



Some Legal Financial Issues – A Barbadian Perspective

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Introduction

- Part of the usefulness of these fora is for participants to benefit from mutual experiences and to understand how hemispheric counterparts have responded to common challenges.
- Chosen to highlight two recent issues addressed by Barbados and have deliberately chosen to keep them simple.
- They are disparate subjects – one touches and concerns our regulatory sandbox and the other a recent court case brought against the Central Bank and others due to a domestic debt restructuring.



The Disconnect Between Innovation and Regulation

- If put in athletic terms, finance is a sprinter and the laws that regulate it, at best are distance runners.
- In this electronic age financial technology and innovation is here to stay.
- In a sense, it is in our lifetime part of the financial evolutionary curve that has brought us from the barter system, through precious metals to paper currency.



The Disconnect Between Innovation and Regulation II

- While we as financial regulators cannot afford to stifle the efficiencies brought about by financial technology, we equally cannot ignore the real GDP damage done through ultra light touch regulation.
- This was clearly seen during the global financial crisis of 2008/2009.
- Crucial therefore for regulators and innovators to communicate and co-operate.



Sand Boxes Generally

- With the previously mentioned competing interests in mind sandboxes might be helpful.
- By way of brief definition - regulatory mechanism designed to bring innovative products such as new payment services to market more quickly, while ensuring adequate customer protections.



Our Sand Box

The Barbados Regulatory Sandbox

- Launched in October 2018.
- Joint initiative between the Central Bank of Barbados (CBB) and the Financial Services Commission (FSC).
- Seeks to provide regulatory clarity to businesses offering innovative financial products, services and solutions.
- Made necessary because there is currently no legislative framework to regulate trending financial innovation.



Objectives and Key Elements

- Support safe financial innovation.
- Provide regulators with an opportunity to assess innovative activities that result from new technologies or practices.
- To examine financial stability issues around fintechs.
- To assess the potential impact of operational and cyber security failures from unlicensed fintech activity.
- Study how Fintech product offerings compare to similar regulated activity – gaps.



Governance

- Regulatory Review Panel (RRP).
- Assessing of applicants.
- Identification of regulatory issues and risks.
- Defining the terms and conditions of participation.
- Issuing a report.



Operational Elements

- Assess how the product or service performed.
- State whether any new regulatory issues were identified.
- Examine whether the product or service falls within the scope of existing legislation.
- Provide recommendations on the path forward.
- Issue a final report.



Applicants and Assessments

So far only two applicants both offering variants of e-wallet services. The sand box participation thus sought to understand whether:

- the product in question is a form of deposit-taking thereby requiring a banking licence;
- customers holdings of the product represent a leakage of deposits from the financial system that could otherwise finance bank credit;



Applicants and Assessments II

- the product in question has an adverse impact on the payment or financial system;
- the robustness, redundancy and scalability of the technology in delivering the product;
- customers are adequately protected from failure of the technology and operational risk; and
- how AML/CFT standards are applied in the delivery of the product.



Observations and Outcomes

- The first sand box entrant utilized the facility between November 2018 and July 2019.
- Cumulative value of wallets capped at US\$125, 000.
- Number of wallets capable of being issued – 12,000 or around 5% of the total population.
- Product was not fully utilized as none of the caps were met – wallet balances remained low at no more than \$25 USD on average – pass through figures higher.



Observations and Outcomes II

- The product in question is a unique and though closely resembling a deposit, did not fall within the definition of deposit-taking within the Financial Institutions Act.
- It did not represent a leakage of deposits from the financial system that could otherwise be used to finance bank credit, given the low average balance per wallet.
- There were no signs of an adverse impact on the payments or financial system.
- There was insufficient activity to adequately assess the scalability, robustness and redundancy of the system.



Conclusions

- No material issues about product performance emerged within the test environment.
- This type of business activity is considered for regulation under the Payment System legislation which is currently being drafted.
- Financial Institutions Act will be amended to cover fintechs subject to regulations to be developed and issued by the Central Bank of Barbados.



A Debt Holder v The Accountant General et al

- In October 2018 the Government of Barbados restructured its domestic debt because of high costs and an expanding fiscal deficit.
- Restructured debt consisted of most government securities and arrears.
- Restructuring involved the exchange of existing debt for new securities with longer maturities and lower interest and in some cases immediate part cash payments.



A Debt Holder v The Accountant General et al

- Though the exchange was ostensibly negotiated the reality was that debt holders did not have many choices.
- Parliament also passed an Act to govern the debt restructuring exercise.



The Facts of the Case

- Mr. A, a pensioner held a Treasury Note in the sum of US\$125,000 from the Government of Barbados.
- A Treasury Note is a fixed interest fixed term security issued by the Government of Barbados.
- Mr. A's security was set to mature in May 2019 but was restructured in October 2018.
- Based on the terms of the restructuring Mr. A would receive no interest payment but would receive his principal in full of which sum US\$25,000 would be cash and the remainder in 42 equal monthly installments.



The Facts of the Case II

- Mr. A, being dissatisfied with the restructuring brought a case against the Government and name the Accountant General (issuer), the Central Bank (fiscal and paying agent for securities) the Attorney General and the Minister of Finance (ostensible decision maker regarding restructuring) as parties.
- Case utilized a procedure known as judicial review which allows a court to study and make orders in relation to certain actions of the executive branch of government.



The Facts of the Case III

- In Barbados, most aspects of judicial review are governed by the *Administrative Justice Act* - Section 3 of the Act provides that “An application to the Court for relief against an **administrative act or omission** may be made by way of an application for judicial review in accordance with this Act and with rules of court.”



The Facts of the Case IV

- The Act also defines an administrative act or omission as *“an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment.”*
- The Act sets out several non-exhaustive grounds for judicial review including illegality, lack of fairness, acting in excess of jurisdiction, breach of duty to act and failure to properly exercise discretion.



The Issues

- Two major issues for the Central Bank:
 - (a) whether judicial review was an appropriate process; and
 - (b) whether the Central Bank as fiscal agent was a proper party to the proceedings.
- Judicial review is a remedy of last resort and this was recently persuasively reaffirmed in *Glencore Energy UK Limited v Commissioners of HMRC* [2017] EWHC 1476.



The Issues II

- The Bank argued that that the claim was founded in contract and thus not a proper case for judicial review – Mr. A could have brought a civil action for breach of contract.
- With respect to the second issue, judicial review principles make it plain that it is the government department which made the decision complained of is the party to be litigated against.



The Issues III

- While it was not disputed that the Central Bank was the fiscal agent of the Government of Barbados - in cases where a banker does not pay a third party because payment instructions from the payer have ceased, who is culpable?
- In *Montgomerie v. U.K Steamship Association (1891)* Q.B. 370 the court held that at common law, a contract is *prima facie* the contract of the principal and not that of the agent.



The Issues IV

- In most cases, it is only the principal who can sue and be sued on a contract and not the agent.
- Finally, the restructuring was effected by an Act of Parliament – because of the doctrine of separation of powers courts cannot judicially review legislation – can strike them down as unconstitutional but Mr. A did not bring a constitutional motion.



Conclusions

In the end the court found that:

- The action was not properly founded in judicial review as other remedies were available.
- The Bank was not a proper party to the action.
- Mr. A should pay the costs incurred by the Bank in defending the action.



Conclusions

When the full judgment is given, this case will be an important one for Caribbean countries as it will advance law regarding who should be proper parties to lawsuits and how or when parties should be absolved from defending cases when clearly there are no sustainable allegations against them.



Questions?

*Thank
you*

