

THE FINANCIAL SERVICES TRIBUNAL

Pierre Lofaro LL.D – Chairman

Joseph Azzopardi FCCA, FIA, CPA, MBA (Warwick) – Member

Ivan Sammut Dip.Bus.Law & Acc., Adv. Trib. Eccl. (Melit.), M.A. (Fin. Serv.), LL.D – Member

FST 01/2017

Heikki Niemelä, Mika Lehto each in their personal capacity as directors of Nemea Bank plc;
Nemea Plc (C 45025);
Nevestor SA (890.311.134); and
Nemea Bank plc (C 45026)

vs

Malta Financial Services Authority

Today, the 20th day of January 2021

Preliminary matters

The Tribunal is hereby deciding the application filed by Nemea Bank plc (the 'Bank') on the 13th of November 2019 in the records of aforementioned appeal and is doing so:

1. After having seen the above-referred to application filed by the Bank on the 13th of November 2019 whereby it is requesting the Tribunal, for the reasons therein mentioned, '*in terms of its decision of 16 January 2017 as confirmed by the Court of Appeal (Inferior Jurisdiction) of 5 November 2018, and having regard to the principles of good administrative behaviour laid down in Article 3 of the Administrative Justice Act (Chapter 490 of the Laws of Malta)*' to order '*the MFSA to restore the effective representation of the Bank in these proceedings by its directors Heikki Niemelä and Mika Lehto including by allowing the said directors access to the Bank, its information (such as financial, accounting and regulatory records), documentation, files, IT systems as well as access to the Bank's financial resources in order for the Bank to be able to pay for legal advice and representation by external legal counsel, subject to such order/s and/or direction/s which this Tribunal may consider to be just and appropriate in the circumstances..*';

2. After having seen the reply filed by The Malta Financial Services Authority (the 'Authority') on the 10th of January 2020 whereby, for the reasons therein stated, it opposed the Bank's request;
3. After having seen the Tribunal's decision delivered on the 16th of January 2017 in the proceedings in the same names but bearing number 04/2016 and which proceedings are being heard concurrently with this appeal, whereby, *inter alia*, the Tribunal decided that the Bank has a *locus standi* in these proceedings;
4. After having seen the judgement delivered by the Court of Appeal on the 5th of November 2018 which confirmed the Tribunal's decision of the 16th of January 2017;
5. After having seen the Tribunal's decision delivered on the 9th of October 2019 whereby it rejected the Bank's request for a stay of these proceedings;
6. After having seen all the acts of these proceedings, including the evidence given and the documents exhibited;
7. After having heard the oral submissions of the parties' lawyers and seen the transcripts thereof; and
8. After having seen the minutes of the proceedings whereby the appeal was deferred for today for the Tribunal's decision on the Bank's application filed on the 13th of November 2019.

The background

The Tribunal notes that the Bank has also made an identical request on the 13th of November 2019 in two other appeals which are being heard concurrently with this appeal, namely appeal numbers FST 04/2016 and FST 10/2016 both in the same names "Heikki Niemelä, Mika Lehto each in their personal capacity as directors of Nemea Bank plc; Nemea Plc (C 45025); Nevestor SA (890.311.134); and Nemea Bank plc (C 45026) vs. Malta Financial Services Authority".

In the current appeal (01/2017) the appellants' main request is that this Tribunal revokes, reverses and/or varies the Authority's directive of the 6 December 2016 in terms of art. 10 of the Banking Act and art. 21(8) of the Malta Financial Services Act.

In its reply the Authority had raised preliminary pleas regarding the absence of *locus standi* on the part of the various appellants, including the Bank, to lodge this appeal.

These preliminary pleas became redundant after the Tribunal rejected them in the aforementioned proceedings bearing number 04/2016 in the same names on the 16th of January 2017. The Tribunal's decision was confirmed by the Court of Appeal (Inferior Jurisdiction) on the 5th of November 2018.

On the 27th of March 2019 the Bank filed an application in these proceedings whereby, for the reasons therein mentioned, it requested a stay of these proceedings “*until such time as the directors of the Bank are granted access to the Bank, its information, files, information, IT systems, information about its financial situation as well as access to the Bank’s financial resources in order for the Bank to be able to pay for representation by external legal counsel and generally until such time as the effective representation of the Bank by its directors is effectively restored*”.

The Authority in its reply, filed on the 17th of April 2019, opposed the Bank’s request for a stay of these proceedings for the reasons therein mentioned.

The Bank’s request for a stay of these proceedings was rejected by the Tribunal by means of a decision given on the 9th of October 2019. There was no appeal from this decision.

Following the Tribunal’s rejection of the Bank’s request for a stay of these proceedings, the Bank, on the 13th of November 2019, filed the request which is being decided today, that is that the Tribunal ‘*orders the MFSA to restore the effective representation of the Bank in these proceedings by its directors Heikki Niemelä and Mika Lehto including by allowing the said directors access to the Bank, its information (such as financial, accounting and regulatory records), documentation, files, IT systems as well as access to the Bank’s financial resources in order for the Bank to be able to pay for legal advice and representation by external legal counsel, subject to such order/s and/or direction/s which this Tribunal may consider to be just and appropriate in the circumstances*’.

The Bank’s submissions as to why the Tribunal should accede to its request

The Bank argues that the decision of the Tribunal delivered on the 16th of January 2017 and confirmed by the Court of Appeal (Inferior Jurisdiction) on the 5th of November 2018 that the Bank has a *locus standi* in these proceedings will be meaningless if its request is rejected. The Bank states that the two remaining directors of the Bank, namely Heikki Niemelä and Mika Lehto, who are also the ultimate beneficial owners of the Bank, are being constrained to defend the interests of the Bank purely on the basis of the information which they had as individuals prior to the appointment of the competent person to administer the Bank, without any access to information which is now not in their possession and having to rely on their own personal resources, including for the funding of appropriate on-going legal representation.

The Bank further sustains its reasoning by invoking general principals of law in legal proceedings such as, the principles of natural justice, effective access to the courts, the right to be assisted by professional persons, fair hearing, equality of arms, good administrative behaviour and the right to properly present one’s case.

The Authority’s submissions as to why the Tribunal should reject the Bank’s request

The Authority maintains:

1. That the arguments and allegations contained in the Bank’s application are nothing more than a repetition of those contained in the Bank’s application requesting a stay of these proceedings (which request was rejected by the Tribunal

by means of its decision given on the 9th of October 2019) and that only the request is slightly different, in that the Bank is now asking the Tribunal to restore the directors with the effective representation of the Bank as opposed to a stay of the proceedings.

2. That the decision of the Tribunal delivered on the 16th of January 2017 and confirmed by the Court of Appeal (Inferior Jurisdiction) on the 5th of November 2018 simply established that the Bank had the necessary *locus standi* and can remain a party in these proceedings as represented by its directors. Any attempt to further broaden this decision is legally unacceptable.

3. That the Bank's real intention is to delay these proceedings and deviate them from the appellants' original request, namely the revocation, reversal and/or variation of the Authority's decision of the 6th of December 2016 above referred to.

4. That should the Tribunal accede to the appellants' request, then this would effectively suspend the appointment of the competent person and divest the competent person of all the powers and functions vested in such person by law.

5. That granting the directors access to the financial resources of the Bank will continue to deplete the already limited resources available to pay out depositors and other creditors of the Bank.

The Tribunal's considerations

The Tribunal disagrees with the Authority's submission that the request in the Bank's application under review is only slightly different from that in the previous application by the Bank requesting a stay of the proceedings. There are similarities but the requests are totally different and distinct.

Whereas the request in the previous application was a stay of these proceedings '*until such time as the directors of the Bank are granted access to the Bank, its information, files, information, IT systems, information about its financial situation as well as access to the Bank's financial resources in order for the bank to be able to pay for representation by external legal counsel and generally until such time as the effective representation of the Bank by its directors is effectively restored*' in the current application the Bank is requesting that this Tribunal '*orders the MFSA to restore the effective representation of the Bank **in these proceedings** by its directors Heikki Niemelä and Mika Lehto including by allowing the said directors access to the Bank, its information (such as financial, accounting and regulatory records), documentation, files, IT systems as well as access to the Bank's financial resources in order for the Bank to be able to pay for legal advice and representation by external legal counsel, subject to such order/s and/or direction/s which this Tribunal may consider to be just and appropriate in the circumstances*' – bold emphasis added by the Tribunal. What is being requested by the Bank today is limited to these proceedings.

The crux of the matter being decided is whether or not the decision of the Tribunal, delivered on the 16th of January 2017 and confirmed by the Court of Appeal (Inferior Jurisdiction) on the 5th of November 2018, will in effect be meaningless and toothless if the Bank's request is not acceded to.

It is the Tribunal's view that the Bank's *locus standi* in these proceedings would simply be a little more than that of a spectator if it is impaired from effectively submitting and substantiating its arguments and reasons for its request to the Tribunal to revoke, reverse and/or vary Authority's decision of the 6th of December 2016 above referred to. If the Tribunal accepts the Authority's stance *in toto* it would in effect suffocate the Bank and tie its hands, leaving it with very limited space within which to manoeuvre.

As for the Authority's argument that the Bank's real intention is to delay these proceedings, the Tribunal emphasizes that the general principles of law invoked by the appellant Bank are sacrosanct and it is the Tribunal's duty to uphold them. Likewise, it is the Tribunal's duty to ensure that the parties do not invoke them simply to vexatiously delay proceedings. The parties' behaviour in these proceedings will, therefore, continue to be strictly monitored.

The Tribunal is also unable to envisage how by upholding the Bank's request, limitedly to these proceedings, it would effectively suspend the appointment of the competent person and divest the competent person of all the powers and functions vested in such person by law. By upholding the Bank's current application, the competent person will still be able to perform the duties envisaged by the law whilst the Bank endeavours at the same time to persuade the Tribunal to uphold its request as laid down its appeal application.

Finally, as to the Authority's objection that by granting the directors access to the financial resources of the Bank such a decision would continue to deplete the already limited resources available to pay out depositors and other creditors, the Tribunal is of the opinion that since the Bank has the right to lodge this appeal the use of its own funds to do so effectively is simply a mere consequence.

The Decision

For the aforementioned reasons the Tribunal is acceding to the Bank's request and orders the Authority to restore the effective representation of the Bank **in these proceedings** by its directors Heikki Niemelä and Mika Lehto including by allowing the said directors access to the Bank, its information (such as financial, accounting and regulatory records), documentation, files, IT systems so long as these are relevant to the Bank's appeal. As for the Bank's request to access its financial resources in order for it to be able to pay for legal advice and representation by external legal counsel, the Tribunal will determine the extent of such access after hearing the parties on this matter.

The costs regarding this decision will be determined together with those of the final judgement.

