

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

SAINT LUCIA

CLAIM NO.: SLUHCV2024/0132

BETWEEN:

[1] DONALD JAMES SCARBOROUGH

[2] BETTY JANE SCARBOROUGH

Claimants

-and-

[1] OLIVER JORDAN,

liquidator for Sunset Village Inc. (in liquidation)

[2] FIRST CARIBBEAN INTERNATIONAL BANK
(BARBADOS) LTD

[3] SUNSET VILLAGE INC. (in Liquidation)

Defendants

Appearances:

Mr. Colin Foster for the Claimants

Ms. Deandra Goss and with her Tazma Dostalie for the 2nd Defendant

2026: January 14
February 9

JUDGMENT

[1] **SAUNDERS, M:** This is a short decision on an Application issued 20 November 2024 (*“the Application”*) by the 2nd Defendant (*“the Bank”*) disputing jurisdiction and seeking to strike out the Claimant’s (*“the Scarboroughs”*) claim against it. The Application is premised mainly on the grounds of abuse of process and want of a cause of action.

[2] On 14 December 2026 I heard the submissions of counsel for the parties and having considered them, the amended Statement of Claim and the documents

filed in support and in opposition, I have decided to grant the Application and to strike out the Claim against the Bank for the reasons which follow.

Background

[3] The Scarborougs' claim against the Bank, in summary, is that the Bank has caused them financial losses arising from its collusion with the 1st Defendant ("Mr. Jordan") in omitting to identify, secure, and distribute a known pool of assets located in United Kingdom bank accounts ("*the UK Assets*"). The Scarborougs contend that the Bank, who petitioned for the winding up of the 3rd Defendant ("the Company"), acted in direct violation of Orders of Belle J and Wilkinson J dated 10 January and 27 June 2012. Those orders mandated, among other things, that:

- a. Mr. Jordan be appointed Receiver of the Company (Order dated 10 January 2012);
- b. Mr. Jordan take possession of the Company's assets (Order dated 10 January 2012);
- c. the Company be wound up (Order dated 27 June 2012);
- d. Mr. Jordan be appointed the Liquidator of the Company effective immediately (Order dated 27 June 2012); and
- e. the liquidator has the power to "*(n). do all such other things as may be necessary for winding-up affairs of the company and distributing its assets*" (Order dated 27 June 2012).

[4] The Scarborougs argue that the Bank's collusion in breaching the above orders was in breach of duties of care, good faith and a fiduciary duty ("*the Duties*") which the Bank owes to the Scarborougs as creditors in the winding up. In making their case, the only fact upon which the Scarborougs rely, is that the Bank failed to follow a recommendation of Mr. Jordan while he acted as a Receiver appointed by the Bank over the Company. The statement, made by Mr. Jordan in his Fourth Report dated 19 March 2012, is as follows:

"The Sunset Village buyers paid deposit and stage payments not into Sunset Village bank accounts, but into UK accounts the details of which are unknown to the Receiver. The Receiver believes it worthwhile to conduct an investigation into what UK bank accounts or

other financial assets might be recovered for Sunset Village, at what cost and over what time frame. To achieve this in a cost effective manner, the Receiver recommends use of available bank resources with the parent company of FirstCaribbean Bank in the UK to avoid costs associated with retaining third party UK counsel, which are likely to be prohibitive”

Strike out for want of a cause of action

- [5] It is not controversial that a creditor can breach their duty of good faith if, generally speaking, in the course of insolvency proceedings they behave in such a manner as to frustrate those proceedings. For example, in **Cadbury Schweppes v Somji** [2001] 1 WLR 615 the English Court of Appeal decided that secret inducements to creditors to vote in favour of an individual voluntary arrangement (“IVA”) are contrary to the requirement of good faith on the part of creditors. Such arrangements, it was decided, undermine the statutory scheme and are a fraud on the other creditors.
- [6] In **Re Gertner** [2017] EWHC 111 (Ch) Keyser K.C., the English High Court decided that the duty of good faith applies even where the inducement comes from a third party and not from the debtor’s estate. In that decision Kaupthing (the 90% creditor) entered an undisclosed settlement agreement (“the KSA”) with Gertner, the bankrupt, prior to the creditors’ meeting. The KSA paid Kaupthing \$6 million, gave it profit-sharing in arbitration claims and purported to keep the debt “alive” for voting purposes. The KSA was found to be a “legal sleight of hand” designed to simultaneously compromise Kaupthing’s claim while keeping it nominally alive for the purpose of voting in the IVA.
- [7] In these proceedings the Scarboroughs contend that the bank, in “collusion” with Mr. Jordan, breached the Duties by declining to follow Mr. Jordan’s recommendation that, in effect, the Bank’s parent company should, as a means of possibly securing further assets for distribution, inject more capital into the Company. That allegation, which appears at 9(c) of the amended Statement of Claim, is essentially the only particular supplied by the Scarboroughs in support of their broad allegation of collusion.

- [8] In my view, it is understandable that the Bank would be reluctant to invest further sums in the Company, which is insolvent. In refusing to do so therefore the Bank cannot be said, as a matter of course, to have acted in bad faith. The Bank acted, ostensibly, in its self-interest and no particulars have been supplied in the amended Statement of Claim to suggest otherwise. I also do not believe that a fiduciary obligation can be imposed upon the Bank vis-à-vis the Scarboroughs, other creditors, based on the discussed recommendation by Mr. Jordan and the Bank's refusal to follow it. No authority either has been given by the Scarboroughs to support a fiduciary relationship arising in such circumstances.
- [9] In the context of a restructuring agreement or workout, creditors are entitled to vote on a plan that binds dissenting minorities. It is understandable that the Court rigorously scrutinises the integrity of such schemes. A creditor, therefore, will breach its duty of good faith if it is found to have manipulated the voting process in such a manner as to subvert it (e.g. vote-rigging) to the prejudice of the collective. In a winding up or a liquidation, however, while things may not necessarily be as cutthroat as "each man for himself", it is expected that a creditor, if asked to inject further capital into a debtor, will carefully weigh the financial pros and cons of doing so. Furthermore, a creditor's evaluation in such circumstances is expected to be on the basis of what is in their own commercial self-interest without regard for those of any other creditor, or, the whole of the creditor group.
- [10] Counsel for the Scarboroughs made submissions that the decision **Medforth v. Blake And Others** [2000] Ch. 86 supported the Scarboroughs' claim insofar as there is the statement by the English Court of Appeal that:
- "If a mortgagee establishes a relationship with the receiver he has appointed under which the receiver exercises his powers in accordance with instructions given by the mortgagee, I can see the force of an argument that if the receiver is liable to the mortgagor then so will the mortgagee be liable."*

[11] Although those particular statements were made by way of obiter dicta, **Medforth** concerning the liability of a receiver not the appointing mortgagee, I do not believe doubt can be cast on them as a general point of law. A receiver is in a fiduciary relationship in respect of their appointment. The statements in **Medforth**, consequently, are explainable on the basis that, at the very least, were a mortgagee/creditor to assist in the breach of a fiduciary's duties, their liability would be engaged. The distinction in these proceedings is that no allegations have been pleaded to suggest that the Bank has in any way directed, or, interfered with Mr. Jordan's duties while he was a receiver or liquidator. It is in fact the opposite, the allegation is that the Bank chose not to follow Mr. Jordan's recommendations.

[12] In my view, for the Scarboroughs to have succeeded in pleading a valid claim against the Bank, they should have given particulars which show that the Bank acted for some improper purpose and not one which was obviously within the Bank's prerogative as a creditor. There is a bald allegation at paragraph 9(i) of the amended Statement of Claim that, the Bank's decision not to bring in and properly investigate the UK Assets demonstrates that it and Mr. Jordan were pursuing an "oblique motive". No specifics, however, have been given of what such a motive was, or, could be. The understandable and defensible motive, on the face of the Claimants' own claim, is that the Bank balked at disbursing any further funds for the benefit of an insolvent entity.

[13] There is also the unexplored company law issue that Mr. Jordan was asking that the Bank get their parent to use its own resources to fund the recovery of the UK Assets. The suit in fact is premised, without explanation, on the assumption that the Bank has some level of control over the affairs of its parent, which is to assume that the tail wags the dog, so to speak.

Abuse of process, *res judicata* and reflective loss

[14] Successive proceedings may be considered an abuse of process following the well-known rule in **Henderson v Henderson** (1843) 3 Hare 100. While an analysis of the findings of that decision, in many cases, is sufficient for an understanding of the principles of abuse of process which I have been invited

to apply, the later decision **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 seems more apt. **Johnson**, while containing a thorough review of **Henderson** abuse, is also a defining authority for the reflective loss principle which, although not directly applicable here, is relevant to whether these proceedings should be struck.

[15] In **Johnson** the House of Lords affirmed, in summary, that a party should bring their whole case in one set of proceedings. Later litigation on matters that could and should have been raised earlier may be an abuse of process. The rule, though not rigid, requires the Court to consider all the circumstances in deciding whether a second action is unfair or oppressive. An action is judged to be an abuse, *“broadly on the merits taking account of all the public and private interests involved and all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of the court”*¹. The factors to be considered include whether the claims are separate, the reasons supplied for not bringing the claim earlier, the conduct of the parties, delay, and whether the second action would cause injustice.

[16] The Scarboroughs’ claim follows an almost identical application before the commercial court in 2015 (*“the 2015 Application”*) seeking permission to issue proceedings against Mr. Jordan, the Company and joining the Bank. The subject of the 2015 Application and the current proceedings is fundamentally the same. That is, the alleged misfeasance of Mr. Jordan in failing to investigate and recover the UK Assets which was allegedly in breach of the Belle J and Wilkinson J orders. Admittedly, the 2015 Application was a generic one by multiple creditors which did not give any particulars at all in respect of the Bank’s role.

[17] In the 2015 Application it appears that the Bank’s joinder was justified by the indemnity given by the Bank to Mr. Jordan upon his initial appointment as receiver. The difference between the two proceedings, the Scarboroughs submit, is that they have now articulated specific allegations that the Bank

¹ **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1

breached the Duties in its refusal to use its resources to fund the investigation of the UK Assets.

- [18] In 2017 the commercial court made a definitive finding in relation to the Bank's role in the 2015 Application stating that, there was *"no legal basis for naming the 2nd respondent [the Bank] as a party to this application"*, that the bank was *"simply a creditor in the proceedings"* and that the matters complained of could and should have been raised in the winding up proceedings. Those findings were upheld by the Court of Appeal in a panel headed by Pereira CJ, the then Chief Justice, with the following statements being issued in the certificate of result (*"the Court of Appeal Decision"*):

"The learned judge was quite correct to point out, in her order dated 28th September 2017, that the matters complained of by the appellants were matters that ought to be raised in the winding up proceedings, rather than seeking to bring a separate and independent action or claim outside of the winding up proceedings

...

There was no basis for joining the bank to the proceedings on the basis of some sort of indemnity. All that was awarded was costs on an indemnity basis to the 2nd respondent bank"

- [19] Equally as important as the above statements by the Court of Appeal, is that the Scarboroughs have not explained what, if any, special circumstances exist for bringing a new claim in 2024 on facts known for over a decade. That is glaringly so considering the failure of the 2015 Application which was on the same core complaint. The existence of the UK Assets was known to the Scarboroughs since the 2015 Application as they were the subject of that application. The amended 2015 Application filed on 15 March 2017 in fact states as a ground that:

"the Court appointed Liquidator failed to identify, investigate, review and seize control of any further liquid assets... in particular the proceeds from the deposits received from purchasers held in a UK bank account as referred to in his Receiver's Reports".

[20] Consequently, the allegation of there being a duty of care or joint liability arising in relation to the Bank could have been relied upon in 2017 as by the time of the filing of the amended 2015 Application, the applicants were aware of the particulars on which the Scarboroughs now seek to rely. The Scarboroughs' argument therefore, that they now have "particulars of bad faith" is misleading. Additionally, for the reasons already decided, the Scarboroughs' "new" particulars do not take the case against the Bank any further than the prior rationale for joining the Bank which the Court of Appeal gave short shrift.

[21] The Scarboroughs have further argued that, procedurally, they are now following the Court of Appeal's advice in invoking sections 406-407 of the Companies Act. Those sections, however, set out how the exercise of a liquidator's powers may be challenged during a winding-up. These proceedings have been issued pursuant to Part 8 of the CPR and were not brought by application in the winding-up which remains ongoing.

[22] Considering all of the foregoing, the claim is an abuse of process and nothing has been said to reasonably justify its issuance in virtue of the 2015 Application. The Court of Appeal's reprimand that the 2015 Application should have been ventilated during the insolvency proceedings was condign. In **Johnson**, the House of Lords decided that a creditor-shareholder cannot recover damages for a loss that was merely a reflection of that suffered by the company. Such losses were more properly recoverable by the company and not its creditor-shareholders individually. The rationale for the Court's decision was to avoid:

- a. prejudice to a company's other creditors in respect of the litigation of the issues engaged in the proceedings;
- b. the circumvention of the distribution rules of the insolvency process; and
- c. there being any double recovery on the part of any creditor.

[23] Although the English Supreme Court's later decision **Sevilleja v Marex Financial Ltd** [2020] UKSC 31 has specifically restricted the principle to

creditor-shareholders, which the Scarboroughs are not, the rationale for the decision in **Johnson** does help to explain why these second proceedings are an abuse of process. Notwithstanding that the Court of Appeal Decision did not elaborate on why the 2015 Application should have been made in the winding-up proceedings, it seems clear that the Court would have considered the same principles which warranted the extension of the reflective loss principle in **Johnson**. That is, in summary, that the pursuit of the litigation outside of the winding-up proceedings was inimical to that process. The Court of Appeal Decision, therefore, should have made it clear to the Scarboroughs that issuing these proceedings outside of the winding-up would, for a second time, abusively undermine the integrity of the process which they are contending is being mismanaged.

Decision

- [24] For all the reasons set out above the Application is granted and the claim against the Bank is struck out. I shall hear the parties in relation to the costs of the Application at the next hearing of the matter.

Yuri Saunders

Master

Registrar