Press Summary

24 March 2025

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

[2025] UKPC 14
On appeal from the Eastern Caribbean Supreme Court (Anguilla)

Justices: Lord Reed, Lord Lloyd-Jones, Lord Hamblen, Lord Stephens and Lady Rose

Background to the Appeal

The issue in this appeal is whether leave to apply for judicial review should be granted to the Appellants.

This claim was brought by two banks which were both incorporated in Anguilla. Each of them carried on a banking business where 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 ("**National Bank**"). The second appellant ("**Commercial Bank**") was a wholly owned subsidiary of the Caribbean Commercial Bank (Anguilla) Ltd ("**Caribbean Bank**"). The Private & Trust Bank had an account with the National Bank with a balance of about EC$52 million and an account with the Caribbean Bank holding about EC$9 million. The Commercial Bank had an account with its parent, the Caribbean Bank, with a balance of over EC$100 million.

In or around 2013, the banking sector of Anguilla experienced a financial crisis which placed the National Bank and the Caribbean Bank in serious difficulty. On 19 April 2016, the Banking Act 2015 came into effect, which in part provided the legislative framework for the rescuing of both banks. On 22 April 2016, the Eastern Caribbean Central Bank ("**ECCB**") placed the National Bank and the Caribbean Bank under receivership. The resolution package devised and implemented provided that:

(1) The first EC$2.8 million in any bank account with the National Bank or Caribbean Bank would be transferred to an account with a new domestic bank wholly owned by

the Government. This would be effected by a Vesting Order to be made by the Minister of Finance which would transfer the balances across to the new bank.

(2) Two Depositor Protection Trusts ("DPT") were to be created, one for National Bank and one for Caribbean Bank. Any balance in a bank account over the EC$2.8 million would be protected by the Trust and paid out over a 10-year period funded by the Government.

In September 2016 the Appellants were told that their accounts with the National Bank and the Caribbean Bank had not been included in the rescue package; they did not have new accounts with the new Government-owned bank containing the first ECS$2.8 million of the money which had been in their accounts and they were not included in the DPTs for the remainder of their former balances with their parent bank. They engaged in extensive correspondence with the proposed Respondents seeking to identify who had made the decision to exclude them and the reasons for that decision. Many of the Appellants' letters were not answered by the Respondents and any answers that were given failed to clarify the decision making process and directed the Appellants' inquiries to a different person.

On 10 March 2017, the Appellants applied for leave from the High Court to bring judicial review proceedings to challenge the fact that their deposits had not been transferred under the above arrangement. The application for judicial review included requests for disclosure of documents which would clarify what decisions had been taken and by whom as regards the Appellants' accounts.

The High Court refused permission on all grounds. It dismissed the claim against the Chief Minister on the basis that no decision had been identified in the claim that could be challenged – any relevant conduct was performed by the receiver subject to the direction and general oversight of the ECCB. As to the claims against the receiver and the ECCB, these were dismissed, amongst other reasons, because there was no reviewable decision taken against the Appellants: the exclusion of their accounts from the rescue package was the result of the operation of law**.** The High Court also refused to make an order for disclosure of documents, on the grounds that it did not relate to any discernible decision.

The Court of Appeal dismissed the Appellants' appeal on the grounds that the judge was exercising his judicial discretion in determining whether the threshold for granting leave had been crossed, and overturning that exercise of discretion should not be done lightly. On the facts, any error that the judge had made did not constitute a blatantly wrong error in principle.

Judgment

The Board allows the Appellants' appeal and orders a hearing on disclosure (subject to whether the Respondents make relevant information and documentation available). Lord Reed and Lady Rose give the joint judgment with which Lord Lloyd-Jones, Lord Hamblen, and Lord Stephens agree.

Reasons for the Judgment

First, the Board holds that a judge's decision as to whether there is an arguable ground for judicial review is not an exercise of discretion **[84]** and the test to be applied sets a low threshold. The Court of Appeal should have considered whether the judge had erred in his

conclusion as to whether there was an arguable ground for judicial review. If it concluded that he had, it should have reconsidered the matter for itself.

Second, the Board finds that the Respondents failed to comply with their duty of candour. Such a duty is well-established in judicial review as a means to protect the public interest and secure the constitutional value of the rule of law **[89]**. This duty applies at the stage of an application for leave and, although likely to be less expansive, the duty requires the defendants to provide such information as is necessary to identify the relevant decision-makers at each stage of the process, to understand why the decision under challenge was made and to identify issues which may arise in relation to that decision **[89-93]**. A lack of candour itself can be taken into account when deciding whether to grant permission **[93]**.

The Board notes that, despite repeated requests by the Appellants, the Respondents each declined to provide relevant information as to their involvement in the decision-making process on appeal, despite this being reasonable to infer **[94-101]**. Their failure to respond meaningfully, or at all, to the Appellants' reasonable requests and to withhold most of the relevant information and documentation from the court displays a troubling failure to comply with this duty **[101-102]**.

Third, the Board notes that 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, and the Respondents were simply acting out arrangements set out in primarily legislation **[103-104]**. However, the Board rejects the submission that this is sufficiently clear to justify refusing leave.

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 the construction of the statute was wrong **[106]**. Alternatively, 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 is the case, the Appellants are entitled to know what factors were taken into account by the decision-maker **[107]**.

The Board finds that the primary legislation did not provide a clear reason to exclude the Appellants. 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 [108].

The first basis is that the Appellants were in administration at the time the resolution plan was implemented and 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 the Appellants' administrator **[114]**. The Board rejects this conclusion for two reasons. First, it is clear from the evidence presented that, if asked, the administrator would have given any consent that was required **[116]**. Second, the chronology of events shows that the ECCB was in effective control of the affairs of the Appellants until the administrator, Mr Tacon, was appointed on 22 February 2016. The receiver transferred the business of the National Bank and Caribbean Bank to the new bank on 22 April 2016, only two months later. It seems likely that discussions and some decisions about the fate of the Appellants' accounts were taken when it was the ECCB rather than the administrator who was in control of the Appellants' affairs **[118]**.

The second basis is that the Appellants were not regulated under the Banking Act 2015. To the extent that this factor led to the courts below refusing leave, then the Board concludes that this was an error of law **[121]**. 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 **[121]**. 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.

The third basis is that the accounts held with the parent banks are not "deposits", but "placements", or some other arrangement that is not covered by the Banking Act 2015. As a starting point, the Board notes that the Appellants do not need to show that the accounts they held with the parent banks definitively did qualify as "deposits"; they only have to show that it is arguable **[133]**. The evidence presented shows that an arguable case exists, as is clear from the Appellants' evidence **[124-127]**.

Finally, the Board grants the Appellants the right to bring a claim for judicial review against the Chief Minister, and to substitute the Executive Council as the proper representative of the government of Anguilla rather than the Attorney General. Given the obstructive attitude of the Respondents before and during the proceedings, if it turns out that one or more of the parties has been joined unnecessarily, then the Respondents have only themselves to blame **[137]-[138]**.

References in square brackets are to paragraphs in the judgment.