with the bank as any depositor would naturally be. However, the orders of the High Court placing the respondent banks under judicial management are designed to address these concerns in a manner in keeping with the interests of depositors and clients of the banks in general. What I do not accept is that this state of affairs gives a right to the applicants to simply fail in their obligations to repay the loans which were granted by the respondent banks in their favour on the basis that the banks can be compelled in law to set-off these loans with funds which were contained in the deposits with the said banks.

[45] In the circumstances, I am not of the view that the draft defense presented by the applicants proves that there is a real prospect of successfully defending this case and it is on this basis I have denied the application to set aside the judgments in default granted on 8th November, 2017.

[46] The general rule is that costs should be granted to the successful party. I can find no reason to deny the respondents the benefit of a costs order given the extensive submissions and

---

[5] ANUHCVAP2004/006

documentation filed in support and in response of this application and the request for additional time which was granted to the applicants to file supplementary submissions. Costs were awarded to the respondents in the sum of **Five Hundred United States Dollars ($500.00US).**

Ermin Moise
Master

By the Court

Registrar