

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
ANTIGUA AND BARBUDA**

ANUHCVP2023/0008

BETWEEN

**[1] ANGELA BARKHOUSE
[2] TONI SHUKLA
(as receivers of shares of Emergent Fidelity Technologies Ltd.)**
Appellants

and

**[1] SAMUEL BENJAMIN BANKMAN-FRIED
[2] EMERGENT FIDELITY TECHNOLOGIES LTD.
(in Provisional Liquidation)
[3] YONATAN BEN SHIMON**
Respondents

Before:

The Hon. Mde. Vicki Ann Ellis	Justice of Appeal
The Hon. Mr. Trevor Ward	Justice of Appeal
The Hon. Mr. Gerard St. C Farara	Justice of Appeal [Ag.]

Appearances:

Mr. David Joseph KC with him Ms. Kathleen Bennett and Ms. Cherise Archibald
for the Appellants
Dr. David Dorsett for the First Respondent
Ms. Andrea Smithen-Henry for the Third Respondent

2023: October 26;
2024: July 26.

Civil appeal – Winding up proceedings – Stay of proceedings – Principles governing the lifting of a stay of proceedings - Whether the learned judge erred in partially lifting the stay of proceedings – Whether the learned judge erred in finding that SBF would suffer prejudice if he was not afforded an opportunity to challenge the receivership order and the freezing orders – Appellate interference – Whether the decision of the learned judge was blatantly wrong warranting appellate interference – Application for permission to adduce fresh evidence – Principles in Ladd v Marshall

This matter concerns what the appellants describe as one of the biggest financial frauds in American history. The appellants contend that there is prima facie evidence that very large sums of money, in excess of US\$550 million, have been wrongfully diverted away from FTX Trading Limited (“FTX”) to Mr. Samuel Bankman-Fried (“SBF”) and Gary Wang, and then into Emergent Fidelity Technologies Ltd (“Emergent”). Mr. Yonatan Ben Shimon (“the third respondent”), contends that he is one of the victims of this suspected fraud and a creditor of Emergent. On 17th November 2022, he applied ex parte for freezing orders against Emergent and SBF and for a receivership over SBF’s debt and equity interests in Emergent and over Emergent’s assets. This ex parte application was heard before Williams J on 18th November 2022, who granted the relief sought (the “18th November Order”).

The Receivers, on 2nd December 2022, commenced Claim 480 by way of a Petition seeking to wind up Emergent pursuant to the provisions of the International Business Corporations Act and seeking to have the Receivers, as holders of the shares of Emergent, appointed as provisional liquidators. On 5th December 2022, at a hearing in Claim 480, Ramdhani J appointed the Receivers as provisional liquidators over Emergent (the “Provisional Liquidators”) with a view to protecting the interests of Emergent’s creditors pending the final determination of Claim 480. The judge also granted a stay preventing the commencement or continuation of any suit or action against Emergent in respect of its assets except with the leave of the court; and staying all claims against Emergent, including Claim 456, without prejudice to the right of any party to apply to lift the stay.

On 12th December 2022, SBF applied to discharge the 18th November Order (the “Discharge Application”) and by application dated 14th December 2022, he sought to lift the stay of Claim 456 granted in the 5th December Order and for the Discharge Application to be listed for hearing. In Claim 480, SBF filed an application for a stay of those proceedings pending the hearing of the applications in these proceedings. That application was dismissed by Ramdhani J in an oral decision delivered on 28th December 2022.

The 28th December 2022 decision in Claim 480 was unsuccessfully appealed by SBF in ANUHCVP2023/0002. SBF’s application for a stay of Claim 480 having been refused, the substantive hearing of the Petition then took place before Forrester J on 27th January 2023, with Forrester J going on to rule that Emergent be placed into liquidation and appointing the Receivers as Liquidators by way of her judgment dated 23rd March 2023 (the “23rd March Judgment”). On 21st February 2023, Forrester J ruled that the stay of Claim 456 should remain with respect to Emergent but be lifted in relation to SBF and Mr. Shimon.

Being dissatisfied, the appellants challenged the decision of Forrester J citing 4 grounds of appeal summarised as follows: (i) whether the learned judge erred in partially lifting the stay in respect of SBF, despite previously concluding that such interference should not occur, consistent with the refusal to lift the stay on claims against Emergent; (ii) whether the learned judge erred in concluding that SBF would suffer prejudice if he was not afforded an opportunity to challenge the 18th November Order because, as the learned judge rightly concluded, there may well be and in fact is no utility in challenging the receivership order which has been overtaken by the Provisional Liquidation Order made by Ramdhani J which has never been challenged or appealed; (iii) whether the learned judge erred in concluding that SBF would suffer prejudice if he was not allowed to challenge the imposition of a

freezing order against him, describing this as a 'sacrosanct right'; and (iv) whether the learned judge erred in failing to conclude that a defendant would have to show compelling reasons as to why a claimant should be forced to continue to prosecute a claim in the absence of evidence of assets or security and no such reasons were put before the learned judge.

Held: dismissing the appeal, affirming the judgment and orders of Forrester J and awarding costs to the respondents, such costs to be assessed if not agreed within 21 days, and to be paid out of the liquidation of Emergent, that:

1. It is settled law that the power to impose a stay necessarily includes the power to lift it. So that where a stay of proceedings has been ordered, a court does have the power to lift the stay allowing proceedings to continue. Either party may apply to the court to lift the stay under the court's case management powers. When faced with applications to lift or impose a liquidation stay, the court should carry out a balancing exercise of relevant factors, seeking to do what is just and fair in all the circumstances. The proper exercise of the power to lift a stay is informed by the nature of the stay which was granted and the purposes for which it was evidently imposed.

Arkin v Marshall [2020] EWCA Civ 620 applied; **King Felix Sunday Bebor Berebon and others v Shell Petroleum Development Company of Nigeria Ltd** [2017] EWHC 1579 (TCC) applied.

2. This Court is not satisfied that the learned judge's decision to lift the stay in respect of SBF while maintaining the stay in respect of Emergent is incongruous or plainly wrong. The Judge's analysis reveals that she understood that the purpose of a liquidation stay is to facilitate the orderly winding up of Emergent in the interest of its creditors and she recognised that the liquidation of Emergent should proceed unimpeded. . However, the learned judge was obliged to take into account the fact that SBF was sued in his personal capacity, and she had to consider the purpose of the stay in relation to the claim against SBF. The Judge clearly considered the appellants' concern that lifting the stay would frustrate the purpose of the stay which was to prohibit SBF from taking steps to regain control of Emergent. However, she was not satisfied that there was enough evidence to show that lifting the stay in respect of SBF could have the dreadful impact which is suggested. The stay was intended to operate solely in respect of the actions or proceedings against Emergent, and not in respect of anyone else. Furthermore, the terms of the 5th December 2022 Order make it clear that to the extent that any suit, action or other proceeding touches or concerns Emergent or its assets, it cannot be maintained without first obtaining the leave of the court. The judgment reveals that the learned judge took this into account and appropriately weighed it in the balance and so ground 1 of the appeal must fail.
3. It is settled law that permission to bring a claim against a company in liquidation should normally be refused if the issues raised by the proposed proceedings could conveniently be decided in the liquidation, because it would ordinarily be quicker

and less expensive for that course to be taken. In this appeal, the third respondent has filed a proprietary claim against both Emergent and SBF in the court below in which he seeks, inter alia, declaratory relief that they hold funds which he invested with FTX or their traceable proceeds on trust for him and in which he seeks an account and payment of such amount as the court may assess. These claims for relief are advanced on the basis that funds which the third respondent invested with FTX were knowingly received by Emergent and SBF in breach of trust and/or that Emergent and SBF dishonestly assisted breaches of trust. The judge therefore had to consider whether such a claim could be dealt with just as conveniently and/or more cost-effectively in the liquidation. The judge did consider this factor and determined that the claim against SBF was a proprietary tracing claim that could not have been dealt with in the winding up process. Accordingly, there is no basis to interfere with this finding.

National Bank of Anguilla (Private Banking and Trust) Ltd (in administration) and another v National Bank of Anguilla Ltd (in receivership) and another AXAHCVP2016/0008 (delivered 11th July 2018, unreported) followed; **Cassegrain v Gerard Cassegrain & Co Pty Ltd (in liquidation)** (2012) NSWCA 435 applied; **In the matter of Bigdeal Artist Management Pty Ltd (in liquidation)** (2015) NSWSC 936 applied.

4. It is clear from the judgment that the learned judge considered both the issue of prejudice and the utility of lifting the stay. The determination of the application to lift the stay requires an exercise of balancing the ingredients enshrined in the overriding objective including the right of every litigant to expeditious justice and the need to minimise litigation delays. There can be no doubt that maintaining the stay would impose a restriction impacting seriously on SBF's right of access to a court, in circumstances where he is a defendant against whom serious allegations involving breach of trust, dishonesty and fraud are alleged. The case law makes it plain that in such circumstances the defendant is entitled to an expeditious hearing. Such actions should come to trial quickly – if the claimant is entitled to a remedy, it must be swift, practical and effective. The judge was clearly not persuaded that the factors advanced on behalf of the appellants sufficed to displace, limit or delay SBF's right to a speedy disposal of the claims advanced in Claim 456. Specifically, she was not satisfied that there was any cogent evidence that lifting the stay would adversely affect the winding up process and her reasoning cannot be faulted. Accordingly, grounds 2 and 3 also fail.

Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH [2005] EWHC 1453 (Comm) applied; **Yiannides v Radley Gowns Ltd** (1975) 119 SJ 711 applied.

5. It cannot be appropriate for a court to be asked to maintain a stay of proceedings on the basis that the underlying proceedings are not maintainable or where there is little hope or prospect of the parties securing any effective remedies. Where the subject claim is hopeless or lacks utility, the appropriate course is to discontinue the claim rather than seek to maintain a stay of proceedings to preserve it. Ground 4 accordingly fails.

6. The appellants' application to adduce fresh evidence does not satisfy the **Ladd v Marshall** criteria because it is common ground that the purported fresh evidence contained in the documents exhibited to the Barkhouse Affidavit, as well as the factual matters evidenced by and referred to therein, post-date the hearing in the court below. It is apparent that the appellants were seeking to deploy this evidence where this Court had arrived at a determination regarding this appeal and elected to exercise its own discretion in regard to the lifting of the stay. They contend that the matters evidenced by these documents cover ground which is very likely to be raised by the Court of Appeal of its own motion as to what is the present position. However, given the reasoning and the conclusions reached in this appeal, there is no basis upon which this Court would need to exercise its discretion de novo. The appellants have not demonstrated that the learned judge committed an error of principle in arriving at her conclusion, which would warrant this Court exercising its discretion afresh. Accordingly, the application to adduce fresh evidence also fails.

Ladd v Marshall [1954] 1 WLR 1489 applied; **Chia Hsing Wang v XY et al** BVIHCMAP2022/0055 (delivered 6th June 2023, unreported) followed.

JUDGMENT

Introduction

- [1] **ELLIS JA:** The principal issue that arises to be resolved in this appeal is whether the learned judge erred in lifting the stay of proceedings imposed by Ramdhani J on 5th December 2022 in Claim No. ANUHCv0480/2022 between Angela Barkhouse and Toni Shukla (as receivers of shares in Emergent Fidelity Technologies Ltd) and Emergent Fidelity Technologies Ltd ("Claim 480").

Background

- [2] In order to resolve this principal issue which arises in this appeal, it is necessary to recount the history of this appeal which is considerable. The background to this matter concerns what the appellants describe as one of the biggest financial frauds in American history. The appellants contend that there is prima facie evidence that very large sums of money (in excess of US\$550m) have been wrongfully diverted away from FTX Trading Limited ("FTX") to Mr. Samuel Bankman-Fried ("SBF") and Gary Wang and then into Emergent Fidelity Technologies Ltd ("Emergent").

[3] Mr. Yonatan Ben Shimon, contends that he is one of the victims of this suspected fraud and a creditor of Emergent. On 17th November 2022, he applied ex parte for freezing orders against Emergent and SBF and for a receivership over SBF's debt and equity interests in Emergent and over Emergent's assets. This ex parte application was heard before Williams J on 18th November 2022, who granted the relief sought (the "18th November Order"). For the present purposes the relevant parts of the 18th November Order are set out below:

- (i) Emergent's assets, whether held within or outside the jurisdiction, were frozen (paragraph 5);.
- (ii) SBF's "equity and/or debt interests" in Emergent, whether held within or outside the jurisdiction, were frozen (paragraph 6).
- (iii) Emergent and SBF were required to provide various items of information to Mr. Shimon's legal representatives (paragraphs 10 and 11); and
- (iv) the appellants were appointed as receivers over all of Emergent's assets and all of SBF's "equity and/or debt interests" in Emergent (paragraphs 22-24).

[4] Subsequent to the 18th November Order, the Receivers sought to enforce SBF's obligations to provide information under paragraph 10 of the order of 18th November 2022 (they say) with no success. The Receivers have raised SBF's failure to discharge his obligations in this regard with the Court. There has never been a return date hearing in respect of the 18th November Order.

[5] The Receivers, on 2nd December 2022, commenced Claim 480 by way of a Petition seeking to wind up Emergent pursuant to the provisions of the **International Business Corporations Act**¹ and seeking to have the Receivers as holders of the shares of Emergent appointed as provisional liquidators.

¹ Cap. 222 of the Laws of Antigua and Barbuda.

- [6] On 5th December 2022, at a hearing in Claim 480, Ramdhani J appointed the Receivers as provisional liquidators over Emergent (the “Provisional Liquidators”) with a view to protecting the interests of Emergent’s creditors pending the final determination of Claim 480. The learned judge also granted the following stay (paragraphs 8 and 9 of the Order of 5th December 2022 (the “5th December Order”)):
- “8. No suit, action or other proceeding be commenced or continued against [Emergent] or in respect of its assets, except with the leave of the Court and subject to such terms as the Court may impose.
9. Without prejudice to paragraph 8 above, all claims brought against [Emergent] in this jurisdiction are stayed, including [Action 0456]. This is without prejudice to the right of any party to any such proceedings to apply to the Court to lift the stay in whole or in part.”
- [7] On 12th December 2022, SBF applied to discharge the 18th November Order (the “Discharge Application”).
- [8] By application dated 14th December 2022 (as amended on 18th January 2023), SBF sought to lift the stay of Claim 456 granted in the 5th December 2022 Order (the “SBF Application”) and for the Discharge Application to be listed for hearing.
- [9] In Claim 480, SBF filed an application for a stay of those proceedings pending the hearing of the applications in these proceedings. That application was dismissed by Ramdhani J in an oral decision delivered on 28th December 2022. At paragraph 3 of the 28th December 2022 Order, Ramdhani J noted ‘[f]or the purposes of the presentation of the Petition as shareholder of 90% of the shares of [Emergent] pursuant to the receivership order [i.e. the 18th November Order] in Claim 0456/2022 (which proceedings remain stayed), the receivers appointed by the said order shall have standing to present the petition’.
- [10] The 28th December 2022 decision in Claim 480 was unsuccessfully appealed by SBF in ANUHCVP2023/0002.

- [11] SBF's application for a stay of Claim 480 having been refused, the substantive hearing of the Petition then took place before Forrester J on 27th January 2023, with Forrester J going on to rule that Emergent be placed into liquidation and appointing the Receivers as Liquidators by way of her judgment dated 23rd March 2023 (the "23rd March Judgment").
- [12] On 21st February 2023, Forrester J ruled that the stay of Claim 456 should remain in part and be lifted in part. At paragraph 43 of her written judgment the learned judge ordered as follows:
- “(a) The stay imposed by Claim 480 on these proceedings is lifted in relation to the Claimant and the Second Defendant [SBF], so that these proceedings in relation to them may continue.
- (b) In relation to the First Defendant, the stay imposed in Claim 480 preventing these proceedings from continuing against the First Defendant is maintained.
- (c) Costs on this application are awarded in favour of the Second Defendant having succeeded in having the stay imposed on him lifted to be paid by the Interim Receivers/Provisional Liquidators who initially sought the stay and opposed its lifting. The Second Defendant's costs are to be assessed if not agreed.”
- [13] On 6th March 2023, SBF applied for the striking out of proceedings brought in Claim 456. He also opposed the third respondent's application for an extension of time for the filing of his statement of claim and issued a jurisdiction challenge under CPR 7.7 and 9.7 on 8th May 2023.
- [14] Dissatisfied with the judgment of Forrester J, the appellants sought and were granted leave to appeal and a short interim stay of the Order of Forrester J pending the determination of the application for a stay of the said order by the Full Court. On 6th April 2023, a single judge of the Court of Appeal dismissed the application for a stay of the judgment of Forrester J with costs.
- [15] On 14th March 2023, the appellants filed their notice of appeal in which it advanced four main grounds of appeal:

- (i) In Ground 1, the appellants acknowledge that the learned judge correctly refused to lift the stay of proceedings as regards the claim brought by Mr. Shimon against Emergent, finding that it was in the public interest that the claim for an orderly liquidation of the first defendant in Claim 480 proceed. However, the appellants contend that in SBF's Notice of Application dated 18th January 2023, the only reason given by SBF for seeking to have the stay lifted was to challenge the appointment of receivers in Emergent and hence intervene in the affairs of Emergent and disrupt or block entirely the work of the Provisional Liquidators in seeking to have Emergent wound up. The appellants contend that the learned judge's partial lifting of the stay in respect of SBF was internally illogical and has served only to allow SBF a route to interfere with and impede the work of the Receivers and Provisional Liquidators when the learned judge had already concluded (correctly), consistent with the conclusions of other tribunals in Claims 456 and 480 to date, that this is the very thing that should not be allowed to happen and is consistent with the learned judge's correct refusal to lift the stay as regards the claims against Emergent.
- (ii) In Ground 2, the appellants contend that the learned judge further erred in law or fact in concluding that SBF would suffer prejudice if he was not afforded an opportunity to challenge the 18th November Order because, as the learned judge rightly concluded, there may well be and in fact is no utility in challenging the receivership order which has been overtaken by the Provisional Liquidation Order dated 5th December 2022 made by Ramdhani J which has never been challenged or appealed.
- (iii) In Ground 3, the appellants advance that the learned judge also erred in law and fact in concluding that SBF would suffer prejudice if he was not allowed to challenge the imposition of a freezing order against him, describing this as a 'sacrosanct right'. The appellants base this argument on the fact that the freezing order only applied to SBF's shares in

Emergent,² and to Emergent's assets in the jurisdiction,³ and that SBF has sworn on affidavit that Emergent has no such assets other than the shares in Robinhood Markets Inc. which were under the control of the Provisional Liquidators/Receivers and had in any event been made subject to a warrant of seizure issued by the United States District Court, Southern District of New York dated 30th December 2022. The appellants further contend that the learned judge failed to give any weight to the finding of Ramdhani J on 28th December that SBF had in any event been in breach of the disclosure requirements in the freezing order before Claim 456 was stayed.⁴

- (iv) In Ground 4, the appellants contend that the learned judge also erred in law in failing to conclude that a defendant would have to show compelling reasons as to why a claimant should be forced to continue to prosecute a claim in the absence of evidence of assets or security and no such reasons were either advanced or evidenced before the learned judge.

The proceedings and judgment in the court below

- [16] In his application before the court below, SBF advanced a number of grounds which included: (i) that the appellants lacked locus standi to commence Claim 480; (ii) that he has a right to be heard on the ex parte order made against him on 18th November 2022 and that he has been denied that opportunity to be heard as a result of the stay imposed on that matter; and (iii) that the existence of a freezing order made against him ex parte is highly prejudicial to him.
- [17] SBF asserted that the appellants (qua receivers) are not the shareholders of Emergent and therefore they do not fall within the provisions of section 301 of the **International Business Corporations Act** to function as a shareholder of the First Defendant. He further advanced that the third respondent: (a) did not have a good

² See para 6 of the 18th November Order.

³ Ibid, para 7.

⁴ See para 21 of the Affidavit of Angela Barkhouse dated 2nd December 2022.

arguable case; (b) failed to demonstrate that there is a real risk that unless the defendants are restrained, they would deal with the assets or take steps which make them less valuable other than in the ordinary course of business with the result that the availability or value of the assets being protected are impaired and a judgment in favour of the third respondent/claimant is left unsatisfied; (c) did not have proper grounds on which to serve SBF outside of the jurisdiction; (d) failed to demonstrate that SBF is a proper party to the proceedings; (e) engaged in material non-disclosure on the hearing of his application ex parte having failed to present to the court arguments adverse to the Orders being sought that would have been made if SBF was present at that hearing; and (f) pursuing the matter was an abuse of the process of the court.

[18] The appellants (the Interim Receivers/Provisional Liquidators) opposed SBF's application to lift the stay on several bases. First, they contended that SBF has brought the application to lift the stay in the wrong proceedings. They argued that the application should have been made in Claim 480 because, the lifting of the stay has to be examined in the context of the 5th December 2022 Order that is, in the action in which the stay was imposed. The appellants further argued that the same issues are being re-litigated by SBF as in Claim 480 where he was unsuccessful in his request to impose a stay on Claim 480 pending determination of the application at bar and to discharge the 18th November 2022 Order.

[19] The appellants also argued that there are no proper grounds for the stay to be lifted. They submitted that it is important for Emergent to enter into liquidation so that its assets can be fairly protected for the benefit of all creditors including the third respondent, Mr. Shimon. This is because there are allegations that SBF misappropriated funds of customers of FTX with there being an ineluctable connection between the misappropriation of customer assets and the assets that have been registered in the name of Emergent. Further, it is alleged that SBF orchestrated a vast criminal conspiracy pursuant to which depositor monies were taken from FTX and transferred to another company named Alameda Research Ltd

(“Alameda”). It is contended that the appointment of Interim Receivers was not a faulty decision as valuable shares need to be protected and the first defendant’s affairs must be conducted separately from the second defendant who is accused of and at the centre of a multi-million-dollar fraud and this is the most orderly manner in which that may be done.

[20] The appellants contended that SBF has failed to cooperate with them as Interim Receivers and or Provisional Liquidators of Emergent to enable them to assemble the full financial records of Emergent and the only significant asset that has been identified is the valuable shareholding in Robinhood Markets, Inc. held in the name of Emergent which was purchased in May 2022 at a cost of about US\$546 Million.

[21] Moreover, the appellants asserted that it is clear that Emergent is insolvent, and that what needs to happen, in order to protect the interests of its creditors, is that it should be placed into liquidation without further ado and that all necessary steps are taken to preserve its assets for the benefit of all its creditors. Finally, the appellants contended that the 18th November Order was properly made and has now been superseded by the 5th December Order in Claim 480 where there is a Petition to orderly wind up Emergent.

[22] In lifting the stay imposed on these proceedings by order in Claim 480, the learned judge adopted the guidance of this Court in **National Bank of Anguilla (Private Banking and Trust) Limited (in administration) and another v National Bank of Anguilla Limited (in receivership) and others**⁵ which prescribed the factors which a court must weigh when considering whether to lift a stay.

[23] The learned judge accepted that she had to balance the competing interest of the parties herein and the nature and extent of prejudice that may be sustained by either party if the stay is lifted or not lifted. First, although the learned judge accepted the need for the stay in relation to Emergent, she questioned the purpose of the stay in

⁵ AXAHCVP2016/0008 (delivered 11th July 2018, unreported).

relation to SBF. She found that if proceedings against Emergent are stayed but allowed to be continued against SBF, neither the claimant nor SBF could advance these proceedings against Emergent other than in the liquidation if the Emergent is put into liquidation.

[24] The statement of claim having not been filed, the judge determined that she could not properly examine the merits of the claim as there were no particulars provided but noted that the claim against both Emergent and SBF was a proprietary tracing claim for knowing receipt and/or dishonest assistance alleging that funds are held in trust for the claimant. In relation to SBF she noted that the claimant's claim against him can properly proceed on its own as SBF is not a company, so the claim in relation to him cannot be part of the winding up process of Emergent. She further noted that the liquidation petition was not filed against SBF.

[25] In regard to the issue of prejudice, the judge recognised that there was clear evidence of harm or prejudice to be sustained as advanced by the Interim Receivers/Provisional Liquidators, if the stay is lifted insofar as it would give SBF an opportunity to take further steps to regain control of Emergent in circumstances where there are significant allegations of illegality pending against him in other jurisdictions in which the assets of Emergent are entangled and the interest of creditors of Emergent is a salient matter. However, she found that there may well be no utility in SBF taking any steps in these proceedings given the state of affairs in Claim 480 and or ability to do the same. Against this backdrop she found that SBF had been deprived of his sacrosanct right to be heard. She noted that he had never had the opportunity to be heard on his challenge to that interim order of the court, as is the usual procedural course that occurs when an ex parte order is challenged, though that order contains several orders adverse to him which includes the appointment of Interim Receivers over his assets within this jurisdiction and elsewhere. The judge found that this stands as a greater prejudice to be suffered in this adversarial system of litigation in the context of a litigant seeking to be heard on an adverse order made in his absence, because the application was heard ex parte

despite it having been overtaken by a series of events that put into question aspects of the continued utility of those proceedings or at least part of these proceedings.

- [26] Finally, the judge found that while the public interest in the circumstances at hand favours the orderly liquidating of Emergent, SBF should be permitted to be heard on the ex parte 18th November Order obtained by the claimant adverse to him as his right to be heard is sacrosanct.

The parties' submissions on appeal
Appellants' submissions

- [27] At the core of the appellants' submissions is the contention that there is a fundamental inconsistency between the learned judge's correct refusal to lift the stay as regards claims against Emergent and the incorrect lifting of the stay as regards claims against SBF. Counsel for the appellants submitted to the Court that on every occasion, despite strenuous opposition from SBF, the courts of Antigua and Barbuda have found plainly and clearly that the shares of Emergent should remain under the control and supervision of neutral court-appointed officers. The appellants contended that challenging this finding is the only purpose pursued by SBF in having the stay lifted against him in ANUHCV2022/0456. The appellants submitted that the repeated attempts made by SBF to try to challenge the court-appointed officer's control of his shares in Emergent and thereby derail and impede the Liquidators' efforts have been dealt with by two separate judges in separate judgments.

- [28] The appellants also posited that it has been made clear since the lifting of the stay on 21st February 2023, (including by issuing further application in ANUHCV2022/0456), that SBF is intent on using ANUHCV2022/0456 as a vehicle to attempt to wrest back control of Emergent and undermine its orderly liquidation. The appellants suggested that the sole argument that SBF had deployed in support of lifting the stay is a wrongful notion that he has been denied an opportunity to be heard with regard to the court appointed officers seizing control of Emergent and his shares in that company and to lift a freezing order and receivership order over

his assets in the jurisdiction. In response to that argument, the appellants submitted the freezing order was made against SBF's assets in Antigua and none, save for the share in Emergent, have been disclosed by SBF. There is therefore nothing to challenge or to lift in the freezing order. Further, with regard to the court appointed officers in Antigua and Barbuda taking control of his shares in Emergent and the affairs of Emergent, SBF has had three unsuccessful attempts on three separate occasions to challenge this.

[29] The appellants submitted that there is an error running through the thread of the learned judge's reasoning i.e. a failure to follow through the logic of refusing to list the stay against Emergent. The learned judge made clear that her refusal to lift the stay against Emergent was on the basis that there was an overriding public interest that the affairs of Emergent remain in the hands of the Provisional Liquidators, and thereafter if the Petition were allowed, in the hands of Liquidators. They further contended that the sole reason given by SBF for seeking to have the stay lifted was to challenge the appointment of receivers over SBF's Emergent shares and to intervene in the affairs of Emergent in an effort to disrupt or block the work of the Provisional Liquidators in the interest of Emergent's creditors as a whole.

[30] The appellants submitted that the effect of the learned judge's partial lifting of the stay in ANUHCV2022/0456 as against SBF is to allow SBF another attempt to try to interfere with and impede the work of the Provisional Liquidators in circumstances where the learned judge has already reasoned that this is the very thing that should not be allowed to happen. The learned judge therefore fell into an error of law/fact and took into account irrelevant factors/disregarded relevant factors and the earlier findings in the judgment.

[31] To bolster their second ground of appeal, the appellants submitted that the learned judge erred in law and/or fact in concluding that SBF would suffer prejudice if he was not afforded an opportunity to challenge the receivership order. The appellant suggested that the learned judge correctly concluded that there would be no utility

in challenging the receivership order or in challenging the liquidation order. As such, the appellants contended that if there is no utility in SBF taking steps in ANUHCV2022/0456, then the learned judge erred in lifting the stay to enable SBF to take such steps. The court should not act in vain. The only utility there could be in SBF taking steps would be for SBF to seek to regain control over Emergent as set out above.

[32] On the third ground of appeal, the appellants submitted that the learned judge erred in law and fact in concluding that SBF would suffer prejudice if he was not allowed to challenge the imposition of a freezing order against him, describing this as a 'sacrosanct right'. The appellants' submission is that the learned judge failed to consider that the freezing order only applied to SBF's shares in Emergent and to Emergent's assets in the jurisdiction. The appellants submitted that there is no prejudice apparent as SBF has failed to place focus on the lifting of the freezing order made against him personally. They suggested that SBF's sole interest lies in a challenge to the Receivership Order and by extension, Emergent's liquidation.

[33] Finally, the appellants submitted that the learned judge further erred in law in failing to conclude that an overseas defendant would have to show compelling reasons as to why a claimant should be forced to prosecute a claim in the absence of evidence of assets or security. Again, SBF's only assets within the jurisdiction are his shares in Emergent which were under the control of the Provisional Liquidator and had been made subject to a warrant of seizure issued by the United States District Court in December 2022.

[34] Counsel for the appellants stated that in light of the foregoing and in applying the test in **National Bank of Anguilla** each of the relevant factors rests strongly in favour of reinstating the stay subject to this appeal being heard in full.

Third respondent's submissions

[35] The third respondent, Mr. Shimon's⁶ brief submissions revolve around an opposition to SBF's request to lift the stay on the basis that he should not be forced to continue with ANUHCV/2022/0456 in circumstances where:

- (1) Emergent is now in liquidation and now under the control of its liquidators;
- (2) the only known assets of Emergent or SBF within this jurisdiction, being Emergent's holding of shares in Robinhood Markets Inc. is now under the control of the liquidators;
- (3) the third respondent will have to prove his claim in Emergent's liquidation; and
- (4) the third respondent should not be forced to continue with the action pending the determination of the appeal so as to prove his claim twice over, once against SBF in ANUHCV2022/0456 and again by proving in Emergent's liquidation (and incurring costs twice over in the process). This is especially so considering that SBF has no assets in Antigua other than his shares in Emergent and there are doubtful prospects of the third respondent being able to recover any costs from SBF in due course.

First respondent's submissions

[36] The crux of the first respondent's submissions is that SBF has a right to be heard in respect of a claim that has been made against him. Counsel for the first respondent submitted that SBF has a constitutional right to a fair trial, and such a right is not subject to any limitations. SBF would be restrained from exercising or enjoying said right if he is not given an opportunity to be heard. The first respondent argued that

⁶ The claimant in the court below.

his right to be heard was being contravened with the continued imposition of stay proceedings.

[37] Counsel for SBF indicated that the third respondent has since filed and served his statement of claim on the first respondent. In turn, SBF has filed an application pursuant to the **Civil Procedure Rules (Revised Edition) 2023** ("CPR") for, among other things, an order setting aside service of the claim on him. The first respondent averred, pointing the Court to his application for setting aside filed on 8th May 2023, that Antigua and Barbuda is not the appropriate forum for the trial of the dispute brought by the third respondent for a number of reasons, including the fact that the claim is a dispute arising from the terms of service agreement, which agreement is not covered by the law in Antigua and Barbuda but instead England and Wales, the commercial relationships underlying it had nothing to do with Antigua and Barbuda, the witnesses being outside the jurisdiction and the fact that Antigua and Barbuda is not the principle place of business for SBF.

[38] It was therefore submitted by the first respondent that SBF is entitled to be heard on such an application and such an application is an application that should be determined soonest in the interest of justice. There is no justice for the court to stay or adjourn proceedings against the first respondent which are properly the subject of another forum and should be the subject of an order setting aside service of the claim form on the first respondent and/or the statement of case against the first respondent otherwise struck out.

[39] The first respondent identified the issue arising for determination in the appeal as whether the decision of the learned judge to lift the stay of proceedings against the first respondent so as to enable him to be heard was a proper exercise of judicial discretion. The first respondent noted that an appellate court is hesitant to interfere with a case management decision unless it were plainly wrong in that it was outside the generous ambit within which reasonable decision-makers might disagree. The first respondent was therefore of the view that the decision of Forrester J to lift the

stay was not plainly wrong. The learned judge considered the relevant principles of **National Bank of Anguilla** and concluded that the right of SBF to be heard on the ex parte orders made against him is 'sacrosanct'.

[40] Counsel for the first respondent went further in submitting that SBF's right is encapsulated by Section 15(8) of the **Antigua and Barbuda Constitution Order 1981** ("the Constitution"). The first respondent bolstered this point by stating that the Constitution provides no limitations on the right to a fair hearing per **Montgomery v HM Advocate**,⁷ **Randall v The Queen**,⁸ and **Serafin v Malkiewicz**.⁹ In essence, counsel for the first respondent submitted that adverse orders were made against SBF in circumstances where there was no properly instituted claim against him. SBF is entitled to be heard and heard soonest. His constitutional rights cannot be subject to the convenience of the appellants. For these reasons, the first respondent averred that the appeal should be dismissed and the stay should not be reinstated.

[41] There is a fundamental internal contradiction in this ruling which vitiates Forrester J's decision. The learned judge correctly ruled that the stay imposed by paragraph 9 of the 5th December Order should not be lifted as against Emergent because the public interest was such that Emergent's affairs should remain in the hands of the Provisional Liquidators until the determination of the Petition on any view and that, if the Petition was allowed thereafter, in the hands of Liquidators. Nevertheless (and inconsistent with this finding), the learned judge determined that the stay should be lifted as against SBF, notwithstanding that the only basis on which SBF wants the stay to be lifted, as disclosed in his application dated 12th December 2022, is with a view to obtaining the discharge of the Receivers' appointment over his shares in Emergent (and thereby impede or derail the progress of the Petition and the work of the Provisional Liquidators, i.e. now the Liquidators).

⁷ [2003] 1 AC 641.

⁸ [2002] 1 WLR 2237.

⁹ [2020] 1 WLR 2455.

Discussion

- [42] This appeal requires this Court to interrogate the exercise of the learned judge's discretion in lifting the stay imposed by the 5th December 2022 Order in Claim 480 so that the proceedings against SBF brought by the Claimant could continue. This was clearly a case management decision¹⁰ and there is now well-established jurisprudence emanating from this Court which prescribes the circumstances in which an appellate court will interfere with the exercise of discretion by the court below. A comprehensive statement of principle is set out in **Dufour and Others v Helenair Corporation Ltd**¹¹ where Sir Vincent Floissac CJ stated:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

The rules governing the grant of a stay

- [43] At first instance, a court has general power to grant a stay under the provisions of CPR Part 26.1(2)(q). A stay can be ordered following an application by the parties or by the court acting on its own initiative.
- [44] The court's jurisdiction to stay proceedings is discretionary and the circumstances in which an application for a stay may be made are almost infinitely variable. However, the order is generally to allow time for something to happen in accordance with the court's objective to ensure cases are dealt with in a just and reasonable manner. In exercising this power, a court must conduct a balancing exercise. That balancing exercise was described in **AB (Sudan) v Secretary of State for the**

¹⁰ AB (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 921.

¹¹ (1996) 52 WIR 188.

Home Department,¹² where the English Court of Appeal approved the following general statements of principle prescribed by the judge at first instance:

“In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a Claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown.

In cases where a request for a stay on proceedings is coupled, expressly or by necessary implication, with a request for interim relief, the court will need to take into account the factors relevant to both types of decision, and may need to take into account a third: that by securing interim relief and a stay, the Applicant may be asking the court to use its powers to give him, for as long as he can secure it, a benefit that he may not obtain at the trial.”

[45] Granting a stay is therefore a very fact-specific exercise which often depends on the relevant context.

[46] Where, as in this case, a court is contending with a multiplicity of proceedings involving the same parties the courts have taken the opportunity to settle additional legal principles. In **Hosking v Apax Partners LLP**,¹³ liquidators were concerned that funds received by the company on a refinancing had been paid away and not put towards the working capital. The liquidators commenced proceedings in the US against various defendants alleging fraudulent transfer and unjust enrichment. The

¹² [2013] EWCA Civ. 921 at paragraphs 26 – 27.

¹³ [2016] EWHC 1986 (Ch).

US court dismissed the claim against some of the defendants for lack of personal jurisdiction but gave permission to the liquidators to amend their complaint to assert claims under the English Insolvency Act. Concerned as to limitation, the liquidators issued further proceedings in England under that Act. In January 2016, the defendants in the US applied to dismiss the proceedings on grounds of forum non conveniens. Pending the US decision, the liquidators applied for a stay of the English proceedings.

[47] Refusing a general stay, but granting a short stay to await the US court's judgment on forum, the Chancellor of the High Court applied the dictum in **Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH**¹⁴ where the court described the relevant factors which should guide the court in the exercise of its discretion in the following terms:

“In my judgment, relevant factors which guide the court in the exercise of its discretion to stay proceedings include (in the circumstances of the present case) the following:

i) The court has a wide discretion to stay proceedings, but in circumstances where the claimant itself has voluntarily brought the two sets of proceedings, a stay should only be granted in very rare circumstances: see *Ledra Fishers v Turner* [2003] EWHC 1049 Ch, paragraphs 14 and 38; *Reichhold Norway ASA v Goldman Sachs* [2000] 1 WLR 173 at pp 179-180.

ii) Even where there are such reasons for a stay, a stay should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party (*Reichhold*, page 180).

iii) A particularly compelling case would be required for a stay to be granted to the Claimant years after he has brought the claim (*Ledra* para 39).

iv) A stay will not, at least in general, be appropriate if the other proceedings will not even bind the parties to the action stayed, let alone finally resolve all the issues in the case to be stayed.

v) A stay will not, at least in general, be appropriate if the parties to the other proceedings are not the same.

¹⁴ [2005] EWHC 1453 (Comm).

vi) A Defendant against whom a serious allegation (such as deceit) is made is entitled to an expeditious hearing, and should not be left for years waiting for the outcome of another case over which he (and the court) has no control. An action alleging fraud should come to trial quickly; thus unwarranted delay may lead to an action being dismissed for want of prosecution even before the limitation period has expired: e.g. clerk & lindsell on torts (18th ed., 2003) 15-38, *Yiannides v Radley Gowns Ltd* (1975) 119 sj 711, the overriding objective (cpr 1.1, 1.2 and 1.4(2)(l)) and article 6 of the ECHR.”

[48] I am satisfied that the summary of relevant considerations by Gloster J in **Klöckner** is a useful starting point. To these I would add that in exercising this case management power, the court must have regard to the overriding objective which, as defined in CPR 1.1, involves dealing with cases justly, that is to say (among other things) expeditiously, fairly and proportionately.

What are the principles which should govern the lifting of a stay in these circumstances?

[49] It is well settled law that the power to impose a stay necessarily includes the power to lift it.¹⁵ So that where a stay of proceedings has been ordered, a court does have the power to lift the stay allowing proceedings to continue. Either party may apply to the court to lift the stay under the court's case management powers. When faced with applications to lift or impose a liquidation stay, the court should carry out a balancing exercise of relevant factors, seeking to do what is just and fair in all the circumstances. In **King Felix Sunday Bebor Berebon and others v Shell Petroleum Development Company of Nigeria Ltd**,¹⁶ Coulson J defined the right judicial approach in the following terms:

“48. The starting point is that the stay should be lifted if that is in accordance with the overriding objective (CPR 1.1) and if it is in accordance with the requirements of justice (Jameel v Dow Jones & Co Inc [2005] EWCA Civ. 75). The issue as to whether that would be an appropriate and proportionate use of the court's resources automatically falls for

¹⁵ *Arkin v Marshall* [2020] EWCA Civ 620.

¹⁶ [2017] EWHC 1579 (TCC).

consideration under r.1.1. The burden of satisfying this test is on the party who wishes to lift the stay.

49. It is not appropriate to tilt the playing field or 'load' the test to be applied in any particular way (for example, by identifying presumptions or making repeated references to the need for 'exceptional circumstances' to be shown in order to prevent the stay being lifted). Each case will turn on its own facts.

50. It may not always be appropriate for an application to lift a stay to be determined by a direct analogy with r.3.4 or r.24.2. There may, for example, be cases which fall short of being an abuse of process or having no reasonable ground for continuance but which, in all the circumstances, might still lead a court to conclude that, when applying the test outlined in paragraph 48 above, the stay should be refused.

51. That said, a court could not sensibly apply the test in paragraph 48 above without some regard to those rules of the CPR. But for the stay, the action would still be ongoing, so questions of abuse of process or the absence of reasonable grounds for continuance will, at the very least, provide helpful guidelines for the proper exercise of the court's discretion in deciding whether or not to lift the stay."

[50] Although there is decidedly less judicial guidance regarding the exercise of a court's discretion to lift a stay (as opposed to granting a stay), it is clear that the proper exercise of that power is informed by the nature of the stay which was granted and the purposes for which it was evidently imposed. The factual matrix in this appeal discloses that the 5th December Order was made during the course of proceedings in which Ramdhani J would have appointed the Receivers as provisional liquidators over Emergent. No notes or transcript of that hearing have been provided in relation to the 5th December Order. However, the court below noted the following passing comment of Justice Ramdhani:

"...[w]hen the Court granted the order appointing Provisional Liquidators, the Court was satisfied that events had overtaken the need to simply have receivers in place to manage the state of affairs. It was considered that the risk and urgencies had escalated which required the appointment of Provisional Liquidators. This is the context within which Claim Number 456 was stayed. This context requires that at the very least, the stay does not affect the appointment of receivers for the purposes of maintaining and prosecuting the petition before this Court."¹⁷

¹⁷ 28th December 2022 Hearing Transcript in Claim 480, Page 17 lines 16 to 25.

[51] The prohibition against commencing or continuing court proceedings against a company in winding up is an essential feature of the liquidation process. In Antigua and Barbuda, the presentation of a winding-up petition does not operate as an automatic stay of proceedings against a company. However, a court has a wide discretion to stay or restrain any proceedings which may have been pending as at the date of presentation of the winding up petition on such terms as it thinks fit.¹⁸ This liquidation stay means that no action or proceedings can be commenced or continued with against the company in liquidation without the permission or leave of the court.

[52] The purpose of the stay is to ensure that all the company's unsecured creditors are treated equally, by preventing dissipation of the company's assets as a result of the litigation, and that no creditor is able, for example, to enforce any judgment obtained by it against the company. It also avoids the necessity of the liquidator having to participate in proceedings where the claim could be dealt with in the liquidation more easily and cost-effectively. It ensures that a company in liquidation is not subjected to a multiplicity of actions which would be both expensive and time-consuming, and in some cases unnecessary, taking the liquidator's attention and available funds away from the orderly winding up of the company.

[53] In **Ogilvie Grant & Anor v East**,¹⁹ McPherson J observed that:

“What is substituted for litigation in the ordinary form is a procedure by which a claimant lodges a verified proof of debt with the liquidator, who admits or rejects it wholly or in part, and from whom an appeal lies to a judge... there can be no doubt that ordinarily such a procedure is, and is designed to be, much more expeditious and less expensive than ordinary procedures by way of action.”

[54] Although there is no statutorily prescribed indication of the circumstances in which the stay can be lifted in order to permit proceedings to commence or continue, the

¹⁸ Section 381 of the Companies Act, 1995.

¹⁹ (1983) 1 ACLC 742.

courts have established judicial guidelines which summarise the factors that may influence the decision to lift the stay. In **Cassegrain v Gerard Cassegrain & Co Pty Ltd (in liquidation)**²⁰ the New South Wales Court of Appeal adopted the commentary in Austin and Black's Annotations to the Corporations Act (para 5.471B), which states:

"The relevant factors to be taken into consideration include the amount and seriousness of the claims; the degree and complexity of the legal and factual issues involved; the stage to which the proceedings, if commenced, have progressed; the risk that the same issues would be relitigated if the claims were to be the subject of a proof of debt; whether the claim has arguable merit; whether proceedings are already in motion at the time of liquidation; whether the proceedings will result in prejudice to creditors; whether the claim is in the nature of a test case for the interest of a large class of potential claimants; whether the grant of leave will unleash an avalanche of litigation; whether the cost of the hearing will be disproportionate to the company's resources; delay and whether pre-trial procedures such as discovery and interrogatories are likely to be required or beneficial."

[55] In addition, courts will usually grant leave to bring claims that could not be proved in the winding up, such as an injunction, or a claim for a proprietary remedy. Cases of this kind will have a bearing on the assets available in the winding up and accordingly court resolution of the issues involved will ultimately benefit both the claimant and the winding up process. This was illustrated in **In the matter of Bigdeal Artist Management Pty Ltd (in liquidation)**²¹ where an order was sought for leave under section 500(2) of the Corporations Act to proceed with a claim against a company in liquidation where the claim was of a proprietary nature. In that case, the claimant was seeking to establish that particular monies paid to the company in liquidation by a third party were monies held by the third party on trust for the claimant such that the monies were held by the company subject to the trust in favour of the claimant. In granting leave to proceed with the claim against the company the court found that the claim had a solid foundation; and further, that

²⁰ (2012) NSWCA 435.

²¹ (2015) NSWSC 936.

where a proof of debt procedure does not permit proprietary claims to be adequately advanced or adjudicated, granting leave to proceed was appropriate.²²

[56] The judgments in both **Cassegrain** and **Bigdeal Artist** were referenced and applied by this Court in **National Bank of Anguilla**.²³ In that case, Blenman JA writing for the Court commended the reasoning of the master in the court below in which she summarised the matters that should be taken into account in the exercise of her discretion in the following terms:

- (a) The purpose of the receivership.
- (b) Whether the nature of the claim can be dealt with in the winding-up process.
- (c) The effect which lifting the stay would have on the parties.
- (d) The public interest.
- (e) The merits of the claim.

[57] This dictum in that case was quite rightly applied by the learned judge in the court below. At paragraph 28 of the judgment, she sets out the operating legal principles and adopted the guidance of this Court:

“When considering whether to lift a stay of proceedings, this Court has to balance the competing interest of the parties herein and the nature and extent of prejudice that may be sustained by either party if the stay is lifted or not lifted. This Court adopts the guidance of the Eastern Caribbean Court of Appeal in *National Bank of Anguilla (Private Banking and Trust) Limited (in administration) and another v National Bank of Anguilla Limited (in receivership) and others* [2018] ECSCJ No. 197 from Justice of Appeal Blenman who stated that when considering whether to lift a stay in insolvency proceedings, the Court should consider:

- (a) “The purpose of the receivership
- (b) Whether the nature of the claim can be dealt with in the winding up process.
- (c) The effect which lifting the stay would have on the parties.

²² See paragraph 16 of the judgment.

²³ *Ibid*, at paragraph 49.

(d) The public interest.

(e) The merits of the claim.””

[58] The judge clearly appreciated that when faced with applications to lift a liquidation stay, the court was required to carry out a balancing exercise of relevant factors. The appellants however take issue with the judge’s exercise of discretion and have advanced 4 main grounds which are considered in seriatim below.

Ground 1

[59] In this ground the appellants highlight the purported incongruity or lack of logic in the judge’s reasoning which saw her refusing to lift the stay as against Emergent on the basis that there was an overriding public interest that the affairs of Emergent remain in the hands of the Provisional Liquidators but on the other hand permitting proceedings against SBF in Claim 456 to continue. Counsel for the appellants submitted the judge’s position was particularly incongruous given the fact that in SBF’s Notice of Application seeking to lift the stay, SBF made clear that his reason for seeking to have the stay lifted was to challenge the appointment of receivers over SBF’s Emergent shares and hence intervene in the affairs of Emergent thus blocking the work of the Provisional Liquidators.

[60] The factual matrix in this appeal is not a typical one. Here, the appellant is not the claimant in the subject proceedings but is instead the defendant against whom very serious interim relief has been granted. Claim 456 was commenced in 2022 by Mr. Shimon who filed a claim form (without a statement of claim) seeking the following relief:

- (i) a declaration that the First Defendant (Emergent) and/or Second Defendant (SBF) hold funds which the Claimant invested with FTX Trading Ltd or their traceable proceeds on trust for the Claimant;
- (ii) such amount as the Court may assess on the basis that funds which the claimant (Yonatan Ben Shimon) invested with FTX Trading Ltd

were knowingly received by the first and/or second defendants in breach of trust and/or that the first and/or second defendants dishonestly assisted breaches of trust;

- (iii) the taking of an account and consequential orders thereupon;
- (iv) damages in tort;
- (v) interest;
- (vi) costs; and
- (vii) such further or other orders as the Court thinks fit.

[61] Thereafter, the claimant sought and obtained interim freezing relief in respect of the worldwide assets of Emergent up to the value of the claimant's investment in FTX, and SBF in respect of his equity and/or debt interests in Emergent up to the value of the claimant's investment with FTX. The basis of the application was that there is a real risk that a judgment against Emergent and SBF will go unsatisfied unless a freezing order is made to prevent them from dissipating their assets in the interim. The application advanced that in May 2022, Emergent acquired a 7.6% shareholding in a NASDAQ- listed company named Robinhood Markets, Inc ("Robinhood") for about US\$650 million, possibly using funds improperly diverted from those invested by the claimant and others with FTX. According to media reports, when FTX was placed into Chapter 11 bankruptcy in the United States on 11th November 2022, SBF was attempting to sell those Robinhood shares at about a 20% discount to their volume-weighted average price. The claimant contended that once liquidated, the sale proceeds may be impossible to recover and he further submitted that in all the circumstances, it would be just and convenient to grant the freezing order.

[62] That application also sought to have interim receivers appointed over Emergent. Mr. Shimon contended that it would be just and convenient to appoint receivers over SBF's equity and/or debt interests in Emergent, and over Emergent's worldwide

assets, to prevent their dissipation or encumbrance. The basis of that application was that SBF was outside the court's territorial jurisdiction and the circumstances of FTX's collapse (as disclosed to date) were sufficiently concerning that there was a measurable risk that a freezing order alone may offer insufficient protection of the assets against which a judgment in favour of the applicant may eventually be enforced.

[63] In respect of SBF, he is enjoined from causing or permitting: (a) the removal from Antigua and Barbuda of any of his equity and/or debt interests in Emergent which are in Antigua and Barbuda up to the value of US\$10,818,600; or (b) the disposal of, dealing with, encumbrance or diminution of the value of any of his equity and/or debt interests in Emergent whether they are in or outside Antigua and Barbuda up to the same value. In addition, receivers were appointed in respect of all of SBF's equity and/or debt interest in Emergent whether in or outside of Antigua including but not limited to any shares in Emergent that may have been registered in his name.

[64] It is clear that while stemming from the same factual matrix, the case against SBF and the reliefs sought in respect of him are very serious. Although at the time when the matter came before the court below no statement of claim had been filed, the affidavit of Mr. Shimon filed in support of the application confirmed that the claim against both defendants is a proprietary claim which alleges inter alia breach of trust and dishonestly assisting breaches of trust.

[65] The orders granted in November of 2022 have persisted since then in respect of both respondents to the claim. Not surprisingly, SBF wishes to have the orders against him discharged and has filed an application (12th December 2022) pursuant to Parts 7.7 and 9.7 of the CPR and without prejudice to his right to apply to stay the proceedings on the forum non-conveniens ground. The grounds of that application are myriad. SBF contends that Mr. Shimon does not have a good cause of action against either the 1st or 2nd defendants and that the proceedings constitute

an abuse of the process of the court in that: a. it is apparent that there is no intention on the part of the claimant of bringing the proceedings to a proper conclusion; and b. the Claimant has brought a claim which he cannot prove. SBF further contends that there is no evidence that justifies an injunction and/or the appointment of a Receiver. Importantly, he contends that he is not a necessary or proper party to any proceedings against Emergent. He also contends that Antigua and Barbuda is not the most suitable jurisdiction in which to try any claim that the claimant might have and that the claim does not fall within CPR 7.3(1) (a) and is not a proper one for the Court's jurisdiction.

[66] That application remains pending while the stay persists.

[67] Although, it may appear to be incongruous having considered the proceedings below in Claim 456, I am not satisfied the learned judge's decision to lift the stay in respect of SBF while maintaining the stay in respect of Emergent is incongruous or plainly wrong. Her analysis of the purpose of the stay reveals that she understood that the purpose of a liquidation stay is to facilitate the orderly winding up of the company in the interest of its creditors. In that regard, the judge agreed that there was a need for a stay in regard to Emergent, the company in liquidation. However, the learned judge was obliged to take into account the fact that SBF is sued in his personal capacity and at paragraph 29 of the judgment she had to consider the purpose of the stay in relation to the claim against SBF.

[68] The learned judge clearly considered the appellants' objection to the lifting of the stay and their concern that it would frustrate the purpose of the stay which was to prohibit SBF from taking steps to regain control of Emergent. However, it is clear that she was not persuaded by that argument. At paragraph 29, the judge determined as follows:

“...However, if proceedings against the First Defendant are stayed but allowed to be continued between the Claimant and the Second Defendant, neither the Claimant nor the Second Defendant can advance these proceedings against the First Defendant other than in the liquidation, if the First Defendant is put into liquidation.”

[69] In my judgment, the error in the appellants' reasoning lies in their failure to grasp the full remit of the judge's refusal to lift the liquidation stay in respect of Emergent. The appellants appear to have ignored the clear terms of the 5th December 2022 Order granting the stay, which while specifically referencing Claim 456, was expressed in general terms such that ALL claims brought against Emergent were stayed. Paragraph 8 of the order also made it clear that no suit, action or other proceedings can be commenced or continued against Emergent or in respect of its assets except with the leave of the court and subject to such terms as the court may impose. This is consistent with the established judicial reluctance to allow proceedings that take attention away from the task of liquidation to deal with a multitude of actions, rather than the uniform and orderly winding up of the company as a whole.

[70] There are two critical factors which are evident from the clear terms of this order. First, the stay is intended to operate solely in respect of the actions or proceedings against the company, Emergent, and not in respect of anyone else. Secondly, to the extent that any suit, action or other proceeding touches or concerns Emergent or its assets, it cannot be maintained without first obtaining the leave of the court.

[71] It follows that to the extent that the proceedings in Claim 456 have the potential to take attention away from the task of liquidation to deal with a multitude of actions, rather than the uniform and orderly winding up of the company as a whole, it would not be permissible for such proceedings to proceed in the wake of the stay.

[72] Counsel for the appellants have placed great reliance on the grounds set out in support of the amended application to lift the stay stating that the sole reason for the application by SBF was to challenge the appointment of receivers over SBF's shares in Emergent to intervene in the affairs of Emergent and disrupt or block entirely the work of the Provisional Liquidators. Having reviewed the record of appeal and the current, I am not satisfied that lifting the stay in respect of SBF could have the dreadful impact which is suggested. At least two courts have recognised

that that liquidation of Emergent should proceed unimpeded. The judgment reveals that the learned judge clearly took this into account and weighed it in the balance.

[73] It is settled law that permission to bring a claim against a company in liquidation should normally be refused if the issues raised by the proposed proceedings could conveniently be decided in the liquidation, because it would ordinarily be quicker and less expensive for that course to be taken. In this appeal, Mr. Shimon, in the court below has filed a proprietary claim against both Emergent and SBF in which he seeks, inter alia, declaratory relief that they hold funds which he invested with FTX or their traceable proceeds on trust for him and in which he seeks an account and payment of such amount as the court may assess. These claims for relief are advanced on the basis that funds which Mr. Shimon invested with FTX were knowingly received by Emergent and SBF in breach of trust and/or that Emergent and SBF dishonestly assisted breaches of trust.

[74] The judge therefore had to consider whether such claim could be dealt with just as conveniently and/or more cost-effectively in the liquidation. At paragraph 31 of the judgment, the judge did consider this factor and determined that the claim against SBF (she acknowledged that the claim against SBF can properly proceed separate and apart from the claim against Emergent) was a proprietary tracing claim that could not have been dealt with in the winding up process.

[75] Applying the dicta in **Cassegrain** and **Bigdeal Artist**, I find no basis to interfere with that reasoning or the conclusion reached by the learned judge. In arriving at this conclusion, I have also considered the judgment of this court in **National Bank of Anguilla** in which the issue before the Court was whether the judge, having concluded that the appellants' proprietary claim could not have been dealt with in the winding up process and being disposed to lift the stay, erred in law by refusing to do so on the sole basis of the non-joinder of the conservator directors. The Court held that once the judge had accepted that the claim was a proprietary claim that could not have been dealt with in the winding up process, and there were no

countervailing factors that militated against her lifting the stay, the judge ought to have done so in the exercise of her discretion.

[76] At paragraph 59 of the judgment, although Blenman JA (as she then was) determined that the master had erred in principle in her approach, she nevertheless applied the relevant principles distilled in the helpful analysis of the master in her judgment and summarised below:

“(1) The claim is alleged to be a proprietary claim. On the premise that it is such a claim it is not one which can properly be dealt with in the winding up process since the proof of debt procedure does not permit proprietary claims to be adequately advanced or adjudicated.

(2) Generally, a claim of this nature (a proprietary claim) should be adjudicated upon in a timely manner in the interests of all parties since it would determine whether the funds in issue form part of the defendants’ insolvency estate and would also provide clarity to the Administrator of the claimants with respect to the status of the funds and aid in the proper discharge of his functions.

(3) There is no evidence of how the lifting of the stay would have any impact, if any, on the winding up process. Specifically there is no evidence that lifting the stay would adversely affect the winding up process.

(4) There is no evidence of how the lifting of the stay would affect financial stability or the discharge of the functions of the Central Bank. Specifically, there is no evidence that the lifting of the stay would adversely affect financial stability or prevent the Central Bank from discharging its functions in an expeditious and efficient manner.”

[77] In my judgment this correctly reflects the approach which should be and which was in fact adopted by the judge in the court below. It is clear that the proof of debt procedure in liquidation proceedings would not permit the claim or indeed SBF’s opposition thereto to be adequately advanced or adjudicated and it is equally clear that it would not afford SBF the avenue or opportunity to have a court finally hear and determine these proceedings and his pending applications.

Grounds 2 and 3

[78] Grounds 2 and 3 of the appeal can be taken together. The appellants contended that the judge erred in law and/or fact in concluding that SBF would suffer prejudice if he was not afforded an opportunity to challenge the receivership because there would clearly be no utility in challenging the receivership order which had been overtaken by the provisional liquidation order. The appellants further contended that the judge erred in law and fact in concluding that SBF would suffer prejudice if he was not allowed to challenge the imposition of a freezing order against him as this was a 'sacrosanct right'. Counsel argued that the judge failed to take into account that the freezing order only applied to SBF's shares in Emergent and to Emergent's assets within the jurisdiction. Counsel also argued that SBF has averred that Emergent has no assets other than the shareholding in Robinhood, which is under the control of the provisional liquidators, and in any event, has been made the subject of a warrant of seizure issued by the US courts.

[79] It is clear from the judgment that the learned judge considered both the issue of prejudice and the utility of lifting the stay. At paragraph 35 of the judgment, the learned judge recited the concerns of prejudice to the liquidation if the stay were to be lifted. At paragraph 36 however the judge brings the context into focus and reasoned that:

"It cannot be disputed that in these proceedings, the Second Defendant has never had the opportunity to be heard on his challenge to that interim order of the Court as is the usual procedural course that occurs when an ex parte Order is challenged though that Order contains several orders adverse to him which includes the appointment of Interim Receivers over his assets within this jurisdiction and elsewhere. The right to be heard is sacrosanct and to this Court, stands as a greater prejudice to be suffered in this adversarial system of litigation in the context of a litigant seeking to be heard on an adverse order made in his absence, because the application was heard ex parte despite it having been overtaken by a series of events that put into question aspects of the continued utility of those proceedings or at least part of these proceedings."

[80] I accept that it may well be more convenient and more comfortable for the appellants if Claim 456 were to be stayed. However, ultimately, the determination of the

application to lift the stay requires an exercise of balancing the ingredients enshrined in the overriding objective including the right of every litigant to expeditious justice and the need to minimise litigation delays. There can be no doubt that maintaining the stay would impose a limitation impacting seriously on SBF's right of access to a court, in circumstances where he is a defendant against whom serious allegations involving breach of trust dishonesty and fraud are alleged.²⁴ The case law²⁵ makes it plain that in such circumstances the defendant is entitled to an expeditious hearing, and should not be left for years waiting for the outcome of another case over which he (and the court) has no control. Such actions should come to trial quickly – if the claimant is entitled to a remedy, it must be swift, practical and effective.²⁶

[81] Ultimately, the judge considered the aforementioned rights of SBF to be determinative. The judge was clearly not persuaded that the factors advanced on behalf of the appellants sufficed to displace, limit or delay SBF's right to a speedy disposal of the claims advanced in Claim 456. Specifically, she was not satisfied that there was any cogent evidence that lifting the stay would adversely affect the winding up process and having considered the appellants' submissions, I can find no fault with the judge's reasoning and do not agree that it discloses any manifest error of law or fact. I am not satisfied that the judge took into account any irrelevant considerations or ascribed too little weight to the relevant factors.

[82] The appellants submitted that the judge failed to consider that there was no utility in lifting the stay given the state of play in Claim 480. This argument in my view ignores the full remit of the matters raised in Claim 456. Moreover, it ascribes no weight to SBF's right to an expeditious disposal of a claim which raises serious allegations

²⁴ The particular context of this application is that SBF is at the centre of allegations of the most serious kind in a multi-billion-dollar fraud (at least US\$8bn) concerning the crypto empire FTX and Alameda 'one of the biggest financial frauds in American history exhibit AB 1 Page 7 – Barkhouse 3 Para 14, Article Financial Times dated 16 December 2022, AB-1 Page 727.

²⁵ Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH.

²⁶ Yiannides v Radley Gowns Ltd (1975) 119 SJ 711.

against him and in which equitable interim relief continues with no apparent end in sight.

[83] I am therefore satisfied that these grounds of appeal must also fail.

Ground 4

[84] In their final ground of appeal, the appellants contended that the judge also erred in failing to conclude that an overseas defendant would have to show compelling reasons as to why a claimant should be forced to continue to prosecute a claim in the absence of evidence of assets or security. This argument is premised on the fact that Emergent is now in liquidation and is also the subject of bankruptcy proceedings in the US. Counsel for the appellant argued that a claimant should not be forced to pursue a defendant in these circumstances particularly when that defendant's alleged conduct is the very reason that the stay was granted. He pointed out that SBF's only assets within the jurisdiction are his shares in Emergent (relying on SBF's own affidavits of 11th December 2022 and 26th April 2023).

[85] Interestingly, this submission was not advanced in the substantive appeal by or on behalf of Mr. Shimon who is the actual claimant in Claim 456. The learned judge in the court below was confronted with a similar issue and at paragraph 37 of the judgment she observed:

"The Interim Receivers/Provisional Liquidators are not in a position to speak on behalf of the Claimant, and or advance arguments on behalf of the Claimant on any aspect of the Claimant's case in these proceedings and its Counsel has made it clear orally that it is not representing the Claimant. They can only act within the powers and discretion granted to them as Interim Receivers/Provisional Liquidators who are officers of the Court acting independent of the parties. So, though they may be able to contend that it is necessary for the stay on these proceedings to be maintained, the Interim Receivers/Provisional Liquidators have not shown what prejudice would be sustained in relation to these proceedings continuing between the Claimant and the Second Defendant though have done so in relation to the First Defendant."

[86] I am inclined to agree and find no merit in this ground of appeal. Ultimately, it cannot be appropriate for a court to ask to maintain a stay of proceedings on the basis that the subject proceedings are not maintainable or where there is little hope or prospect of the parties securing any effective remedies. Where the subject is hopeless or lacks utility, it seems to me that the appropriate course is to discontinue the claim rather than secure and maintain a stay of proceedings to preserve it.

The appellant's alternative position

[87] In the event that this Court dismisses the appeal, (thereby allowing the stay to be lifted (or to remain lifted) as against SBF), the appellants posit that such a lifting of the stay should be granted subject to one or both of the following conditions precedent (failing which the stay of Claim 456 shall be reinstated in full):

(1) first, that SBF shall provide security for the Receivers' and the Claimant's costs of responding to his various applications in Claim 456 (see CPR 26.1(3)/ 26.1(4)(b)); and/or

(2) second, that SBF shall comply fully with all interlocutory and other orders which have been made against him in Claim 456 and Claim 480 (and in its ancillary appellate proceedings), including (without limitation) the various outstanding costs orders which have been made against him in those proceedings to date (see CPR 26.3/ 26.1(4)(c) and/or (d)).

[88] The appellants submitted that if this Court is minded to maintain the lifting of the stay in Claim 456 as against SBF, then this is precisely the kind of case where it would be appropriate for strict conditions to be imposed on SBF's right to continue to (re)litigate issues in Claim 456, rather than giving SBF a free ride to wreak yet further havoc with total impunity. Having considered all of the circumstances, I am not satisfied that this additional intervention by this Court is warranted in this appeal. It seems to me that these matters would best be advanced before the court below and within the respective claims.

Application for leave to adduce fresh evidence

[89] During the course of this appeal, the appellants sought to advance an application seeking to have this Court exercise its inherent jurisdiction to permit the appellants leave to adduce and rely on the Fourth Affidavit of Angela Barkhouse dated 27th September 2023 and its exhibits (“the Barkhouse Affidavit”). The appellants described the Barkhouse Affidavit as updating evidence so that this Court is fully apprised of the present situation with regard both to SBF himself and the principal asset of Emergent, namely the shares in Robinhood.

[90] The several exhibits to the Barkhouse Affidavit include a copy of the order of the United States Court in the Southern District of New York (as well as from three confirmatory news articles, each citing reputable sources in a well-covered news story, which are also exhibited to the Barkhouse Affidavit for the sake of completeness and context). SBF has had his bail revoked on the basis that there was credible evidence that he had attempted to tamper with witness evidence and is currently in custody in the United States of America awaiting trial in October 2023. The documents exhibited to Barkhouse Affidavit also include the Interlocutory Sale Order approved by the United States District Court of New York on 28th August 2023, which evidence that Emergent’s shares in Robinhood have now been sold by the United States Marshal Service for and on behalf of the United States. These exhibited documents update the Court as to the present position (with these matters being sufficiently well reported as to amount to matters that this Court might take cognisance of in any event without a formal application to adduce new evidence).

[91] In addressing the legal principle adumbrated in the seminal case of **Ladd v Marshall**²⁷ the appellants contend that the exhibited documents evidence and record matters that are highly credible and indeed incontrovertible. They submit that SBF cannot legitimately dispute either that he has had his bail revoked or that the Robinhood shares have been sold.

²⁷ [1954] 1 WLR 1489.

[92] The appellants further contended that the evidence could not have been obtained with reasonable diligence for use at the hearing before the judge below. They say that this is self-evidently the case, because these documents, as well as the factual matters evidenced by and referred to therein, post-date that hearing and the learned judge's order.

[93] Finally, the appellants contend that the fresh evidence in the Barkhouse Affidavit is or may well be of relevance and have an important influence in the event that this Court elects to exercise afresh the case management discretion which forms the subject matter of the instant appeal (should this Court be satisfied that it should do so).

[94] The application was robustly opposed by the Counsel for SBF who commended to the Court the judgment in **Chia Hsing Wang v XY et al**²⁸ in which this Court held that:

“...the Ladd v Marshall criteria are to be applied with considerable care and in accordance with the overriding objective of doing justice. The court must also bear in mind that **an application to admit fresh evidence in relation to an appeal from a decision in an interlocutory matter is not another opportunity for the losing party to invite the court to rehear the application on the basis of either evidence in existence but not adduced before the court below and which the party seeking to adduce and to rely on it could not have discovered with reasonable diligence; or additional or new evidence not in existence at the time of the first instance hearing.**” (Emphasis added)

[95] From this guidance, it is apparent that the appellants' application does not satisfy the **Ladd v Marshall** criteria because it is common ground that these documents, as well as the factual matters evidenced by and referred to therein, post-date that hearing. This Court considered this very issue in **Chia Hsing Wang** and held that:

“The first limb of the Ladd v Marshall criteria is that the fresh evidence sought to be relied on in an appeal must have existed at the time of the trial or hearing in the court below, but which could not have been obtained with reasonable diligence by the applicant. However, in exceptional circumstances, the court has a discretion to admit, at the appellate stage,

²⁸ BVIHCMAP2022/0055 (delivered 6th June 2023, unreported).

evidence which did not exist (essentially 'new' evidence) at the hearing of an interlocutory application, where such evidence is capable of further strengthening the court's determination of an issue or finding. Such circumstances are exceptional, and there must be compelling reasons why 'new' evidence ought to be admitted."²⁹

- [96] In this appeal, the appellants have not however relied on or demonstrated any exceptional circumstances, warranting this Court admitting this fresh evidence. Instead, counsel for the appellants submitted that in this context, it is irrelevant that the various documents exhibited to the Barkhouse Affidavit post-date the proceedings in the court below as this Court will be exercising its discretion afresh in light of all the relevant circumstances pertaining at that time. The weight to be attached to this evidence will then be a matter for this Court hearing the appeal.
- [97] Having reviewed the application, the evidence filed in support and the written and oral submissions advanced, it is apparent that the appellants seek to deploy this evidence where this Court has arrived at a determination in regard to this appeal and elects to exercise its own discretion in regard to the lifting of the stay. They contend that the matters evidenced by these documents cover ground which is very likely to be raised by the Court of Appeal of its own motion as to what is the present position.
- [98] However, given the reasoning and the conclusions reached in this appeal, there is no basis upon which this Court would need to exercise its discretion de novo. The appellants have not demonstrated that the judge committed an error of principle in arriving at her conclusion, which would warrant this Court exercising its discretion afresh.
- [99] An appeal against a judgment given by a trial judge in the exercise of a judicial discretion would not be allowed unless the appellate court was satisfied that in exercising his or her judicial discretion, the judge erred in principle either by failing

²⁹ See: Adam Bilzerian et al v Terrence Byron et al SKBHCVAP2019/0032 (delivered 21st July 2020, unreported) per Farara JA at paragraph 33; and Staray Capital Limited et al v Cha Yang (also known as Stanley) BVIHCMAP2013/0009 (delivered 14th July 2014, unreported) per Thom JA at paragraph 25.

to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations; and that as a result of the error or degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement was possible and might therefore be said to be clearly or blatantly wrong. I am not satisfied that the appellants have met this threshold in this appeal. In my judgment, the order made by the judge below was a matter of sensible case management and there is no basis upon which this Court could or should interfere.

Disposition

[100] Accordingly, and for the reasons given above, the appeal is dismissed with costs to the respondents. I therefore make the following orders:

- (1) the appeal is dismissed;
- (2) the judgment and orders of the learned judge are affirmed; and
- (3) the appellants shall pay the respondents their costs of the appeal, such costs to be assessed if not agreed within 21 days, and to be paid out of the liquidation of Emergent.

I concur

Trevor Ward
Justice of Appeal

I concur

Gerard St. C. Farara
Justice of Appeal

By the Court

Chief Registrar