Hilary Term
[2025] UKPC 14
Privy Council Appeal No 0079 of 2022

JUDGMENT

National Bank of Anguilla (Private Banking and Trust) Ltd (in Administration) and another (Appellants) *v* Chief Minister of Anguilla and 3 others (Respondents) (Anguilla)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Anguilla)

before

Lord Reed
Lord Lloyd-Jones
Lord Hamblen
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
24 March 2025

Heard on 26 June 2024

Appellants
David Pievsky KC
Edoardo Lupi
Natasha Simonsen
(Instructed by LK Law LLP (London))

1st and 2nd Respondents
Peter Knox KC
The Honourable Attorney-General Dwight Horsford
Theon Tross
(Instructed by Sheridans (London))

3rd and 4th Respondents
Paul Dennis KC
Nadine Whyte Laing
Navine Fleming
(Instructed by Myers Fletcher & Gordon (London))

LORD REED AND LADY ROSE:

1. Introduction

1. This claim is brought by two banks which were both incorporated in Anguilla. Each of them carried on an offshore banking business whereby they provided deposit accounts for overseas customers denominated in a foreign currency. The first appellant ("Private & Trust Bank") was a wholly owned subsidiary of the National Bank of Anguilla Ltd ("the National Bank"). The second appellant ("Commercial Bank") was a wholly owned subsidiary of the Caribbean Commercial Bank (Anguilla) Ltd ("the Caribbean Bank").

2. In 2013, the National Bank and the Caribbean Bank (together "the parent banks") were in serious difficulty because of the financial crisis in Anguilla. The fourth respondent, the Eastern Caribbean Central Bank ("the ECCB"), intervened to place the parent banks under a conservatorship. Thereafter, the day-to-day operations of the parent banks were carried out by people appointed by the ECCB's monetary council, of which the first respondent, the Chief Minister of Anguilla, was and remains a member. Over the following three years between 2013 and 2016, a rescue package was devised by the Government of Anguilla ("the government") together with the ECCB and those working in the parent banks. In outline, the rescue package, known as the resolution plan, involved transferring accounts held by customers in the parent banks over to a newly incorporated bank called the National Commercial Bank of Anguilla ("the new bank") which was wholly owned by the government. This transfer was, however, limited to the parent banks' liability for the first $2.8 million in each deposit account. If the customer had more than $2.8 million in their account with either the National Bank or the Caribbean Bank, the liability for the excess was placed in a depositor protection trust ("DPT"). The effect of that was that the balance in the customer's account in excess of $2.8 million would gradually be paid off (with interest) over a ten year period, largely using money allocated to the DPTs by the government. A suite of legislation was enacted by the House of Assembly and assented to by Her Excellency the then Governor in preparation for the implementation of the resolution plan.

3. On 22 April 2016, the Chief Minister explained the outline of the resolution plan to the people of Anguilla in a press statement. On the same day, the conservatorship of the parent banks was brought to an end and those banks were placed into receivership with the third respondent, Mr Gary Moving, appointed to be the receiver. On 25 April 2016 the new bank commenced business in the premises previously used by the parent banks.

4. The appellants say that they were customers of the parent banks at the relevant time. Their evidence is that as at April 2016, Commercial Bank had a deposit account

with its parent, the Caribbean Bank, with a balance of over $100 million. Private & Trust Bank had an account with its parent, the National Bank, with a balance of about $52 million and an account with the Caribbean Bank holding about $9 million.

5. The appellants went into administration on 22 February 2016 and Mr William Tacon was appointed to be their administrator. In September 2016, the appellants were told that their accounts with the parent banks had not been transferred over to the new bank along with the other customers' accounts under the resolution plan. The appellants do not therefore now have new deposit accounts with the new bank holding the first $2.8 million of their old account balances. Further, they have not been included in the list of beneficiaries of the DPTs for either of the parent banks. They have been left to pursue what rights they may have in the insolvencies of the parent banks – rights which are not expected to be very valuable.

6. Mr Tacon has, since 2016, been trying to find out which of the several institutions and office-holders involved in devising the resolution plan took the decision to exclude the appellants' accounts from the protections of the resolution plan. He wants to know when that decision was taken and why. His attempts to understand what has happened and the reasons why the appellants have not enjoyed the same protection as the parent banks' other customers have, he says, been met with obfuscation and obstruction by the authorities. Sometimes he is told that no decision was taken to exclude them and sometimes one government body tells him that it was someone else who took the decision.

7. The appellants applied for permission to bring judicial review proceedings against the four respondents to this appeal. The application was supported by affidavits sworn by Mr Tacon. Evidence opposing the application was filed on behalf of the Chief Minister by Dr Aidan Harrigan who was the Permanent Secretary in the Ministry of Finance. The application for permission was refused at first instance by Innocent J in a judgment handed down on 3 February 2020. The appeal to the Court of Appeal was dismissed in a judgment handed down on 30 July 2021. The appellants now appeal, seeking leave to apply for judicial review from the Board.

2. The facts

(1) The parties and other entities involved

8. The appellants were incorporated under the laws of Anguilla, and before their management was taken over by the ECCB they were managed by individuals ordinarily resident in Anguilla. They were licensed and regulated by the Anguillian Financial Services Commission ("the FSC") established under the Financial Services Commission Act (RSA c F28). They were also licensed to conduct offshore banking business under the Trust Companies and Offshore Banking Act (RSA c T60) ("TCOBA"). TCOBA

defines "offshore banking business" as banking business carried out in or from Anguilla in a currency other than Eastern Caribbean dollars with a non-resident of Anguilla: see section 1(1). They were not licensed to conduct domestic banking business and so they were subject to regulation only by the FSC.

9. The parent banks were both privately owned prior to the events giving rise to this claim. They were licensed under the Banking Act 2005, which was superseded by the Banking Act 2015 as explained below. According to evidence filed by Dr Harrigan, the parent banks had a market share of 76% of the total assets of the banking system in Anguilla. It appears that the parent banks had previously carried on the offshore banking business themselves but had transferred the business to their respective subsidiaries in April 2005.

10. The first respondent, the Chief Minister, was also at the material time the Minister of Finance. The second respondent, the Attorney General, was sued as representing the government. The appellants recognised at an early stage that the Executive Council ("ExCo") was the proper respondent to represent the Government of Anguilla and there was no need to involve the Attorney General in the proceedings. They applied to the first instance court for permission to substitute ExCo for the Attorney General as a party. That application was dismissed on the grounds that there was no basis for bringing a claim against the government in any guise. The second respondent will be referred to as "ExCo" in this judgment.

11. The third respondent ("the receiver"), as explained earlier, was the receiver of the parent banks appointed in April 2016. The fourth respondent, the ECCB, was the regulator of the parent banks. The ECCB is also the monetary authority for Anguilla and for the other Eastern Caribbean countries and territories that participate in the currency union. The agreement establishing the ECCB, made on 5 July 1983 ("the ECCB agreement"), was incorporated into Anguillian law by the Eastern Caribbean Central Bank Agreement Act (RSA c E5) as from 7 February 1992.

(2) The financial crisis and the resolution plan

12. The banking system in Anguilla experienced a financial crisis in about 2013. In their judgment, the Court of Appeal described the parent banks as having been "caught in the crosshairs of the impending catastrophic shocks to the system" (para 3). The ECCB decided to exercise its emergency powers under Part IIA, article 5B of the ECCB agreement. That article, as amended, applies where the ECCB is of the opinion that the interests of the depositors of a financial institution are threatened or that a financial institution is likely to become unable to meet its obligations, and provides the ECCB with power to assume control of, and carry on the affairs of, the financial institution.

13. According to the appellants' application for judicial review, the conservator directors appointed by the ECCB over the parent banks also effectively took over the running of the appellants between the date of the conservatorship in August 2013 and the date when the appellants went into administration in February 2016. On 17 October 2013, the customers of the appellants were sent a letter addressed "Dear valued customer" from the ECCB's officer in charge, Mr Hudson Carr. This letter said that the ECCB had taken control of the parent banks and also of the two subsidiaries. The letter assured them that both banks were operating as normal. It said that the ECCB was "diligently and urgently pursuing an orderly and speedy resolution to the situation with the assistance of the Government of Anguilla, the British Government and the banking community of the Eastern Caribbean Currency Union". The letter informed them that an upper limit had been set on some withdrawals of balances.

(3) The resolution plan legislation

14. The Banking Act 2015 came into effect on the date it was published in the Gazette, which was 19 April 2016: see section 193. In section 1 it defines "banking business" as meaning, amongst other things, (a) the business of receiving funds through the acceptance of monetary deposits which are repayable on demand or after notice or any similar operation, together with the use of such funds for making loans or investments at the risk of the business; and (b) any other activity recognised by the ECCB as banking practice which a licensed financial institution may be authorised to do. This wording reflects the definition of "banking business" in article 2 of the ECCB Agreement.

15. Part 10 of the Banking Act 2015 provided the legislative framework for the subsequent appointment of the third respondent as receiver for the parent banks and for the transfer of the business of those banks to the new bank under purchase and assumption agreements ("PAAs"). Section 137 within Part 10 empowers the ECCB to appoint a receiver for a licensed financial institution which is insolvent or not viable. The receiver has power under section 137(2) to liquidate the institution. Section 140 provides that a receiver "shall be accountable only to the [ECCB] for the performance of its duties and the exercise of its powers as receiver" and that the receiver has to report to the ECCB regularly. Section 141 provides that the receiver becomes the sole legal representative of the bank and succeeds to all the rights and powers of the shareholders, directors and officers.

16. Sections 142, 144 and 145 confer on the receiver extensive powers, including, under section 142(2), the power to dispose of a licensed financial institution's assets and liabilities through a PAA. These powers are to be exercised subject to the prior written approval of the ECCB. Further, the procedure for determining the validity and priority of claims is determined by the ECCB (see section 149). The appellants also rely on section 152, which deals with priorities in payment of claims. Section 152(6) provides that the ECCB may take action that would treat similarly situated creditors differently but only in

limited circumstances, namely if the claims to be treated more favourably are of strategic economic importance and if "no creditor will receive less in the liquidation than it would have without the disparate treatment".

17. Part 13 of the Banking Act 2015 deals with the transfer of a banking business. This is not limited to cases where a bank is in financial difficulty or where a receiver has been appointed. Section 174 provides (so far as relevant):

> "174. (1) Where an agreement has been entered into for the acquisition by a licensed financial institution … (herein referred to as the 'transferee financial institution') of the undertaking of another financial institution … (herein referred to as the 'transferor financial institution') the transferor financial institution may, for the purpose of effecting the transfer to, and the vesting in, the transferee financial institution of the undertaking, make a written application to the Central Bank [ie the ECCB], notice of which shall be published in the Gazette in any case where the Central Bank so directs.
>
> (2) Upon the making of an application under subsection (1), the Central Bank shall investigate the application including in particular the circumstances leading to the proposed transfer, the ability of the transferee to discharge its obligations under the transfer and the effect which the transfer is likely to have on the banking services available to the public.
>
> (3) On completion of the investigation, the Central Bank may, if it thinks fit, make a recommendation to the Minister to make a Banking Business Vesting Order transferring to and vesting in the transferee financial institution the undertaking, as from the date specified therein, and on the making of such an order, all such existing property, rights, liabilities and obligations as are intended by the agreement to be transferred and vested shall, by virtue of this Act, and without further assurance be transferred to, and shall vest in, the transferee financial institution to the intent that the licensed financial institution shall succeed to the whole or such part of the undertaking of the transferor financial institution as is contemplated by the agreement.
>
> (4) …

> (5) Notwithstanding anything contained in any enactment to the contrary, the Minister may issue a Banking Business Vesting Order which, for the purposes of corporation tax, contain provisions respecting—
>
> (a) the carry forward; and
>
> (b) the set off;
>
> by the transferee financial institution of such of the losses of the transferor financial institution as may be specified in the Banking Business Vesting Order as if the undertaking of the transferor financial institution had not been permanently discontinued on the date specified in the Banking Business Vesting Order and a new banking business had been then set up and commenced by the transferee financial institution."

The minister referred to in those provisions is the Minister for Finance, ie the first respondent (section 1(1)).

18. The effects of a Vesting Order made under section 174 are then set out in section 175. These include:

> (a) the transferee bank is substituted for the transferor bank in any existing contract: section 175(1)(a),
>
> (b) any account between the transferor bank and a customer shall become an account between the transferee bank and that customer: section 175(1)(b),
>
> (c) any cheque or money order drawn on the old account shall have effect as if drawn on the new account: section 175(1)(d),
>
> (d) any judgment or award obtained by or against the transferor bank is enforceable against the transferee bank: section 175(1)(f), and
>
> (e) any officer or employee (other than a director, secretary or auditor) of the transferor bank becomes an officer or employee of the transferee bank

on no less favourable terms unless the agreement provides to the contrary: section 175(1)(g).

19. The Bank Resolution Obligations Act 2016 Act (No 4 of 2016) ("the Obligations Act") provided the framework for what became the two DPTs for the parent banks. The statute is headed "An Act to make provision for the Government of Anguilla to make payments to the Social Security Board and Depositor Protection Trusts in support of the resolution of the National Bank of Anguilla Ltd and the Caribbean Commercial Bank (Anguilla) Ltd." The trusts were not, however, established under the Obligations Act itself but were to be constituted by the government under its common law or prerogative powers.

20. Section 2 of the Obligations Act provides that the government must pay to the Social Security Board and the DPTs the sums specified in Schedules 1 and 2 to the Act in support of the resolution of the parent banks. Under section 3, the government then has claims in the receiverships of the parent banks corresponding to the value of the payments.

21. Schedule 2 to the Obligations Act provides that the government shall pay the DPTs the aggregate principal sum of $52 million. That sum is to be split between the DPTs in proportion to their obligations to the large depositors of the parent banks. Interest is payable by the government on the balance at the rate of 2% per annum and the payment term is ten years from 30 June 2016. Section 6 provides that the minister must review the terms of the Schedules whenever deemed necessary but at least every three years and must lay a report of his findings and make recommendations to the House of Assembly.

22. In addition, the DPTs were to be funded by any proceeds that were realised from what were called the non-performing loans owed to the parent banks. These loans were transferred to the Eastern Caribbean Asset Management Corporation by the Eastern Caribbean Asset Management Corporation Agreement (Amendment) Act 2016 enacted on 18 April 2016.

(4) The events of 22 to 25 April 2016

23. In April 2016 several important events took place marking the start of the implementation of the resolution plan. First the conservatorship of the parent banks was relinquished by the ECCB and the receiver was appointed over the parent banks under section 139 of the Banking Act 2015. Secondly, the new bank, which had been incorporated in December 2015, commenced operations on 25 April 2016, a few days after the receiver was appointed over the parent banks.

24. These events were described in a number of announcements made to the Anguillian public. The then Chief Minister, the Hon Victor F Banks, held a press conference and published a statement on 22 April 2016, that is on the same day that Mr Moving was appointed receiver of the parent banks. He stated that the ECCB monetary council had approved legislative reforms including the passage of the Banking Act 2015. He also recorded that at a meeting held on 24 February 2015, the ECCB monetary council "took the decision to provide full protection for all depositors of the [parent banks]. That meant that whatever resolution strategy was adopted, depositors would not lose any of their funds held with the two banks." He referred to the establishment of the new bank as being "for the sole purpose of purchasing and acquiring assets and liabilities of [the parent banks] to protect the depositors and to ensure the continuity of indigenous banking services in Anguilla."

25. The Chief Minister closed his statement with the following:

> "We expect the Anguillan Community to play a pivotal role in the success of the resolution going forward. To date your support, loyalty and patience has been exceptional. You can continue to assist by showing confidence in the resolution strategy. Remain a depositor in the [new bank] and continue with normal banking practice. Speak to your relatives and friends about the importance of being committed to the [new bank], the only national bank in Anguilla."

26. On the same day, a statement was issued by the Governor of the ECCB, Timothy N J Antoine. He said that the ECCB had that day issued a banking licence to the new bank. The new bank, he said, was established for the sole purpose of purchasing and acquiring assets and liabilities of the parent banks to protect depositors and to ensure the continuity of local banking services in Anguilla. Under the heading "How will this work?" the ECCB's statement said:

> "Kindly note the following:
>
> a. Good assets and matching deposit liabilities up to a threshold of EC$2.8m from both [parent banks] are being transferred to the [new bank];
>
> b. Deposit liabilities over the EC$2.8m threshold from both banks will be transferred to a Deposit Protection Trust (DPT). On transfer, these deposits will be transformed into long term liabilities of the DPT. Depositors will hold a claim (not a deposit) against the DPT. These long term claims will be

> matched by an annual amortising bond with a ten-year maturity and 2.0 per cent interest rate;
>
> c. All remaining assets and liabilities will be placed in receivership. The assets in the receivership will be liquidated and the proceeds distributed based on the priority of claims established in the new Banking Act."

27. A further information leaflet was published by the receiver on the parent banks' website on 25 April 2016. This reassured depositors in the following terms:

> "What has happened to my money at the [parent banks]?
>
> You have not lost any of your deposits as a result of the [parent banks] no longer carrying on banking business. Your deposits up to EC$2.8m have been transferred to the [new bank]. Your money will be available for transactions during regular hours of business.
>
> The portion of your deposits over EC$2.8m will be placed in the Depositor Protection Trust (DPT). The DPT is a fund created for the sole purpose of protecting the portion of your deposits over EC$2.8m. It is designed to ensure that, over time, you will recover your deposits."

(5) The transfers of the parent banks' business and the DPTs

28. Shortly after 22 April 2016, the receiver entered into two PAAs with the new bank, one for each of the parent banks. These agreements are not in the papers before the Board. The respondents have refused to disclose them to the appellants in these proceedings and the appellants' application for disclosure was dismissed by the courts below. It appears, however, to be common ground that the effect of the PAAs was to transfer to the new bank certain customers' accounts with the parent banks up to the value of $2.8 million for each account. Whether the deposit accounts of every customer of the parent banks except for the appellants were transferred or whether any other customers were also excluded from the transfer to the new bank is not apparent from the information at present available on the court record.

29. If, as appears to be the case, the PAAs were made pursuant to section 174 of the Banking Act 2015 and the procedure there set out was followed, there must have been:

(1) an application by the parent banks to the ECCB to approve the transfer of the undertaking from each parent bank to the new bank;

(2) an investigation of that application by the ECCB as to the effect the transfer was likely to have on banking services;

(3) a decision by the ECCB to recommend the making of a Vesting Order;

(4) a recommendation from the ECCB to the Minister of Finance to make a Vesting Order;

(5) a consideration by the minister as to whether to accept that recommendation; and

(6) the making of a Vesting Order for each of the parent banks.

30. The evidence filed by Dr Harrigan on behalf of the Chief Minister appears to confirm that this procedure was indeed followed: see his second affidavit sworn on 10 December 2019.

31. Vesting Orders under section 174 of the Banking Act 2015 were ultimately made by the Chief Minister in respect of the business transfers but only on 26 June 2020. These Vesting Orders are in the papers before the Board as they were attached to the submissions of the Chief Minister and the Attorney General in opposition to the appellants' application for leave to appeal from Innocent J's refusal of leave.

32. The Vesting Orders refer to the PAAs dated 22 April 2016 (as amended on 6 July 2018) as being between the receiver and the new bank and as "relating inter alia to the purchase of certain assets and assumption of certain liabilities" of the parent banks. The undertakings vested in the new bank were set out in the Schedules to the Orders, but the Schedules do not appear to have been made available to the appellants, although the Orders are statutory instruments and were published in the Gazette. The Vesting Orders, so far as their contents have been disclosed, do not assist, therefore, in clarifying whether the appellants were the only customers of the parent banks excluded from the PAAs.

33. As to the delay between the PAAs in 2016 and the Vesting Orders in 2020, according to Dr Harrigan's evidence this arose because of the provisions in the PAAs that the new bank could "put back" certain assets to the receiver. Article 4 of each of the Vesting Orders provides that within six months of the making of the Order the receiver

and the new bank can agree both to add in any part of the undertaking that has been inadvertently or otherwise omitted from the PAA and also to transfer back to the parent bank anything that has been inadvertently transferred under the PAA to the new bank.

34. Those documents, therefore, dealt with the element of the resolution plan which required the transfer of the liability for the first $2.8 million of the parent banks' customers' deposits to the new bank.

35. Turning to the part of the resolution plan designed to protect deposits above $2.8 million, deeds comprising the DPTs were made on 30 June 2017 pursuant to the Obligations Act. They were made between the government, three trustees, and the receiver. The purpose of the DPTs is stated in the deeds to be to receive the payment from the government in respect of the parent banks and to hold that money in satisfaction of the obligation for deposits which were formerly held by the primary beneficiaries in the parent banks. The "primary beneficiaries" are defined as individuals or entities who were owners of deposits specified in schedule 1 to each of the DPTs.

36. Schedule 1 to each of the DPTs listed five depositors for the National Bank (with deposits totalling nearly $24 million), and 13 depositors for the Caribbean Bank (with deposits totalling nearly $33 million). The depositors included individuals as well as companies. According to the appellants, the DPTs were first disclosed to them as exhibits to the evidence filed in these proceedings. From the DPTs, the appellants could see that they were not included in the schedules of protected depositors.

37. Schedule 3 to each of the DPTs contained a form for a deed of subrogation which each depositor who was a "primary beneficiary" under the deed was invited to sign. The Board was shown an example of a deed signed on 21 November 2017 by one of the depositors in the National Bank listed in schedule 1 to the relevant DPT. The deed of subrogation recited that there were insufficient assets in the National Bank to satisfy the debt owed to the depositor. The deed recited further that the government, recognising the systemic risk to the banking system and economy of Anguilla and recognising also that the depositor would suffer loss in the liquidation of the National Bank, "has made certain decisions including a decision to indemnify the depositor against certain loss". The term "debt" was defined as the aggregate of all deposits held by the depositor in the National Bank as at close of business on 22 April 2016 other than any sums transferred to the new bank. In return for that, the depositor subrogated and assigned all his or her rights to the debt to the government.

(6) The position of the appellants

38. On 22 February 2016 William Tacon was appointed administrator of the appellants by order of the High Court under a power conferred by the Financial Services

Commission Act. Mr Tacon has described the events that unfolded between 2013 and the commencement of the legal proceedings in his affidavit in support of the application for judicial review, sworn on 10 March 2017.

39. Mr Tacon's focus in March 2016 was on ensuring that any monies that had been deposited by the appellants' customers in their accounts with the appellants after the start of the conservancy on 12 August 2013, and then on-lent to the parent banks after that date, would be fully available for access and repaid in full. He became concerned when he took over the management of the appellants that no mechanism had been put in place after August 2013 to keep track of these post-conservancy payments.

40. Mr Tacon had a meeting with the receiver on 27 April 2016 and he summarised what had been said at the meeting in a letter to the receiver he sent the following day. In that letter, Mr Tacon recorded that the receiver had said that he considered "the balances [ie on the appellants' accounts with the parent banks] to represent 'placements' rather than deposits" so that no protection would be afforded to the appellants unlike the other depositors in the parent banks. The letter then covered a variety of other matters, closing with a request that the receiver advise him if he did not agree with any of the matters set out in the letter. The receiver did not respond to that letter.

41. Mr Tacon wrote again to both the receiver and the new bank on 20 July 2016 setting out in more detail his arguments that the accounts that the appellants held with the parent banks were indeed deposits within the scope of the resolution plan. He noted that the term "deposit" was not defined in the Banking Act 2015 and so bore the normal common law meaning of a sum of money paid to a bank on terms that it will be repayable on demand or after notice. It was clear, Mr Tacon said, that the monies advanced to the parent banks by the appellants were advanced on the basis that they were intended to be repayable on demand from accounts held by the appellants with the parent banks. He then referred to the audited accounts of the Caribbean Bank in 2012 and 2013 which supported this analysis. Mr Tacon's letter to the receiver and the new bank of 20 July concluded:

> "By reason of the matters set out above, and contemporaneous materials to which reference is made, we consider that it is clear that claims made by [the appellants] against either of the parents in respect of the intra-group advances and CCB deposits would be claims in respect of deposits, and qualify [the appellants] as depositors, for the purpose of section 152(2) of the 2015 Act. The contemporaneous evidence as to the treatment of the intra-group advances and CCB deposits is overwhelming.

> We would be grateful for your confirmation as to whether the parents and [the new bank] agree with this analysis and, if not, ask that you identify (i) the basis upon which the analysis is disputed; and (ii) any contemporaneous evidence relied upon as contradicting the materials referred to above."

The receiver did not reply to that letter.

42. In parallel with putting forward his arguments as to why the accounts held by the appellants were deposits within the scope of the resolution plan, Mr Tacon also sought to protect the appellants' position as potential creditors claiming in the receivership of the parent banks in case there were to be any funds to be distributed among creditors outside the resolution plan. He therefore also wrote to the receiver on 3 August 2016 asking for more information about lodging proofs of claim as creditors in the parent bank receiverships—something clearly of importance if the appellants did not in fact benefit from the resolution plan either at all or for any monies in their accounts in excess of $2.8 million. The receiver did not reply to that letter either.

43. On 25 August 2016, Mr Tacon wrote two letters to the receiver chasing for responses to both strands of his correspondence. Again, there is no reply to either of those letters in the papers before the Board.

44. On 15 September 2016, solicitors acting for the new bank wrote to Mr Tacon telling him that the appellants' accounts had not been included in the resolution plan, and so the appellants did not have any accounts with the new bank. The letter said:

> "The accounts of [the appellants] to which your letters refer (defined as 'intra-group advances' and 'CCB deposits') were not transferred to [the new bank] under the purchase and assumption agreements, and as far as our client is aware, they remain with [the parent banks]. As such, (i) any questions that your clients might have about those accounts should properly be directed to the receiver of [the parent banks]; and (ii) your clients are accordingly not depositors of [the new bank] for the simple reason that they have no accounts with our client (whatever the nature of their accounts with [the parent banks] might have been)."

45. On 5 October 2016 Mr Tacon wrote at length to the Chief Minister. In that letter he referred to the receiver's assertion at the early meeting that the appellants' accounts with the parent banks were "placements" rather than deposits. He also said that the appellants had recently become aware of the existence of the DPTs established under the

Obligations Act. He requested copies of the trust deeds, the names of the trustees, and an account of the monies paid into and out of the trusts. He said:

> "Despite our best efforts to obtain a better understanding of the trusts, we have been unable to ascertain any information over and above that which is stated on the face of the Obligation[s] Act, articles in the local press, and short extracts on the ECCB's website. No clarification concerning the status of our clients' deposits and which regime they fall within has been forthcoming from any of the Government of Anguilla, the Honourable Minister of Finance, the ECCB, [the new bank] (beyond the brief assertion set out above) or Mr Moving as receiver of the parents."

46. Mr Tacon then set out in that letter his arguments as to why the appellants were "depositors" and "large depositors" for the purposes of the legislation. As such, he asserted, they were entitled to receive information regarding the DPTs. Referring to public statements made by the Chief Minister, he said:

> "We do not believe that it can have been the intention that [the appellants'] deposits alone should be the only deposits that were neither transferred to [the new bank] nor entitled to protection under and payment from the trusts. If in fact [the appellants'] deposits are the exception to the above scheme, such that they alone are the only deposits that were neither transferred to [the new bank] nor entitled to protection under and payment from the trusts, then we regard this treatment as being wholly unfair and inequitable. For the avoidance of doubt, we hereby reserve all our legal rights to take steps to redress any exclusion of the deposits from being afforded any of the protection described above, including. without limitation, judicial review or administrative proceedings."

47. On 3 November 2016, the Attorney General responded on behalf of the Chief Minister to Mr Tacon's letter. He said he was unable to provide the information sought. As regards Mr Tacon's arguments about whether the appellants were depositors or not, he said that it was "obvious" from the terms of the legislation that the procedure for dealing with claims was for the ECCB and the receiver: "It is plainly not a matter for the Government of Anguilla." The Attorney General went on:

> "As an essential building block of your case that your clients are 'large depositors' is entirely dependent upon your claim that

> they are also 'depositors' pursuant to section 152 of the [Banking Act 2015], it therefore follows that you must first seek a determination from Mr Gary Moving, the receiver and/or the [ECCB], in respect of whether or not your clients are 'depositors' for the purposes of the 2015 Act. That is not a matter for the GOA [Government of Anguilla]."

48. Mr Tacon did not accept the Chief Minister's assertion that the question of the correct classification of the appellants' deposits was a matter solely for the "determination" of the receiver. On 15 November 2016, Mr Tacon therefore wrote further letters. One letter was sent to the receiver. In that letter Mr Tacon referred back to his initial letter of 20 July 2016, to the arguments he had set out there and to the fact that he had not received any response whatsoever from the receiver to that letter. He asked for a substantive response. Under the heading "LETTER BEFORE ACTION: JUDICIAL REVIEW", Mr Tacon described the decision taken by the receiver which would be challenged as being the decision to conclude that the appellants' deposits are "placements" and thereby to conclude that they are not "depositors" within the meaning of the Banking Act 2015. The receiver did not reply.

49. On 15 November 2016 Mr Tacon also wrote to the Chief Minister directly in response to the Attorney General's letter of 3 November 2016. He referred to having set out his analysis of the meaning of "deposit" in earlier letters to the receiver. He said: "Unfortunately the receiver has not responded to that analysis, nor indeed to the many letters we have written to him since the receivership began."

50. In that letter, Mr Tacon reiterated his view that the proper interpretation of the legislation was a matter for the government and not dependent on a prior determination by the receiver. He set out the history of the government's involvement with the setting up and funding of the DPTs, the enactment of the necessary legislation and the "legitimate expectations" created by the government's public statements that customers' deposits would be protected. He asserted that the government was "both capable and legally required to state whether or not a party claiming to be a 'large depositor' entitled to protection under the trusts is such in its view." Mr Tacon then said that if the government refused to express a view, that would be "tantamount to denying" that the appellants were depositors entitled to protection under the DPTs. Again, under the heading "LETTER BEFORE ACTION: JUDICIAL REVIEW" Mr Tacon set out the decisions of the government he intended to challenge.

51. On 14 December 2016 the Attorney General wrote to Mr Tacon, on behalf of the Chief Minister, in reply to the letter of 15 November 2016. He said that "Once more the GOA is not currently in a position to assist your clients." This was, the Attorney General said, because the questions raised must be addressed by the receiver, or various people other than the government:

> "Further, if you seek information in respect of the Depositor Protection Trust (DPT), whilst the GOA has statutory responsibilities in respect of the DPT, the functions you ascribe to the GOA are in reality functions for either the trustees of the DPT or the receiver and not the GOA. The DPT cannot be conflated with the GOA. Trustees of a trust hold property on trust as separate legal entities.
>
> Your letter repeatedly asserts that the GOA is deemed to have concluded that your clients are not depositors. The GOA has made no such determination. The GOA position remains that your clients should address the issue of whether you are a depositor with the receiver (as your letter impliedly accepts given your grounds for judicial review) or with the Eastern Caribbean Central Bank."

The Attorney General's letter went on to request more particularity as to the asserted claims for judicial review.

52. Mr Tacon replied to the Chief Minister by letter dated 2 February 2017. Mr Tacon said that the government's approach was obstructive and at odds with the duty of candour which, as a public authority, the Chief Minister owed in the context of judicial review proceedings:

> "We consider that potential judicial review defendants, such as yourself, should comply with proportionate requests for information and documentation made by claimants at the pre-action stage unless there is a good reason for them not to do so. We would urge you, with respect, not to continue to treat our inquiries in this matter as if it they were being made in the course of ordinary adversarial litigation between private parties."

53. In his 2 February 2017 letter to the Chief Minister, Mr Tacon again described the role that the government played in devising the resolution plan and asserted that this must have involved a determination at some point that the appellants would be excluded. That letter also raised an additional decision which Mr Tacon said would be challenged in any proceedings, namely the making of a Vesting Order under section 174 of the Banking Act 2015 transferring the parent banks' assets to the new bank. Mr Tacon said that that decision would be challenged in so far as it failed to transfer the appellants' balances. Mr Tacon again requested copies of the trust deeds and the names of the trustees. He also requested copies of any Vesting Order and of any agreements forming part of the

transactions transferring assets and liabilities of the parent banks to the new bank. The Chief Minister did not reply to that letter.

54. Also on 2 February 2017, Mr Tacon wrote a letter before action to the ECCB. He referred to the fact that in previous correspondence, the ECCB had refused to disclose documents requested, including the resolution plan and the PAAs, and had invited Mr Tacon "to direct all future inquiries to the receiver". Mr Tacon recorded that he had sent a number of letters to the receiver but had received no response. He pointed out that the ECCB was responsible for oversight of the receiver, pursuant to section 140 of the Banking Act 2015 (see para 15 above). He referred also to the press release issued by the ECCB on 22 April 2016 and set out the appellants' arguments as to why they were depositors for the purposes of the resolution plan. He enquired whether the ECCB had directed the receiver to enter into the PAAs on terms which excluded the appellants' balances from the liabilities transferred, or had approved the making of a Vesting Order on terms which excluded the parent banks' liabilities to the appellants. He set out in some detail the grounds on which he challenged any such decisions.

55. In that letter to the ECCB Mr Tacon also raised the duty of candour as requiring the ECCB to comply with proportionate requests for information and documentation at the pre-action stage unless there was good reason for them not to do so. He therefore asked them to confirm that they made the decisions described and to provide him with documents including the PAAs and documents evidencing recommendations and decisions they had made.

56. The ECCB replied to Mr Tacon by letter dated 17 February 2017. Under the heading "Letter before Action: Judicial Review", the letter comprised three sentences as follows:

> "We refer to your letter dated the 2 February 2017, concerning the subject at caption.
>
> We have carefully reviewed your letter and considered its contents. In particular, we have noted the assumptions made by you in relation to the matters discussed in the letter.
>
> We hereby advise that we find ourselves unable to accede to the requests made in your letter."

57. On 10 March 2017, Mr Tacon lodged the appellants' claim for judicial review.

3. The proceedings and the judgments below

(1) How the appellants' judicial review claim is put

58. The application for judicial review alleges that:

(1) All the contemporaneous evidence demonstrates that at all material times the appellants were depositors of the relevant parent banks and that, accordingly. their accounts fell within the scope of the policy that depositors should be protected from loss.

(2) Instead of affording the appellants the same treatment reserved for depositors, the respondents took decisions the cumulative effect of which was to exclude the appellants' deposits from protection up to $2.8million per deposit by not transferring liability for those deposits from the parent banks to the new bank and to exclude the balance of each deposit over that figure from protection under the DPTs.

(3) Contrary to the duty of candour incumbent on public authorities, the Chief Minister has refused to state whether responsibility for determining eligibility for a distribution from the DPTs and/or distributing monies to beneficiaries lies with him or the receiver. The receiver has failed to respond to any correspondence regarding the appellants' deposits.

(4) Either the receiver or the Chief Minister "has now plainly taken the decision" that the appellants are not to benefit from the resolution plan. If that is on the basis that their accounts are not deposits for the purposes of the plan then that decision was unlawful.

59. Section D of the application sets out in more detail the decisions which it is alleged each of the respondents has taken, and Mr Tacon explained in his affidavit the evidence supporting these. In summary:

(1) Two decisions of the ECCB are challenged, namely the decisions to direct the receiver to omit liability for the appellants' deposits from the PAAs and then from the Vesting Orders.

(2) Two decisions of the Chief Minister are challenged, namely the decision to make the Vesting Orders excluding liability for the appellants' deposits and the

decision that their deposits "are not deposits and are therefore ineligible for protection under the DPTs".

(3) Two decisions of the receiver are challenged, namely the disposal of the parent banks' assets and liabilities by entering into the PAAs which excluded liability for the appellants' deposits and, as with the Chief Minister, the decision that their deposits do not qualify for protection.

60. The decisions set out are then alleged to be unlawful on various grounds including that they were ultra vires the respondents' powers under the Banking Act 2015, particularly the powers in section 142(2) or section 174(3); that they involved unjustified unfavourable treatment compared with the treatment of other depositors; and that the statements made by the ECCB and the Chief Minister on 22 April 2016 had raised a legitimate expectation that the appellants' deposits would be fully protected, the appellants had relied on those statements to their detriment and that expectation had been frustrated.

61. It was expressly alleged that in so far as a respondent had decided that the appellants' accounts did not comprise "deposits", that was an error of law. Further the appellants alleged that if it was properly the function of the receiver to adjudicate on whether they were depositors, then his decision that they were not "was *Wednesbury* unreasonable insofar as it was not within the range of reasonable decisions open to him to make properly directing himself as to the relevant law": para 63.

62. The application for judicial review included requests for disclosure of documents including the DPT deeds and documents evidencing the direction given by the ECCB to the receiver to enter into the PAAs. The relief sought included certiorari orders quashing the various decisions and declarations that the appellants' accounts were deposits and that they are entitled to the protection of the resolution plan.

63. The ECCB and the receiver did not initially oppose the grant of leave. The Board does not place any weight on their initial decision not to contest.

(2) The judgment of Innocent J

64. The hearing before Innocent J took place on 12 December 2019, and judgment was handed down on 3 February 2020. The judge recorded at para 12 that the leave application was not opposed by the receiver or the ECCB so that he was only concerned with the application as it related to the Chief Minister and the Attorney General. Dealing first with the Attorney General, the judge said that it appeared that the Attorney General had played no part in the alleged decision-making process forming the basis of the leave application

and the Attorney General was not a necessary and proper party: para 19. He then considered the application to substitute ExCo for the Attorney General. He dismissed this application on the basis that ExCo was not a party to the DPTs and was not a trustee. ExCo was therefore not responsible for determining eligibility for distribution from the DPTs: para 23.

65. Turning to the Chief Minister, the judge said that the appellants challenged the decision to grant the Vesting Order and the decision that they were ineligible for protection under the DPTs. The question before him was whether the Chief Minister, as Minister of Finance "made any decision or performed any act that was outside his statutory remit under the legislative regime that would substantiate a claim for judicial review": para 36. He said that the tenor and the wording of the legislative scheme supported the view that the conduct of the receiver was subject to the direction and general oversight of the ECCB and not the Finance Minister. The court, therefore, had great difficulty accepting that there was any decision on the part of the Chief Minister to exclude the appellants' deposits from the resolution plan. This was entirely a matter for the receiver and the ECCB; a view which was, he said, supported by the evidence of Dr Harrigan.

66. At para 47, the judge referred to the appellants both being "offshore subsidiaries" of the parent banks which were put into administration under the TCOBA and the Financial Services Commission Act. Having examined the provisions of those Acts, he noted that there was no evidence of a PAA having been made transferring liability for the appellants' deposits to the new bank. He was therefore constrained to hold that those deposits were not part of the resolution plan, and therefore did not fall to be transferred pursuant to section 142 of the Banking Act 2015, and consequently could not have been transferred to the new bank under any PAA. This meant, he said, that the deposits had been excluded "by operation of law and not by virtue of any readily discernible decision" of any of the respondents (para 55).

67. He then turned to the proceedings against the ECCB and the receiver. He considered that the statutory provisions showed that eligibility for distribution was their sole responsibility. Despite their non-opposition to the grant of leave, he considered that it was the court's task to consider whether the threshold for the grant of leave to apply for judicial review against them had been met.

68. The judge held that the application for leave was premature against those respondents. This was because there was no Vesting Order in existence and the provisions in section 174 of the Banking Act 2015 "have not crystalized": para 58. Further, he held that section 187 of the Banking Act 2015 appeared to grant immunity to the receiver with respect to acts performed by them in good faith. Bad faith had not been alleged. The allegations of discriminatory conduct were not supported by the material presented to the court and there had been no constitutional challenge. He dismissed the appellants'

disclosure application on the basis that there was no evidence that the Vesting Order of which disclosure was sought existed and the application amounted, he said "to nothing more than a fishing expedition": para 77.

69. He therefore held that the issues raised did not present a good arguable case with a reasonable prospect of success. The Chief Minister and the Attorney General were struck out as parties to the proceedings and the application for leave as against the receiver and the ECCB was refused.

(3) The judgment of the Court of Appeal

70. The appellants' appeal against that order was heard by the Court of Appeal in January 2021. The receiver and the ECCB at this stage filed submissions opposing the appeal. Judgment was handed down on 30 July 2021. The judgment was given by Henry JA (Ag) with Pereira CJ and Farara JA (Ag) concurring.

71. The Court of Appeal set out the facts, the relevant statutory provisions and a summary of the appellants' grounds of appeal. At para 51 they stated that the judge had been required to exercise a judicial discretion in determining whether the threshold for granting leave had been crossed. That test was whether the appellants had set out an arguable ground for judicial review of the impugned decision that had a realistic prospect of success. They then said that the appellants, by their appeal, were inviting the court to interfere with the judge's exercise of his discretion to deny leave:

> "53 … It is trite that an appellate court will interfere with a judge's discretion only if satisfied that the judge erred in principle by failing to take into account or giving too little or too much weight to relevant factors, or by having regard to irrelevant factors; and by reason of such error in principle, the learned judge's decision exceeded the generous ambit within which reasonable disagreement is possible and is therefore plainly wrong."

They cited the decision of Floissac CJ in *Dufour v Helenair Corporation* (1996) 52 WIR 188 as authority for that principle.

72. With that principle in mind, the court then turned to the appeal against the striking out of the Attorney General as a respondent to the claim. The court held at para 63 that a careful review of the case advanced by the appellants revealed that nowhere in their application or evidence did they allege that the Attorney General had made any decision, taken any action or refrained from taking a relevant decision or action in relation to the

exclusion of their deposits. It was not appropriate simply to join the Attorney General as a representative of the government; the correct defendant is the official who made the impugned decision. They held that the judge's decision to strike out the Attorney General as a party could not be faulted: para 66.

73. The court then considered the significance of the fact that the Vesting Orders had not been made at the time of the hearing before Innocent J. At para 101, the court reiterated its view of how it should approach these issues:

> "I have already mentioned the appellate court's reluctance to override the exercise of a trial judge's discretion unless it is determined that he has erred in principle and that such error led to a decision which is manifestly wrong. I must add that this court has emphasised repeatedly that an appellate court will not lightly overturn a judge's exercise of discretion or his findings of fact and his evaluation of them including the weight to be attached to them, except where such findings are not supported by the evidence."

74. The Vesting Orders by that time produced to the Court of Appeal were dated 26 June 2020 and there was no evidence that there had been any earlier Vesting Orders. The hearing before Innocent J was in December 2019. The court held that the judge's decision that the proceedings against the Chief Minister were premature was correct: para 109.

75. They then turned to what was perhaps the crux of the appellants' case, namely that someone had decided to exclude them from the transfer of deposit accounts to the new bank and from the DPTs. As part of this argument, the appellants criticised the judge for referring to them as "offshore companies" and their accounts as "offshore deposits"—a misunderstanding of the factual basis of their claim: see paras 124 onwards. The court concluded that the judge was merely using the term as shorthand apt to cover domestic banks engaging in offshore banking business.

76. The court held that the judge had used these terms in the context of concluding that because the appellants were regulated under the Financial Services Commission Act and TCOBA and Mr Tacon had been appointed to be their administrator under that legislation, the judge had "reasoned that the receiver had no authority under the resolution plan to deal with deposits over which the administrator had been granted exclusive control by court order": para 137. They then examined whether that conclusion was correct. They referred to the relevant legislation and the orders appointing Mr Tacon as vesting the management of the appellants exclusively in his control. That led the judge, they said, to the conclusion that "it was not by reason of any decision by the Chief Minister, the receiver or the ECCB that the subsidiary banks' deposits with the parent banks were

excluded from the DPTs, but rather by operation of law" (para 145). This appears to be because any dealing with their deposits would require a direction of the court or of Mr Tacon. The judge's conclusion that the exclusion of the appellants was brought about by operation of law was, they said, supported by the evidence and did not constitute a blatantly wrong error in principle: para 152.

77. The Court of Appeal then considered the position of ExCo (paras 154 onwards) and whether that had, as the appellants asserted, played a role in determining eligibility of beneficiaries under the DPTs. Again, the Court of Appeal concluded that the appellants had not identified any specific decision by ExCo that could be made the subject of judicial review. The judge's refusal to substitute ExCo in place of the Attorney General could not be faulted on the ground that he erred in principle and as a result made a decision which was manifestly wrong. He made no error in law or fact by so ruling.

78. Finally, the Court of Appeal considered whether the judge had been wrong to refuse leave as against the receiver and the ECCB, who had not opposed the grant of leave. The appellants argued, amongst other things, that given that the receiver and the ECCB were the only people responsible for the PAAs and the determination of eligibility under the DPTs, it had been illogical for the judge to refuse leave: para 175. The Court of Appeal rejected any suggestion that the judge had found as a fact that the signatories of the DPTs were the only persons responsible for the decisions regarding eligibility for the DPT benefits. On the contrary, the judgment had contained no finding that the ECCB and the receiver had made any relevant decision. Again, they interpreted the judgment as concluding as follows:

> "183. The learned judge was thereby signifying that in face of the protection order made by the other court, the receiver had no authority to execute a PAA effecting transfer of the subsidiary banks' deposits to [the new bank] or to a DPT and could not do so without instructions from the administrator or his duly appointed designate. His conclusion that the application for leave was premature as against the receiver in relation to the transfer and deposits decisions and against the ECCB in relation to the direction and recommendation decisions is unimpeachable. There was simply no evidence that they had made those decisions."

79. Further, they held, once a determination had been made that the proposed respondents had not made any relevant decision "consideration of the duty of candour on the part of the receiver and the ECCB did not arise": para 186.

4. The grounds of appeal

80. The appellants say that their overarching ground of appeal is simply that the courts below were wrong to refuse the application for leave for judicial review against the four proposed respondents, that is the ECCB, the receiver, the Chief Minister and ExCo.

81. In summary, the individual grounds relied on are as follows:

(1) Ground 1: the Court of Appeal erred in approaching its task as being a review of the reasoning of Innocent J. The Court of Appeal should have considered afresh whether leave should be granted, applying the appropriate threshold, namely that there is an arguable case.

(2) Ground 2: the court erred in its conclusions as to whether either the Chief Minister or another suitable respondent representing the government had made relevant decisions to exclude the appellants from the resolution plan.

(3) Ground 3: the court erred in concluding that the claim against the Chief Minister had been premature because the Vesting Orders had not been made until after the hearing of the application at first instance. Given that the court's task was to consider the application afresh (see Ground 1), the court should have addressed the factual position as it stood at the hearing before it, by which time the Vesting Orders had been made.

(4) Ground 4: the court was wrong to hold that neither the ECCB nor the receiver had taken relevant decisions.

(5) Ground 5: the court was wrong to conclude that the appellants' deposits with the parent banks were not eligible for protection under the resolution plan under the applicable legislation.

(6) Ground 6: finally, the court erred in concluding that it was for the appellants to adduce evidence that each of the respondents had taken the decisions complained of. In the light of the failure of the respondents to engage with the appellants and to provide adequate information to the court in compliance with their duty of candour, the court should have reasoned that any lack of evidence concerning those decisions was due to the respondents' lack of candour, which was in and of itself a reason to grant leave. Alternatively, at a minimum, it was a reason to order the respondents to provide further disclosure before deciding whether to grant leave.

82. The Board will group the Grounds and address them as follows. The Board will consider first Grounds 1, 3 and 6, since those relate to the overall approach adopted by the Court of Appeal to its task in considering the appeal from the refusal of leave. The Board will then consider the substantive reasons why leave was refused. Finally, the Board will consider, if necessary, the appropriate respondents to the application.

(1) Grounds 1 and 3: the role of the appellate court

83. In order to understand the role of the Court of Appeal on an appeal against the refusal of leave to apply for judicial review, it is first necessary to understand the nature of the relevant criterion for granting leave. The test to be applied, both at first instance and on appeal, has been explained many times. It will suffice to cite two authorities. In *Sharma v Brown-Antoine* [2006] UKPC 57; [2007] 1 WLR 780, Lord Bingham of Cornhill and Lord Walker of Gestingthorpe stated at para 14:

> "(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy".

More recently, in *Attorney General of Trinidad and Tobago v Ayers-Caesar* [2019] UKPC 44, Lord Sales, giving the judgment of the majority of the Board, said at para 2:

> "The test to be applied is the usual test for the grant of leave for judicial review. The threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether [the applicant for judicial review] has an arguable ground for judicial review which has a realistic prospect of success: see governing principle (4) identified in *Sharma v Brown-Antoine* [2006] UKPC 57; [2007] 1 WLR 780, para 14. Wider questions of the public interest may have some bearing on whether leave should be granted, but the Board considers that if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage."

As Lord Sales said, this is a low threshold. It operates as a filter to exclude cases which are unarguable.

84. Deciding whether there is an arguable ground for judicial review is not an exercise of discretion. Accordingly, when the judge in the present proceedings refused leave to apply for judicial review on the ground that there was no arguable ground for judicial review with a realistic prospect of success (or, as he put it, possibly pitching the test somewhat higher, "a good arguable case with a reasonable prospect of success"), he was not exercising a discretion. It follows that, on the appeal against his decision, the Court of Appeal was not reviewing an exercise of discretion. It should not, therefore, have confined itself to the limited grounds on which the exercise of discretion might be reviewed on appeal, but should have considered whether the judge had erred in concluding that there was no arguable ground for judicial review. If it concluded that he had, it should then have re-considered the matter for itself. In approaching the appeal as a review of the exercise of discretion, the Court of Appeal accordingly erred in law. It is therefore necessary for the Board to consider the question anew.

85. We should add that, although in their written submissions the receiver and the ECCB argued that leave should be refused on the ground that the appellants had an alternative remedy—an argument which would raise an issue involving the exercise of discretion, as indicated in the passage cited above from *Sharma v Brown-Antoine*—that contention was expressly departed from at the hearing of the appeal.

86. Turning to the question of prematurity, it may often be appropriate for the court to refuse permission to apply for judicial review in situations where the act or decision under challenge has not yet occurred. That may be the case, for example, where the decision-maker has not yet reached a concluded view, or where the court will have only incomplete information before it until the decision has crystallised. In such a case, the court may consider that the challenge has been brought too soon, and that it will be necessary to wait and see what emerges. However, if the process or course of conduct on which the decision-maker has embarked is clear, then it may be that a challenge to its power to embark upon that process or course of conduct need not be postponed until it has been completed. In particular, where the decision-maker has already adopted a position to which the anticipated act or decision will subsequently give effect, it may be appropriate for the court to undertake judicial review in advance of that proposed or intended action, as for example in *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531, where the court undertook a review of proposed regulations, and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, where the challenge was to a proposal to give notice of withdrawal from the EU without legislative authorisation.

87. In the present case, the issue of concern to the appellants is the exclusion of their accounts with the parent banks from the protection given to other depositors under the resolution plan, and their consequent exclusion from the legislative and other arrangements which gave effect to that plan by transferring deposits up to $2.8 million per deposit to the new bank, under the Vesting Orders, and protecting the balance of each deposit under the DPTs. The decision that the appellants were not to benefit from the

resolution plan is challenged as unlawful. Consequently, the various decisions giving effect to the resolution plan, including the decision to make Vesting Orders which omitted the appellants' deposits with the parent banks from the scope of the liabilities transferred to the new bank, are also challenged.

88. In those circumstances, the fact that the Vesting Orders had not been made by the time the present proceedings began did not render the proceedings premature. On the appellants' case, the orders were the means of implementing unlawful decisions that had already been made. The fact that, as it turned out, the orders had not been made at the time when the proceedings were begun might necessitate some amendment of the appellants' pleadings, but it did not materially affect the basis of their challenge to the respondents' actions, or place the court under any difficulty in deciding whether that challenge was well founded. The critical aspect of the Vesting Orders, namely the exclusion of the appellants' deposits, was already a clearly determined policy, whose lawfulness was capable of being decided in advance of the orders being made.

(2) Ground 6: the duty of candour

89. Judicial review proceedings are not conducted in the same way as ordinary disputes between private parties concerned to protect their competing interests. The supervisory jurisdiction is designed to protect the public interest in the lawful use of the powers conferred under public law, as well as the private interests of those who may be affected by the abuse of those powers. It is intended to secure the constitutional value of the rule of law, to which public authorities, and the other parties to judicial review proceedings, are or should be committed. In consequence, the parties to such proceedings are expected to ensure that the court is in possession of all the information which it requires to decide the case correctly. This places a particular obligation upon parties in situations where it is not possible for the court to assess the merits of an issue that has been raised unless the parties in question (usually the public authority against whom the claim is brought, but potentially another party to the proceedings) furnish the court with information which they alone are in a position to provide.

90. This obligation, usually described as the duty of candour, is well established. For example, in *Bahamas Hotel Maintenance & Allied Workers Union v Bahamas Hotel Catering & Allied Workers Union* [2011] UKPC 4, Lord Walker, giving the judgment of the Board, said at para 23 that judicial review proceedings "are meant to be conducted with cooperation and candour". In *Graham v Police Service Commission* [2011] UKPC 46, Sir John Laws said at para 18 that it "is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision". More recently, in *Pyaneandee v Leen* [2024] UKPC 27, Lady Simler said at paras 42 and 47 (quoting Laws LJ in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, para 50) that a respondent

to a judicial review claim is under "a very high duty … to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide". Breach of the duty may (but will not necessarily) lead to the court drawing inferences which are adverse to the party in breach (*R v Civil Service Appeal Board, Ex p Cunningham* [1992] ICR 816, 822–824), as well as to the grant of orders for disclosure, or orders for costs to mark the court's disapproval of the conduct of the party concerned.

91. Although the duty of candour was said in some older cases to arise once leave to apply for judicial review had been granted, more recently it has been held that the duty applies at the stage of an application for leave: *Peerless Ltd v The Gambling Regulatory Authority* [2015] UKPC 29, para 21, where the issue was a lack of candour on the part of the applicant. The same view has been taken in relation to the respondent in a number of English cases: see, for example, *R (Terra Services Ltd) v National Crime Agency* [2019] EWHC 1933 (Admin), paras 9 and 14. It was also accepted by all parties before the Court of Appeal in the present case, as was recorded in para 67 of the judgment. That approach is in accordance with principle: the reasons underlying the recognition of the duty of candour—the importance of enabling the court to perform its function in judicial review proceedings of protecting the rule of law, and the fact that material information will often be solely within the knowledge of the respondent—can be relevant at the leave stage as well as after leave has been granted. Indeed, although no duty of candour is owed to the court until judicial proceedings have been commenced (*Marshall v Deputy Governor of Bermuda* [2010] UKPC 9, para 30), since it is only then that the court requires the material needed to make an informed decision, similar considerations can be relevant in the parties' dealings with each other at the pre-action stage, as a matter of good practice. That is recognised in England and Wales in the Pre-Action Protocol for Judicial Review under the CPR (updated 2021), para 13, and in the Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings issued by the Treasury Solicitor in 2010, para 1.2, endorsed by the Court of Appeal of the Eastern Caribbean Supreme Court in *Burke v Sam,* SVGHCVAP2014/002, 15 September 2015, para 18.

92. At the same time, the leave stage is not intended to be a full consideration of the application for judicial review: its purpose, as explained earlier, is to filter out cases which are unarguable, or which on other grounds should not be permitted to proceed. Accordingly, depending on the circumstances, what the duty of candour entails at that stage may in consequence be less expansive than it would be at the stage of a full hearing after permission has been given. What the court requires at the initial stage is sufficient information to be able to decide the leave application on an accurate basis. In broad terms, the claimant and the court are likely at that stage to require such information as is necessary to understand why the decision under challenge was made, and to identify the issues which may arise in relation to that decision. In the present case, where a number of public bodies and office-holders were involved in the decision-making process, and the roles which each of them played in that process are unclear, the claimant and the court also require information enabling them to identify the relevant decision-makers at each stage of the process.

93. The court can take account of a lack of candour in deciding whether to grant permission: see, for example, *Peerless Ltd v Gambling Regulatory Authority,* para 24. An apt illustration in the present context is the Irish case of *Treasury Holdings v National Asset Management Agency* [2012] IEHC 66, where the applicants complained, at the stage of an application for leave, about the respondent's failure to put before the court the documentation relevant to the decision under challenge. Finlay Geoghegan J said that the applicants "should not be prejudiced by the absence before the court of relevant documents such as the record of the board decisions and any recommendation or other document considered by the board", or "by a lack of clarity as to by whom or when the important recommendation was made" (para 129). Those observations resonate in the context of the present case. As they make clear, the court will not permit public bodies to withhold crucial information or documents and then submit to the court, as the respondents did in the present case, that the applicant for judicial review has consequently failed to establish an arguable case.

94. As has been explained, Mr Tacon wrote to each of the respondents prior to the commencement of these proceedings with requests for information concerning the decisions relevant to the appellants' exclusion from the protection afforded to other depositors with the parent banks. In particular, he wrote to the receiver of the parent banks, (a) requesting confirmation that he had decided that the balances on the appellants' accounts with the parent banks were "placements" rather than deposits, with the consequence that the appellants were not entitled to payment as depositors under section 152(2) of the Banking Act 2015, (b) putting forward legal and factual arguments in support of the view that the appellants were properly classified as depositors, and (c) asking for any basis, in law or in fact, on which those arguments were disputed. His letters received no response: see paras 40 and 41 above. Further repeated requests for a response to that correspondence, including a formal letter before action, were also ignored: see paras 42, 43 and 48 above.

95. Mr Tacon also wrote several times to the Chief Minister and Minister of Finance, requesting information about the DPTs, including copies of the trust deeds and the identities of the trustees, and about the government's role in the decisions which had led to the exclusion of the appellants from the protection afforded to depositors under the arrangements with the new bank and the DPTs. The Attorney General, replying on behalf of the Chief Minister, declined to provide the information requested, and contended in effect that the government played no role in the matter, notwithstanding its involvement in devising and implementing the resolution plan: see paras 45–47 and 49–51 above. Mr Tacon repeated those requests in later correspondence, and also requested copies of any Vesting Order and of any agreements forming part of the transactions transferring assets and liabilities of the parent banks to the new bank. He received no reply: see paras 52–53 above.

96. Mr Tacon also wrote a number of times to the ECCB. In response, it declined to provide him with any of the documents requested, including the resolution plan, the

PAAs, any recommendations made to the Minister of Finance in relation to Vesting Orders, and any directions given to the receiver to enter into the PAAs. It also declined to provide any of the information requested, including information as to measures taken by the ECCB under its statutory powers in respect of the receivership of the parent banks and the making of Vesting Orders: see paras 54 and 55 above.

97. The respondents were no more forthcoming, either to the appellants or to the court, after the judicial review proceedings had been commenced. Neither the receiver nor the ECCB filed any submissions, affidavit evidence or documentation; but neither of them opposed the grant of leave. The other respondents opposed the grant of leave, and relied on affidavits of Dr Harrigan, filed on behalf of the Chief Minister, and on submissions filed on behalf of the Chief Minister, the government and ExCo. The affidavits explained that Dr Harrigan had executed the DPTs on behalf of the government, on the instructions of ExCo, and disclosed the names of the original trustees, but otherwise contained no new information of significance. In response to the first affidavit, the appellants wrote to the Attorney General by letter dated 6 November 2019 (about a month before the hearing of the leave application), asking once more for the PAAs, and for answers to questions concerning (1) the decisions not to transfer liabilities to the appellants under their accounts with the parent banks to the new bank, (2) the date of any Vesting Order, (3) the decisions relating to "put back" (see para 33 above), (4) the identity of the minister responsible for presenting the paper for the DPTs to the government or ExCo, (5) the identity of the person who decided to exclude the appellants from the DPTs, and (6) the capacity in which the person made that decision. The response from the Attorney General's chambers, dated 8 November 2019, provided none of the documents or information requested, and was entirely opaque and unhelpful.

98. In their application for leave to apply for judicial review, the appellants sought an order for disclosure of (1) the deeds establishing the DPTs, (2) the identity of the trustees, (3) any formal recommendation made by the ECCB to the Chief Minister (in his capacity as Minister of Finance) in respect of a Vesting Order, (4) any documents evidencing the direction given by the ECCB to the receiver to enter into PAAs pursuant to its powers under section 142 of the Banking Act 2015, (5) the relevant Vesting Order, (6) the PAAs, and (7) any document setting out the resolution plan.

99. Although the appellants complained of a lack of candour by all of the respondents in their submissions to the judge, he did not mention the issue in his judgment. He refused to make an order for disclosure, on the basis that "the leave application clearly does not point to any discernible decision", and described the request for disclosure as "nothing more than a fishing expedition" (para 77). The Board cannot agree with that comment. For the reasons explained below, the Board considers that the appellants had pleaded an arguable case. It is unsurprising that their pleadings were lacking in detail, particularly in relation to decisions and decision-makers, and were in some respects based on reasonable but mistaken assumptions, given the wall of silence with which they were confronted.

100. The position was much the same at the hearing before the Court of Appeal. At that stage, the receiver and the ECCB made legal submissions in support of the refusal of leave, but did not provide any information or documentation. The appellants renewed their application for disclosure, adding to the material sought the information which they had sought in their letter of 6 November 2019 to the Attorney General (para 97 above). In their judgment, the Court of Appeal focused on disclosure rather than candour, noting that disclosure would be ordered only to the extent necessary to dispose of the issues fairly and justly. They did not consider it necessary in the case before them, and accordingly the application for disclosure was refused. The Board would observe that the normal approach to disclosure in judicial review proceedings reflects the practice of the parties in complying with their duty of candour. Where that duty has been complied with, orders for disclosure are not usually required, although they can and should be made where that is necessary for the fair and just disposal of the case. Where such compliance is absent, on the other hand, the court may be much readier to make orders for disclosure, since they may be essential if justice is to be done. That was the position in the present case.

101. The extent of each individual respondent's involvement in the decisions under challenge remains unclear, largely as a consequence of the non-disclosure of the relevant information and documents. Nevertheless, it is reasonable to infer from the material presently before the Board that the Chief Minister, the government and ExCo, the receiver and the ECCB were all involved in one way or another in the process of decision-making which resulted in the exclusion of the appellants from the protection afforded by the transfers to the new bank and by the DPTs. Their failure not only to respond meaningfully, or at all, to the appellants' requests for information, but also to withhold most of the relevant information and documentation from the court, displays a troubling failure to comply with the duty of candour which is incumbent upon all parties to proceedings of this nature. In *Marshall v Deputy Governor of Bermuda*, para 27, the Board cited a passage from the judgment of Sir John Donaldson MR in *R v Lancashire County Council, Ex p Huddleston* [1986] 2 All ER 941, 945 which seems to the Board to be apt to the present proceedings:

> "The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why."

102. The Board concludes that the duty of candour was not fulfilled in these proceedings. As explained above, that is a matter that can be taken into account when considering whether leave should have been given. The court will not permit public bodies to withhold crucial information or documents and then submit to the court, as the

respondents did in the present case, that the applicant for judicial review has consequently failed to establish an arguable case.

(3) Grounds 2, 3, 4 and 5: is there an arguable case for the grant of leave?

103. The main reason given by the courts below for refusing permission was that there was no reviewable decision taken by anyone to exclude the appellants because their exclusion was the result of the operation of law. As Innocent J put it at para 55 of his judgment:

> "55. In the circumstances, by operation of law and not by virtue of any readily discernible decision by the Chief Minister, the receiver or ECCB, were the deposits of [the appellants] held with [the parent banks] excluded from the DPT. They simply did not qualify in light of the existing statutory framework. Therefore, it would elude and preclude good reason and common sense to infer that the offshore deposits of [the appellants] were excluded from the DPT by any active decision on the part of the Chief Minister, the receiver or the ECCB."

104. What the Board understood by this was that the courts below concluded that the exclusion of the appellants' deposits followed on inexorably from the application of the relevant legislation, properly construed. If that were the case, then Mr Pievsky KC, appearing for the appellants, accepted that it is not open to them to challenge the myriad decisions of civil servants, ministers and others that went into drafting that legislation—those are all superseded by the wording of the primary legislation and that legislation, passed by the Assembly, is not amenable to judicial review. Similarly, if there is indeed primary legislation which, properly construed, rules out the inclusion of the appellants' accounts in the PAAs or the DPTs, then any steps taken by the receiver or by ministers putting the arrangements into effect are also not amenable to judicial review.

105. But if it is not clear that the primary legislation mandates the exclusion of the appellants' accounts then someone, somewhere, at some time must have made a decision that they should be excluded. The Board accepts that the appellants are entitled to bring judicial review proceedings first to identify by whom, where and when that decision was taken, secondly to be told the reasons for it and thirdly to challenge the validity and reasonableness of that decision on ordinary judicial review grounds.

106. It may be that the decision-maker misconstrued the legislation and thought that it did mandate their exclusion. If that was the basis of the decision, then the appellants are entitled to be granted leave on the basis that it is arguable that that construction of the

statute was wrong. The decision would then have been based on an error of law and it should be quashed.

107. It may be that the decision-maker construed the legislation as conferring a discretion on him either to include or exclude the appellants from the resolution plan and that decision-maker then decided to exclude them. If that turns out to be what happened, then the appellants are entitled to know what factors were taken into account by the decision-maker. They can then test whether those factors were rational. They also want to know whether the appellants have been treated differently from other customers of the parent banks without proper justification for that different treatment. There can be no doubt that they are entitled to seek permission on the basis that it is arguable that there was no good reason to exclude them.

108. There appear to be three different bases for the respondents' argument that the exclusion of the appellants from the resolution plan arises by operation of law:

> (a) the appellants were in administration at the time the resolution plan was implemented;
>
> (b) the appellants were not regulated under the Banking Act 2015;
>
> (c) the accounts the appellants held with the parent banks are not "deposits" but "placements" or something else which are not covered by the Banking Act 2015 and so are not capable of being transferred.

The Board considers each of these in turn.

(a) The status of the appellants in administration

109. This argument was relied on before the Board by the receiver and ECCB but was not relied on by the Chief Minister or ExCo.

110. As described above, the order placing the appellants in administration was made by the court on 22 February 2016 pursuant to section 31(2)(b) of the Financial Services Commission Act ("the administration order"). Mr Tacon was appointed as administrator and, according to clause 3 of that order, he thereby acquired "complete control of the management" of the appellants. He was enjoined to conduct the management of the appellants "with the greatest economy compatible with efficiency": clause 4.

111. The administration order also required Mr Tacon to file a report stating what course of action would be "in the circumstances, in his opinion most advantageous to the general interests of the customers, clients, depositors and creditors, of each [appellant]": clause 5. He was granted wide powers, including the power to sell, charge or otherwise dispose of the assets of the appellants, and "to do all such things as may be necessary or expedient for the protection of the [appellants'] property or assets": clause 13(c) and (k). By order dated 5 May 2016 the powers under the administration order were varied to include the powers of a liquidator under section 222 of the Companies Act.

112. This seems to have been the basis of Innocent J's decision, at least as that judgment was interpreted by the Court of Appeal. At para 48 of his judgment Innocent J said:

> "Therefore, it is clear that the offshore deposits of [the appellants] held at [the parent banks] could not possibly be eligible for protection under the respective DPT. This is the case for the simple reason that the court ordered administration at the behest of the FSC conferred jurisdiction and control over these deposits on the administrator so appointed. In the premises, the receiver, having been appointed by the ECCB under the Banking Act, which Banking Act is primarily concerned with the regulation of domestic banking business and not offshore banking business, had no authority to deal with these deposits under the resolution plan. Therefore, it is to the FSC and the administrator that the applicants ought to address their concerns."

113. The Court of Appeal at para 95 of its judgment referred to the judge having "reasoned that the appointment of an administrator of the subsidiary banks effectively subjected their assets and liabilities to the exclusive control of the administrator and precluded the receiver or the ECCB from dealing with those assets and liabilities by transfer to the PAAs or DPTs". They dealt with this point at paras 137 onwards.

114. It appears from those paragraphs that the Court of Appeal decided that because the administrator was vested with exclusive responsibility for the appellants' assets, those assets could not have been included in the resolution plan without the consent of Mr Tacon:

> "144. [The judge] noted that no PAA had been made between the receiver, [the new bank] and 'any other necessary party' to transfer the subsidiary banks' assets and liabilities to [the new bank]. He reasoned that in the absence of such agreement, he was unable to find that the subsidiary banks' deposits were part

> of the resolution plan. The foregoing formulation signalled that the learned judge recognised that in light of the appointment of the administrator, he or his designee would be a necessary party to any PAA with [the new bank]. He rightly concluded that this could not have been achieved between the receiver and [the new bank] without the administrator's imprimatur, and in the circumstances those deposits did not fall to be transferred by the receiver under section 142 of the Banking Act under either of the two PAAs he executed with [the new bank] in April 2016."

115. The Board does not accept that the fact that the appellants' assets were in the hands of Mr Tacon as administrator is a complete explanation as to why their accounts with the parent banks were excluded from the resolution plan.

116. First, it is clear from the correspondence described above that Mr Tacon was very anxious that their deposits should be included in the plan so that the first $2.8 million would be transferred to accounts with the new bank and the remaining balance would benefit from the DPTs. His letters to each of the respondents explained why he regarded the appellants' accounts as falling within the scope of the resolution plan. The Board expresses no view at the present stage of the proceedings as to whether the courts below are correct in their view that Mr Tacon needed to give his consent to the inclusion of the appellants' accounts in the PAAs and the DPTs. The appellants argue in their written case that the receiver's statutory powers under the Banking Act 2015 were unaffected by the administration, and that the receiver accordingly had power to arrange for the appellants' deposits to be transferred to the new bank even without Mr Tacon's consent. Similarly, they argue that the administration did not affect the eligibility of their deposits with the parent banks for protection under the DPTs pursuant to the Obligations Act. It is sufficient for present purposes that these contentions are arguable. What is absolutely clear is that if Mr Tacon had been asked, he would gladly have given any consent that was required. In light of his duties as set out in the administration order, it would have been very surprising if he had taken another course.

117. There is no suggestion in any of the correspondence or in the legislation that Mr Tacon could, single-handedly, have brought about the inclusion of the accounts in the PAAs or the DPTs. On the contrary, Mr Tacon was told repeatedly in the correspondence that this was a decision entirely for the receiver and the ECCB. If the inclusion of the appellants' accounts in the protections offered by the PAA and DPTs did need Mr Tacon's imprimatur then someone managing the process of devising and implementing the PAAs and the DPTs must have taken a decision not to ask him. Such a decision may have been based on an incorrect interpretation of the law or on a misunderstanding about the nature of the appellants' business. The appellants are entitled to permission to bring these proceedings to identify, if it is relevant on the proper construction of the law, why no one

asked Mr Tacon to agree to their inclusion in the PAAs and DPTs if, indeed, that agreement was what was missing.

118. The second reason is that the chronology of events suggests that this could not have been the reason. The evidence filed in the proceedings shows that the ECCB monetary council was in effective control of the affairs of the appellants until Mr Tacon was appointed on 22 February 2016. The receiver entered into the PAAs on 22 April 2016, only two months later. It seems unlikely that decisions about the fate of the appellants' accounts were all taken in that two month period when it was Mr Tacon rather than the ECCB who was in control of the appellants' affairs. Again, the court considering the judicial review claim may need to explore what discussions within the ECCB were taken about the fate of the appellants' accounts before the application was made by the FSC to place them in administration. It might also be relevant to investigate why it was decided to put the appellants into administration shortly before the PAAs were signed, if that had the effect of making it more difficult for those PAAs to provide the same protection to the appellants' customers as to the customers of other account holders with the parent banks.

(b) The applicable regulatory regime

119. A substantial part of the Court of Appeal's judgment was devoted to ascertaining whether the wording of Innocent J's judgment showed that he concluded that the appellants were excluded because they were not incorporated in Anguilla. At several points in his judgment, he referred to them as "offshore companies", "offshore banks" or "offshore subsidiaries of [the parent banks]", suggesting that he had mistakenly thought that they were not Anguillan banks. The Court of Appeal rejected that criticism and held that there had been no such confusion in the judge's mind. He had, they concluded, used those terms merely as shorthand to describe banks which carry on offshore business.

120. However, it does appear that the conclusion of the courts below that the appellants' accounts were excluded "by operation of law" was based in part on the fact that they were regulated under the Financial Services Commission Act rather than under the Banking Act 2015 or its predecessor: see paras 49–56 of Innocent J's judgment, to which the Court of Appeal referred at para 147 of their judgment.

121. If that factor led to the courts below refusing leave, then the Board has concluded that that was an error of law. There appears to be no reason why the regulatory framework under which the appellants operated should prevent them from being included in the resolution plan. Furthermore, the schedule to the DPT listing "DPT Holders" for both the parent banks includes names which suggest that the protected customers include individuals, an insurance company, a credit card company and a pension provider. Some of those may well be regulated under other statutory regimes; others are not regulated at

all. That does not seem to have prevented them from benefiting from the resolution plan. The appellants are entitled to be told whether the fact that they were regulated under a different regime was the reason, or part of the reason, for them being excluded so that they can test whether there was an error of law behind that decision. They are also entitled to know whether there were other banks regulated by the FSC which were included in the PAA and if so, why they were treated differently.

122. As with the previous point arising from the administration order, this reason is very far from rendering the appellants' challenge unarguable.

(c) The nature of the appellants' "deposits" with the parent banks

123. The principal reason that was discussed in the correspondence between Mr Tacon and the respondents as to why the appellants' accounts were not included was that they did not fall within the wording of the legislation; that was why they were "excluded by operation of law". However, this argument was not advanced before the courts below. The Board pressed counsel for the receiver and the ECCB at the hearing to identify precisely which provisions of the legislation implementing the resolution plan operated to mandate the exclusion of the appellants' accounts. Counsel made it clear that the only provision relied on was the definition of "banking business" in section 1(1) of the Banking Act 2015 which refers to "monetary deposits". The point seems to be, therefore, that on the proper construction of the legislation, the powers of the receiver under Part 10 and/or the ability to transfer a banking business under Part 13 are limited to "deposits". The argument runs that the appellants' accounts with the parent banks were not "deposits" and so could not be included.

124. The Board has already described the correspondence on this issue passing between Mr Tacon and the respondents: see paras 40 onwards.

125. Mr Tacon's evidence in his first affidavit as to the nature of the dealings between the appellants and the parent banks was as follows. From 2005 onwards and at all material times after that, each appellant "on-lent all cash deposited with them to their respective parent". Private & Trust Bank also advanced certain funds to the Caribbean Bank, which was not its parent. He states that these monies were advanced on the basis that they were intended to be (and were treated by both the parent banks and the appellants as being) sums of money paid on terms that they would be repayable on demand from accounts held with the parent banks in the names of the appellants. He exhibited to that affidavit excerpts from the financial statements of the appellants and the parent banks showing that that was how they regarded the advances. For example, in the accounts of the National Bank for the year to 31 March 2013, under the heading "Deposits from customers" is the following statement:

> "PB&T has demand deposit accounts with the bank amounting to $81,923,473 as at 31 March 2013 (2012: $80,964,563) with interest rate of 4.25% for both 2013 and 2012. Total interest paid by the bank to PB&T during the year amounted to $3,485,272 (2012: $3,293,151)."

126. Mr Tacon says at para 34 of his affidavit:

> "Therefore, both the contemporaneous audited accounts of the parents and those of the applicants, on numerous occasions signed-off by directors of the ECCB, show that the inter-company balances due to [the appellants] from the parents were treated at all material times as sums of money repayable on demand. It is now not open to the respondents to seek to re-classify or re-characterize the sums owed by the respondents to [the appellants] as being other than deposits repayable on demand."

127. This evidence clearly raises an arguable case that the appellants' accounts have at all times been regarded as "deposits" and that the Banking Act 2015 and the other legislation was drafted and adopted on that basis.

128. At the hearing before the Board, the Chief Minister's principal argument on statutory construction relied on the disparity between the sum to be allocated to the DPTs according to the Obligations Act, that is $52 million, and the sums that the appellants claim they held on deposit with the parent banks, that is very much more. Mr Knox KC, appearing for the Chief Minister and ExCo, invited the Board to infer from the figure in Schedule 2 to the Obligations Act that it could never have been intended by the legislature that the appellants' monies be protected by the resolution plan.

129. Mr Pievsky's response to that was two-fold. First, the sum of $52 million may reflect the fact that, according to his instructions, an earlier version of the resolution plan proposed that the first $4 million of each customer's account would be transferred to the new bank rather than only the first $2.8 million. In that event, the excess sums expected to go into the DPT might have been substantially smaller in aggregate. The Board has not been shown any information about, for example, when and why the figure changed or how much money would have been needed for the first few years of the DPT's liabilities to the parent banks' customers if the original figure of $4 million had been adopted.

130. Secondly, the $52 million is only the first allocation of money. That sum can be topped up as the years go by and the calls on the allocated funds in the DPTs arise. The

minister was required under the Obligations Act to review the adequacy of the funds every three years: see section 6.

131. Further, according to the agreed statement of facts and issues, there was an additional source of funds for the DPTs, as some proceeds from the non-performing loans which were transferred to the Eastern Caribbean Asset Management Corporation were earmarked for the DPTs. Again, the Board has not seen any evidence as to what the respondents expected would come from this source or how much money has in fact been realised from these loans for the benefit of the DPTs.

132. The allocation of $52 million to the DPTs is therefore very far from being a conclusive, knock out point of the kind that would be needed to justify a refusal of leave.

133. For present purposes and in the light of the way these proceedings have been conducted, the appellants do not have to show that the accounts they held with the parent banks definitely did qualify as deposits, they only have to show that it is arguable. The appellants' claim clearly raises an arguable case that, if indeed the reason why the appellants were excluded was because someone construed some aspect of the legislation as mandating that result, that decision was vitiated by an error of law. The appellants are entitled to require the respondents to explain whose interpretation of the legal framework led to them being excluded so that they can invite the court to determine whether that interpretation was right or wrong.

5. The correct respondents and the way forward

134. At the hearing, Mr Knox argued that whatever the merits of the case against the receiver or the ECCB, the courts below were right to refuse leave as against the Chief Minister and ExCo. He put forward three main points.

135. As regards the scope of the PAAs and the DPTs, Mr Knox pointed out that there is no challenge in these proceedings to the validity of those agreements and the appellants do not seek to set them aside. He sought to downplay the role of the government, suggesting that they were presented with a fait accompli by the receiver and the ECCB. As regards the Vesting Orders, they were presented to the government for approval in 2020 whereas the businesses had been transferred to the new bank in 2016. Any discretion to be exercised by the government when deciding to make the Vesting Orders was theoretical only since a refusal to make them would have thrown several years of banking business into chaos. Since there was no conceivable basis on which the government could properly have declined to take the one decision which clearly fell within its remit, that is the making of the Vesting Orders, there is no basis for including them in the proceedings.

136. The Board does not accept these submissions. The appellants have always made clear that they regard the PAAs, the DPTs and the Vesting Orders as the effect—rather than the cause—of their having been excluded from the protections offered by the legislation. The Board agrees with that analysis. In their written submissions dated 25 November 2019 in support of their application for judicial review, the appellants say:

> "it appears self-evidently untenable to claim that the resolution to the Anguillan banking crisis can somehow have been devised and implemented without the Chief Minister or the Government of Anguilla having made any decisions at all in relation to it."

137. That is clearly right. More broadly, in the Board's view, if at the end of the proceedings it turns out that one or more of the parties has been joined unnecessarily, then the respondents have only themselves to blame. In those initial submissions, the appellants referred to the fact that they have made repeated attempts to establish the decision-making process behind the PAAs and the DPTs but that in light of the obstructive attitude of the respondents, the proceedings were drafted in a way "intended to cover all bases". That was clearly the only sensible way for Mr Tacon to proceed in accordance with his duties to protect the interests of appellants and their creditors.

138. The order that the appellants sought from the Court of Appeal was to set aside the decision of Innocent J and grant leave to them to apply for judicial review. They also asked that court to exercise its power to substitute ExCo for the Attorney General, and to order the disclosure of documents and information that had been requested in the original leave application and in a letter to the Attorney General of 6 November 2019.

139. In the light of the conclusions set out above, the Board will humbly advise His Majesty to allow the appeal, to allow the Executive Council to be substituted for the Attorney General as a respondent, and to grant leave to apply for judicial review.

140. In the view of the Board, the next step in the proceedings should be a hearing on disclosure, if the respondents persist in refusing to make relevant information and documentation available. That may, however, be avoidable if they now provide affidavits giving a full and accurate account of what took place, together with all the relevant documents in their possession. In the meantime, all the respondents should remain party to the proceedings until the decision-making process has been clarified, and it becomes possible, at long last, for the appellants to identify the critical decisions and the individuals or institutions who made them.