

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No. 1467 of 2017

BETWEEN

MARK TAITT

CLAIMANT

AND

CARIBBEAN DEVELOPMENT BANK

DEFENDANT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2019: March 05

November 01

Appearances:

Mr. Hal Gollop Q.C, and Mr. Wayne Marshall, Attorneys-at-Law for the Claimant.

Mr. Garth Patterson Q.C., Mr. Bartlett Morgan and Ms. Taylor Laurayne, Attorneys-at-Law for the Defendant.

DECISION

Introduction

[1] The Caribbean Development Bank (“the Bank”), wishes to have a claim against it struck out on the basis that the service of documents on the Bank was illegal, and that in any event the Court has no jurisdiction to hear the matter.

Establishment of the Bank

- [2] The Bank was established by a treaty agreement called the “Agreement Establishing the Caribbean Development Bank”, (“the Bank Agreement”), which came into force on 26 January, 1970. The members of the Bank include regional and non-regional governments. Barbados is a member of the Bank.
- [3] The purpose of the Bank is to:
- “...contribute to the harmonious economic growth and development of the member countries in the Caribbean (hereinafter called the “region”) and to promote economic cooperation and integration among them, having special and urgent regard to the needs of the less developed members of the region”.
(Art.1 of the Bank Agreement).
- [4] The Bank is multifunctional in order to fulfil its mandate. To this end, the signatories agreed that it is empowered to:
1. assist regional members in the coordination of their development programmes with a view to achieving better utilization of their resources, making their economies more complementary, and promoting the orderly expansion of their international trade, in particular intra-regional trade;
 2. mobilize within and outside the region additional financial resources for the development of the region;
 3. finance projects and programmes contributing to the development of the region or any of the regional members;
 4. provide appropriate technical assistance to its regional members, particularly by undertaking or commissioning

pre-investment surveys and by assisting in the identification and preparation of project proposals;

5. promote public and private investment in development projects by, among other means, aiding financial institutions in the region and supporting the establishment of consortia;
6. co-operate and assist in other regional efforts designed to promote regional and locally controlled financial institutions and a regional market for credit and savings;
7. stimulate and encourage the development of capital markets within the region;
8. undertake to promote such other activities as may advance its purpose; and
9. where appropriate, cooperate with national, regional or international organizations or other entities concerned with the development of the region. (Art.2 of the Bank Agreement).

[5] The contracting parties further agreed to grant the Bank full juridical personality, with full capacity:

“(a) to contract;

(b) to acquire, and dispose of, immovable and movable property; and

(c) to institute legal proceedings”.

The Bank is also authorized to enter into agreements with members, non-member States and other international organizations. (Art.48 paras.1 and 2 of Bank Agreement).

- [6] Certain immunities, exemptions and privileges are also conferred on the Bank, inter alia, immunity from legal process (Art.49); immunity of assets (Art.50); immunity of archives (Art.51); freedom of assets from restriction (Art.52); privilege for communications (Art.53); and immunities and privileges of Bank personnel (Art.54). The Bank may waive any immunity, privilege or exemption. (Art.57).
- [7] The Barbados Parliament enacted the Caribbean Development Bank Act, (“Cap.323A”), in early 1970. Under this legislation, Articles 48 to 54 of the Bank Agreement have the force of law in Barbados. (S.6 Cap.323A).
- [8] The contracting parties also agreed that the principal office of the Bank should be located in Barbados. (Art.36 paras.1 of Bank Agreement). To this end, the Government of Barbados and the Bank signed an agreement on 02 June 1970, “the Headquarters Agreement”). Cap. 323A grants certain provisions of the Headquarters Agreement the force of law in Barbados. (Section 8). These provisions are as follows:
1. Article V, Section 13(a) (inviolability of Headquarters Seat and immunity from legal process);
 2. Article V, Section 14(b) (in relation to judicial notice to be taken by Barbados courts of regulations made by the Bank under Section 15 of Article V);
 3. Article V, Section 15(a) (in relation to the power of the Bank to make regulations for the full and independent exercise of its functions within the Headquarters Seat);

4. Article V, Section 17 (expulsion or exclusion of persons from Headquarters Seat);
5. Article X11, Section 43 (entry into Barbados of certain persons);
6. Article X11, Section 44 (requests by the Barbados Government for certain persons to leave Barbados); and
7. Article X111 (privileges and immunities of individuals).

[9] The legal implications of giving some of the provisions of the Bank Agreement and the Headquarters Agreement the force of law in Barbados will be addressed later in this judgment. (See paras. [21] – [23] *infra*).

Background to Claim

[10] The Claimant was an employee of the Bank when he was called to a meeting on 08 June 2017. At that meeting he was informed that his post of Director, Information and Technology Solutions, was to be abolished. He was invited to discuss a separation package pursuant to a redundancy.

[11] Thereafter, a number of letters and emails passed between the Claimant, his legal counsel and the Bank. Counsel for the Claimant complained to the Bank that the Claimant was not terminated because of redundancy, and that the termination constituted unfair dismissal. In a letter dated 09 August 2017, counsel informed the Bank, *inter alia*, that:

“I am instructed that the services which my client provided in his role as Director, Information and Technology Solutions, continues (sic) to be performed by personnel of the Bank. As such, I

have advised my client that the action of the Bank amounts to an unfair dismissal under the law.

Your said letter sets out a remuneration package to which my client is entitled as a result of your decision and he would be pleased to receive the same without prejudice to any rights which he reserves in those circumstances.

I look forward to hearing from you by 18 August 2017 and advise that you treat this letter as a protocol letter in accordance with the Civil Procedure Rules of Barbados”.

- [12] General Counsel for the Bank responded to the Claimant’s legal counsel by letter dated 17 August 2017. She stated therein that:

“...in accordance with Article 49 of the [Bank Agreement] which has the force of law in Barbados by virtue of Section 6 of the Caribbean Development [Bank] Act, Chapter 323A, the Bank enjoys immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its power to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities. As such the provisions of the Employment Rights Act of Barbados 2012-9 and the Civil Procedure Rules of Barbados will not be applicable to the Bank”.

- [13] Counsel for the Claimant took strong objection to the correspondence from the General Counsel. It was argued that the Bank’s power to contract and to institute legal proceedings attracted a concomitant liability to suit. The Barbados Constitution was also prayed in aid of the Claimant. The Claimant’s counsel threw down the gauntlet, and advised that:

“....I take serious objection to the interpretation given to [Section 6] and the associated quoted Articles. For the avoidance of doubt Article 48 in my view is the relevant article in respect of the Bank’s legal status....

In accordance with the said Article it is clear that the Bank possesses full capacity

(a) to contract.

This empowers the Bank to enter into contracts of any kind and must concomitantly impose all the rights, duties and obligations that are ordinarily imposed upon parties to a contract;

(b) to institute legal proceedings.

It is a trite point of law that any party who has full juridical personality to institute legal proceedings is liable to a corresponding action brought against it. In short the Article 48, defining the legal status of the Bank sets it up as a person that can sue and be sued.

In the circumstances, should you find my interpretation of the said article at variance with yours by which you seem to claim immunity against suit, I shall proceed to the Law Courts for a declaration of the legal status of the Bank as it relates to the said Article 48 and my client’s contract with the Bank.

For the record, let me state that I do not find Article 49, Legal Process 50, Immunity of Assets, 51, Immunity of Archives, 52, Freedom of Assets form (sic) Restrictions, 53, Privilege for Communications, or 54, Immunities and Privileges of [Bank personnel], of any relevance to the issue at stake.

A fortiori, the Constitution of Barbados accords to every person within the state of Barbados an entitlement to equality of treatment under the law.

This should make an absurdity of any claim by any institution of immunity against suit for a wrong committed against that individual.”

[14] Counsel for the Claimant also sought the intervention of the Minister of Finance, in his capacity as a Director of the Defendant, and of the Chief Labour Officer. Some of the exhibited correspondence, written on behalf of the Claimant, was copied to up to thirty individuals including the then Prime Minister of Barbados, the Hon. Freundel Stuart.

The Claim and the Application

[15] The fixed date claim form was filed on 03 October 2017, and the Claimant sought the following declarations:

1. that the Bank is subject to the laws of Barbados by virtue of its governing legislation;
2. that by virtue of its operation within the *vires* of its governing legislation, the Bank falls within the full meaning, spirit and intendment of Section 21 of the Interpretation Act, Cap.1, as a body corporate;
3. that the Bank possesses full juridical personality and the capacity to contract and to institute legal proceedings as a result of its governing legislation and Article 48 of the agreement establishing the Bank;
4. that the Bank is liable to all the concomitant obligations associated with its right to contract and to institute legal proceedings;
5. that by virtue of its governing legislation and the Interpretation Act, the Bank may not claim immunity from suit in the present circumstances;
6. that the Claimant is entitled to costs; and

7. further or other relief as deemed just by this Court.

[16] The Court notes that no declarations or other orders are sought with respect to the Claimant's employment rights or entitlement, or to any breach of his rights under the Barbados Constitution.

[17] The Bank filed an acknowledgment of service on 23 October 2017, but in answer to question number 6: "Do you intend to defend the Claim?", responded that it was disputing jurisdiction under Rule 9.7 of the Supreme Court (Civil Procedure) Rules, 1982 ("the CPR"). Two days later a notice of application for relief pursuant to CPR Rule 9.7 was filed on behalf of the Bank, together with an affidavit in support of the application.

[18] The grounds of the application are that:

1. the Claimant purported to effect service on the Bank by leaving copies of the fixed date claim form and the affidavit in support on the premises of the Bank;
2. the Bank is an international organization created by sovereign states and territories under the Bank Agreement;
3. Barbados is a contracting party to the Bank Agreement;
4. the Government of Barbados has recognized and ratified the immunity of the Bank in Article 49 of the Bank Agreement;
5. Article 49 has the force of law in Barbados by virtue of Section 6 of Cap.323A;
6. the inviolability of the Bank's Headquarters Seat is codified in Section 13(a) of the Headquarters Agreement. The Headquarters Agreement

has been ratified in Barbados and given the force of law under Section 8 (a)(i) of Cap. 323A;

7. the claim does not arise out of or in connection with the exercise of the Bank's powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities. Therefore, the claim does not fall within the limited exceptions to the Bank's immunity stipulated in the Agreement as given the force of law in Cap. 323A. The claim also violates the Headquarters Agreement;
8. the purported service of the fixed date claim form and supporting affidavit on the Bank is unlawful; and
9. even if the service is lawful, the court has no jurisdiction to entertain the claim as the Bank is immune from legal process in Barbados.

[19] The orders applied for by the Bank are:

1. a declaration that pursuant to Rule 9.7 of the CPR the court has no jurisdiction to hear and determine the claim;
2. in the alternative, a declaration that the court should not exercise any jurisdiction it may have in respect of the claim against the Bank;
3. an order that the purported service on the Bank of the fixed date claim form and the supporting affidavit be set aside;
4. an order that the claim be struck out in its entirety;
5. costs; and
6. such further or other relief as deemed fit.

International Governmental Organizations

[20] The Bank was established by the Bank Agreement between sovereign member states. It is an international governmental organization ("IGO") that enjoys

privileges and immunities not only in the region, but as far afield as England. (See The Caribbean Development Bank (Immunities and Privileges) Order 1972, S.I.1972 No.113). Alina Kaczorowska-Ireland explains the immunity of IGO's in this way:

“The immunity of IGOs is not based on international customary law but derives from the terms of the particular treaty creating the particular IGO. Such treaties, almost without exception, specify privileges and immunities accorded to the IGO which are shaped by the functions that the relevant IGO is intended to fulfil. The founding treaties usually impose an obligation on the contracting parties to enact national legislation granting the relevant [IGO] and its representatives specific immunities and privileges.

Normally, a headquarters agreement is concluded between the relevant IGO and its host member State which regulates the extent of immunities and privileges granted to the organization in the national territory.

The reason behind granting immunities and privileges to an IGO and its representatives is that in order to fulfil particular tasks assigned to it by its members an organization must be independent from any member State....

Although the scope of immunities and privileges that IGOs enjoy, either under bilateral or multilateral treaties and national legislation, differs from one IGO to another, it is, nevertheless, submitted that there are substantial similarities as to their international immunities. IGOs are generally granted absolute immunity from all types of legal process in respect of all acts carried out with a view

to achieving the purposes set out in the constitutional treaty in a host member State and in States which are members of the organization. Thus, immunities are based on the principle of functionality, i.e. an IGO is immune in respect of all activities related to the exercise of its functions necessary to fulfil its international mandate. The immunity covers not only immunity from the adjudicative and enforcement jurisdiction of municipal courts, but also inviolability of an IGO's property, immunity from direct taxes and customs duties on transactions and on property, and often indirect taxes....and immunity from censorship of official correspondence and communications". ("Public International Law", 5th ed. at pages 440-441; see also "Akehurst's Modern Introduction to International Law" by Alexander Orakhelashvili, 8th ed. at page 248).

[21] Immunities granted to the Bank under the Bank Agreement and the Headquarters Agreement were accorded the force of law in Barbados. This is in recognition of the principle that international organizations are not entitled to sovereign status at common law, and therefore are only entitled to the immunity granted by legislative instrument. (See Bingham J in **Standard Chartered Bank v. International Tin Council and Others** [1986] 3 All ER 257 at 263 c-d, and Smith J in **Barbara Vargas v. OECS et al**, Suit no. **SLUHCV 2017/264**, decision dated 05 March 2018, at paras. [27] – [29]).

In the **Vargas** case Smith J opined that:

“[29] It is clear....that what international organizations enjoy is not sovereign or state immunity but rather organizational immunity. The

nature and extent of that organizational immunity depends on the enactment conferring the immunity”. (See too **Assuranceforeningen Gard Gjensidig v. International Oil Pollution Compensation Fund [2014] EWHC 3369 (Comm)**).

- [22] The conjoined effect of the Bank Agreement, the Headquarters Agreement and Cap.323A, is that there are immunities and privileges granted thereunder, which are binding in international law and enforceable domestically in the Barbados courts. (See **Vargas** supra para. [21] at [10]. Another outcome of Cap.323A is that it confers legal personality of the Bank. In **Arab Monetary Fund v. Hashim and others [1991] 1 All ER 871**, Lord Templeman reasoned that:

“...when sovereign states enter into an agreement by treaty to confer legal personality on an international organization, the treaty does not create a corporate body. But when the [Arab Monetary Fund] Agreement was registered in the [United Arab Emirates] by means of Federal Decree No.35 that registration conferred on the international organization legal personality and thus created a corporate body which the English court can and should recognize”. (At page 875 d-e of judgment).

- [23] It was on this basis that Organization of Eastern Caribbean States achieved legal status in St. Lucia. According to Smith J:

“Saint Lucia as the host country and seat of the headquarters, could not recognize the OECS as an international organization having legal personality until that treaty was enacted into domestic law.

With the passage of the Organization of Eastern Caribbean States Act...., the OECS became recognised in Saint Lucia as an international organization with legal personality”. (See **Vargas** supra para.[21] at para.[8] of judgment).

The Bank achieved its status in Barbados through a similar process.

[24] This Court is also cognizant of the rules of interpretation to be applied when interpreting the text of the Bank Agreement and the Headquarters Agreement.

The Court is guided in this regard by persuasive dicta in the recent case of

Reyes v. Al-Maliki and another [2017] UKSC 61. In that case Lord

Sumption stated that:

“[10] It is not in dispute that so far as an English statute gives effect to an international treaty, it falls to be interpreted by an English court in accordance with the principles of interpretation applicable to treaties as a matter of international law. This is especially the case where the statute gives effect not just to the substance of the treaty but to the text... .

[11] The primary rule of interpretation is laid down in article 31(1) of the Vienna Convention on the Law of Treaties (1969):

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

The principles of construction according to the ordinary meaning of terms is mandatory (“shall”), but that is not to say that a treaty is to be interpreted in a spirit of pedantic literalism. The language must,

as the rule itself insists, be read in its context and in the light of its object and purpose. However, the function of context and purpose in the process of interpretation is to enable the instrument to be read as the parties would have read it. It is not an alternative to the text as a source for determining the parties' intentions".

- [25] Having explored the legal status of the Bank, it would now be appropriate to consider the two basic issues raised in this case. These issues are whether the Bank is immune from the service of process, and/or from the jurisdiction of this Court "under the present circumstances" as detailed in the Claimant's supporting affidavit.

Service of Documents on the Defendant

- [26] Article V Section 13(a) of the Headquarters Agreement states that:

"The Headquarters Seat shall be inviolable, and shall be under the control and authority of the Bank. Except in connection with suits and judgments against the Bank authorized by the [Bank Agreement], no officer or official of the Government, or other person exercising any public authority within Barbados shall enter the Headquarters Seat to perform any duties therein without the consent of, and under conditions approved by, the Bank, **nor shall the service of legal process, including the search for or seizure of private property, take place within the Headquarters Seat without the express consent of, and under the conditions approved by, the Bank**". [Emphasis added].

Section 13(a) has the force of law in Barbados.

[27] In his affidavit filed on 13 October 2017, counsel for the Claimant deposed that service of the claim form and supporting affidavit was effected on the Bank's receptionist at the Bank's Headquarters Seat at Wildey, St. Michael. The documents were returned to counsel that same day in what counsel described as a flagrant disregard of the Bank's obligation as a corporate entity in Barbados, to show due respect to process issuing out of the Supreme Court of Barbados. In his written submissions filed on 13 November 2017, counsel also contends that it would be illogical for a person working at the Bank to be expected to await permission to serve a document on the Bank's premises.

[28] There are two possible exceptions that emerge from the text of Article V Section 13(a). These are where the Bank expressly consents to the service of legal process at the Headquarters Seat; or where service is directly connected to suits and judgments authorized by the Headquarters Agreement. There is no evidence in this case that the Bank agreed to service of the claim form and supporting affidavit at its Headquarters. Indeed, the return of the documents to counsel on the same day of service, is an unquestionable repudiation of any thought of express consent.

[29] Article 49 (1) of the Bank Agreement which establishes the Bank says that:

“The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its power to borrow money, to guarantee obligations, or to buy

and sell or underwrite the sale of securities, in which case actions may be brought against the Bank in a court of competent jurisdiction in the territory of a member in which the Bank has its principal office, or a branch office, or in the territory of a member or non-member State where it has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities”.

Article 49 of the Bank Agreement is also incorporated into the domestic law of Barbados.

- [30] The present circumstances of the claim do not arise out of, and are not connected to, the exercise of the Bank’s power to borrow money, or to guarantee obligations, or to buy and sell or underwrite the sale of securities. The present circumstances are concerned with an employment contract between the parties. Therefore, service of the claim documents in this suit was not connected to suits and judgments authorised by the Bank Agreement.
- [31] No relevant judicial pronouncements on the validity of the service of legal process on an international organization were brought to the attention of this Court by counsel for the parties. In the **Al-Malki** case, the Supreme Court in England considered the immunity of a member of the diplomatic staff of the embassy of Saudi Arabia in London. An individual employed by the diplomat at his private residence, began proceedings in the Employment Tribunal alleging, inter alia, unlawful deduction from wages and failure to pay the national minimum wage.

[32] The Court of Appeal held that the Employment Tribunal had no jurisdiction to hear the matter given the diplomat's immunity. ([2015] EWCA Civ 32). However, the Supreme Court found that immunity was lost when the employer ceased to be a diplomat. During the course of the Supreme Court judgment, an issue relating to service of process was addressed. It was held that service by post was not in breach of Articles 29 or 30 of the Vienna Convention. Article 30 conferred on the private residence of a diplomat, the same inviolability and protection as the premises of the mission. There was no municipal legislation prescribing the mode of service on diplomatic agents.

[33] Lord Sumption reasoned that:

“14...The present question is whether there is an immunity from service, or from certain modes of service, implicit in the inviolability of a diplomat's person and private residence. This immunity is distinct from and additional to his immunity from jurisdiction. If it applies, then articles 29 and 30 of the [Vienna] Convention, being unqualified, must prevent service by post in all proceedings whether or not there is any jurisdictional immunity in respect of them....

16 The person of a diplomatic agent is violated if an agent of the receiving state detains him, impedes his movement or subjects him to any personal restriction or indignity. It is arguable that personal service on a diplomatic agent would do that, although it is not an argument that needs to be considered here. Premises are violated if an agent of the state enters them without consent or impedes access to or from the premises or normal use of

them: see article 22 relating to the premises of a mission, which is applicable by analogy to a diplomatic agent's private residence under article 30(1). The delivery by post of a claim form does not do any of these things. It simply serves to give notice to the defendant that proceedings have been brought against him, so that he can defend his interests, for example by raising his immunity if he has any. The mere conveying of information, however unwelcome, by post to the defendant, is not a violation of the premises to which the letter is delivered. It is not a trespass. It does not affront his dignity or affect his right to enter or leave or use his home. It does of course start time running for subsequent procedural steps and may lead to a default if no action is taken. But so far as this is objectionable, it can only be because there is a relevant immunity from jurisdiction. It is not because the proceedings were brought to the diplomatic agent's attention by post. Otherwise the same objection would apply to any mode of service which starts time running, including service through diplomatic channels as proposed by the Secretary of State".

- [34] There are obvious distinctions between the factual matrix of the **Al-Malki** case, and the present circumstances before this court. Although the protagonists are employees, the antagonist in **Al-Malki** was a diplomat and not an international organization. Service of legal process in **Al-Malki** was by post, whereas service here was by the entry of a registered bailiff on to the premises of the Bank's Headquarters Seat. The method of service engaged on behalf of the Claimant is clearly in breach of Article V Section 13(a) of the Headquarters Agreement, as bolstered by Section 8 of Cap.323A.

[35] This issue of service on an international organization has also occupied the American courts. Cedric Ryngaert points out that:

“A technical issue which has arisen in US litigation against OPEC [the Organization of Petroleum Exporting Countries], and which may in fact turn out to be the most potent procedural obstacle to a successful lawsuit, is the problem of proper service of legal process. Under US law, high, formal standards for service of legal process – i.e. official notification of an action filed against a defendant – apply. Even if a defendant has been informed of the filing of a lawsuit, (s)he will not be considered as properly served if the formal procedures were not followed, and the lawsuit will have to be aborted”. (See “Challenging Acts of International Organizations Before National Courts”, ed. August Reinisch, (2010) at p. 249).

[36] Ryngaert refers to the **Prewitt** litigation against OPEC where service by international mail was attempted. The District Court initially ruled that OPEC was duly served in this manner, and then went on to enter a default judgment against OPEC, which failed to appear. (Supra para. [35] at fn3). He noted that:

“In subsequent proceedings, however, OPEC successfully challenged this decision, which was finally vacated by the Court of Appeals for the 11th Circuit on the ground that OPEC was not properly served under Austrian law. The Headquarters Agreement between OPEC and Austria....provided that “the service of legal process....shall not take place within the [OPEC] Headquarters seat except with the express consent of, and under conditions approved by, the Secretary General [of OPEC]” ”.

(Prewitt Enters Inc. v. Organization of Petroleum Exporting Countries 353 F3d 916 (11th Cir 2003), where that court stated that:

“Austrian law clearly provides protection to OPEC as an international organization from all methods of service of process without its consent, and also requires that any service of process from abroad should be effected through Austrian authorities”, at p.927 of the judgment).

[37] The relevant provision in the headquarters agreement between Austria and OPEC was drafted similarly to Article V Section 13(a) of the Headquarters Agreement between the Bank and the Government of Barbados. The Court may have been persuaded by the dicta in the **Prewitt** case, bearing in mind that a Headquarters Agreement was being considered. The Court would have been more likely to follow this judgment had the Claimant attempted to serve the Bank by post. In the present circumstances, service by a bailiff was illegal as it undermined the inviolability of the Bank’s Headquarters.

[38] Ryngaert recognized the challenges connected to the service of process on an IGO. He was of the view noted that:

“This problem of service of legal process is not only germane to OPEC. On the contrary, as many Headquarters Agreements may feature similar language, the heads of international organizations may fend off any lawsuit against the organization by refusing to give consent to be served; international organizations enjoy absolute immunity from suit, thereby rendering meaningful remedies elusive”. (At p.250).

[39] In this case the Claimant has not brought himself within any of the exceptions that would permit service of the claim form on the Bank. Therefore, the method of service used on his behalf is prohibited by our domestic law. This Court has no power to create other exceptions to the text of either Agreement. That is solely within the treaty making province of the Executive.

The Challenge to Jurisdiction

[40] The Bank gave early notice that the jurisdiction of the Court to hear the claim would be challenged. Its acknowledgment of service highlighted Rule 9.7 of the CPR. Rule 9.7 sets out the procedure for disputing the court's jurisdiction as follows:

“(1) A defendant who wishes

(a) to dispute the court's jurisdiction to try the claim; or

(b) to argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that the court has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service.

(3) An application under this rule must be made within the period for filing a defence.

(4) An application under this rule must be supported by evidence on affidavit.

(5) If the defendant

(a) files an acknowledgment of service; and

(b) does not make such an application within the period for filing a defence,

he is treated as having accepted that the court has jurisdiction to try the claim.

(6) Any order under this rule may also

(a) discharge any order made before the claim was commenced or served;

(b) set aside service of the claim form; and

(c) strike out any statement of claim.

(7) If on an application under this rule the court does not make a declaration the court

(a) may

(i) fix a date for a case management conference; or

(ii) treat the hearing of the application as a case management conference; and

(b) must make an order as to the period for filing a defence.

(8) Where a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the court

under paragraph (7)(b) and any further extension requires a further order of the court”.

[41] The Bank satisfied all the preliminary requirements of Rule 9.7. The argument on its behalf is simply that Article 49 of the Bank Agreement, together with Section 6 of Cap.323A, confers complete immunity from legal process on the Bank. A number of cases were cited to underscore the argument, inter alia, **Entico Corporation Ltd v. UNESCO [2008] EWHC (Comm)**, **Mukuro v. European Bank for Reconstruction and Development [1994] ICR 897**, **Bertolucci v. European Bank for Reconstruction and Development [1997] EAT/276/97 (Transcript)**, **East African Development Bank v. Blueline Enterprises Ltd [2012] 3 LRC 332**, **Tissa Amaratunga v. Northwest Atlantic Fisheries Organization et al [2013] 3 SCR 866**, and **The Caribbean Examinations Council v. The Industrial Disputes Tribunal et al [2015] JMSC Civ. 44**.

[42] Each of the above mentioned cases explored the near absolute immunity from suit of various international organizations. And in relation to employment rights, such matters are considered to be *juri imperii*, and therefore covered by immunity.

[43] Counsel for the Claimant countered that the matter is justiciable given the legal status of the Bank with full juridical personality to contract and to institute legal proceedings. Counsel argued that the Bank was subject to the

Diplomatic Immunities and Privileges Act (“Cap.18”), and Section 21 of the Interpretation Act (“Cap.1”), which together with Article 48 of the Bank Agreement, completely removed the veil of immunity.

[44] The Court is not persuaded by the argument that the Bank’s capacity to contract, and to institute legal proceedings, must of necessity expose the Bank to an employee suit. The Court is unable to accept counsel’s argument, when Parliament in its deliberate judgment granted the Bank immunity from suit, except in very limited circumstances. There is, therefore, no conflict between Articles 48 and 49 of the Bank Agreement. Both Articles have the force of law in Barbados. Article 48(1) accords the Bank juridical personality, with full capacity to contract and institute legal proceedings. And Article 49 insulates the Bank from legal process, except in very limited circumstances. There is no inherent inconsistency between these two Articles.

[45] Neither Cap.18 nor Cap.1 expose the bank to legal process in a Barbados court. The Long Title to Cap.18 describes it as “An Act to confer immunities, powers and privileges on diplomatic and consular representatives of international organizations and certain other persons; and for purposes ancillary to or connected with matters aforesaid”. This legislation came into force on Independence Day in Barbados, i.e., 30 November 1966. Part III of Cap.18 is concerned with international organizations and persons connected there-

with. (Ss.6 to 8).

[46] Section 6 of Cap.18 provides in part that:

“(1) This section shall apply to any organization declared by the Minister by order to be an organization of which one or more sovereign powers or the government or governments thereof are members.

(2) Subject to subsection (3), the Minister may from time to time by order –

(a) provide that any organization to which this section applied (hereinafter referred to as “the organization”) shall, to such extent as may be specified in the order, have the immunities and privileges set out in Part I of the Second Schedule, and shall also have the legal capacity of a body corporate...”.

[47] The Court has found no orders made under Sections 6 (1) or (2) that relate to the Bank. This is not surprising, as the Bank was established by a Bank Agreement with articles that spoke to the immunities of the Bank and its personnel. These are Articles 9 and 54 with Article 54 having the force of law in Barbados. Likewise, the Headquarters Agreement refers to the inviolability of the Headquarters Seat and its immunity from legal process (Art. V, Section 13 (a)); and to the privileges and immunities of individuals (Art. XIII). These provisions in the Headquarters Agreement also have the force of law in Barbados.

[48] Cap.18 does not apply to the Bank. Therefore, counsel for the Claimant is

unable to argue successfully that the reference to “a body corporate”, in Section 6(2)(a) of Cap.18, invokes Section 21 of Cap.1. Section 21 enacts in part that:

“(1) Where an Act passed after 16 June, 1966, contains words establishing, or providing for the establishment of, a body corporate **and applying this section to that body** these words shall operate

–

(a) to vest in that body when established –

(i) the power to sue in its corporate name;....

(b) to make that body liable to be sued in its corporate name....”.

(Emphasis added).

[49] Although the words in Section 6(2)(a) of Cap.18 establish a body corporate, Cap.18 does not apply Section 21 of Cap.1 to that body corporate. And even if Section 21 of Cap.1 did apply to Cap.18, the Bank does not fall under the umbrella of Cap.18. Had the Claimant shown a legislative connection between the Bank and Section 21 of Cap.1, it would not have assisted his case. Section 21 also permits Parliament to derogate from the powers conferred by Section 21. Subsection (2) of Section 21 provides that:

“Without prejudice to subsection (1) of section 3, the application of this section to a body corporate shall not-

....

(b) prevent the powers conferred by virtue of such application being limited by any enactment....”.

Cap.323A is such an enactment that limits the ability of persons to sue the Bank.

The Constitutional Issue

- [50] Before a final determination of the jurisdiction issue, the Court proposes to treat with another issue raised on behalf of the Claimant. In his supporting affidavit, he referred to correspondence in which his counsel submitted to the Bank that a claim of institutional immunity could not co-exist with his constitutional right to equality of treatment under the law. (See para. [13] supra). Such contentions are usually framed in the context of access to justice.
- [51] In **Capital Bank International Limited v. ECCB et al, Civ. Ap. Nos.13 & 14 of 2002, CA Grenada, decision dated 10 March 2003**, one of the issues was whether immunity from process was inconsistent with the constitutional provisions which guaranteed the appellant a right to have the courts determine its legal rights. (S.8(8) Grenada Constitution). Sir Dennis Byron CJ explored the constitutional provision against the backdrop of its derivation from section 6 (1) of the European Convention on the Protection of Human Rights. He referred to a number of cases which interpreted section 6(1) of the Conven-

tion. (Para.[13] of judgment).

[52] The learned Chief Justice reasoned that:

“[14] In this case there is no issue that the immunity provisions have legitimate objectives. They reflect the agreement of the participating governments that it was in the public interest to confer immunity from judicial process in their respective territories. The provisions have statutory force and effect and are recognized in public international law. These immunities were considered necessary to protect the currency, financial system and economies.

[15] The issue in this case is whether they offend the constitutional concept of proportionality....”.

[53] Having found that a civil right was in dispute, Sir Dennis concluded that:

“[32]...It is therefore at least arguable, that The Banking Act itself provides a statutory exception to the immunity provisions where the ECCB has reason to believe that a person is carrying on banking business without a valid licence. In a case like this it would be ineffective for proceedings to resolve this issue to be conducted without the ECCB as a party. How else would the evidence of non-compliance be guaranteed? The alternative of ruling that the issue should not be determined would in my view be clearly disproportionate to the objectives of the immunity provisions and would be a deprivation of the rights conferred by section 8(8) of the Constitution”.

[54] With respect to other aspects of the claim in **Capital Bank**, which sought relief for the investigative and reporting activities of the ECCB, the learned Chief Justice held that they were covered by the statutory immunity under the

Act. (Para.[37] of judgment). He was guided in that regard by **Fayed v.**

United Kingdom (1994) 18 EHRR 393, and emphasized that:

“[35]...it is a matter of general public interest and necessary in a democratic society that governments exercise supervisory controls over large commercial activities to ensure good management practices and the transparency of honest dealings, transparency which is enhanced by the publication of the Inspectors’ reports....it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) if a state could without restraint remove from the jurisdiction of the courts a whole range of civil claims, or confer immunities from civil liability on large groups or categories of persons. A fair balance has to be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.

[55] Section 8(8) of the Grenada Constitution is in *pari materia* with Section 18(8) of the Barbados Constitution. Despite the similarities, this Court is of the considered opinion that this is not the appropriate case in which to rule on the constitutionality of the immunity granting provisions in Cap.323A. There are a number of reasons for this view.

[56] At the outset, the Court concedes that there is a growing body of jurisprudence which supports an extra textual limitation to the immunities granted by treaty agreements that are underpinned by the national legislation of a contracting party. Judges in the Commonwealth Caribbean have been willing to balance

the immunities of an international organization against individual rights enshrined in a written Constitutional document. (E.g. **Capital Bank** supra; and in **Charter Capital Limited v. National Bank of Anguilla Limited and ECCB, Suit AXAHCV2014/0036, Hgh. Ct. Anguilla, decision dated 31 October 2014**, Master Taylor-Alexander accepted that statutory immunity “...is not an absolute immunity and that it cannot restrict access to the court for determination of a constitutional right or obligation” (para.[19] of judgment)).

[57] In this case the Claimant has not invoked the jurisdiction of the Court under Section 24 of the Constitution. Section 24 permits an application to the High Court for redress, where it is alleged that a fundamental right is being or is likely to be contravened. There is no request in the claim form for any constitutional redress. The Attorney-General, who is the chief legal advisor to the Crown, is not a party to these proceedings. And there is no evidence that the Claimant’s documents were served on the Attorney-General. Therefore, the Attorney-General was not afforded the opportunity to make any submissions to the Court in the context of any alleged breach of the Claimant’s fundamental rights.

[58] The Court has not had the benefit of any meaningful submissions, in circumstances where a question pertaining to the Claimant’s constitutional

rights was not properly before it. And there is no allegation by the Claimant that the Bank did not provide any alternative procedures for the settlement of his claim; or that, if alternative procedures existed, that they were not satisfactory procedures. (See “Satow’s Diplomatic Practice”) 6th ed., Sir Ivor Roberts ed. (2009), at paras.21.29 and 21.30).

[59] This is an area of law in which there are opposing views. Mention was made of the **Capital Bank** case earlier, where the court entertained arguments based on an allegation of a breach of a fundamental right. (See para.[51] supra). The Canadian courts have also treated with similar allegations in the context of an employment contract between an employee and an international organization. In the **Amaratunga** case (supra at para.[41]), LeBel J proffered that:

“[61] As for the *Canadian Bill of Rights*, the “right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligation” recognised in s.2(e) does not create a substantive right to make a claim. Rather, it provides a fair hearing if and when a hearing is held.

....

[63] The fact that the appellant has no forum in which to air his grievances and seek a remedy is unfortunate. However, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state’s courts. As La Forest J. said in *Re Canada Labour Code* in the context of sovereign immunity, it is an “inevitable result” of a grant of immunity that certain

parties will be left without legal recourse, and this is a “policy choice implicit” in the legislation: p.91. The same holds true in the instant case”.

[60] For these reasons, the Court makes no finding with respect to any subliminal constitutional issues in this case.

Disposal

[61] The Court finds in favour of the Bank’s application and makes the following orders:-

1. that the purported service of the fixed date claim form and the affidavit in support be set aside; and
2. that pursuant to Rule 9.7 of the CPR, this Court has no jurisdiction to hear and determine the claim.

[62] The Court will now hear the parties on the question of costs.

Sonia L. Richards
Judge of the High Court