

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2022/0480

IN THE MATTER OF EMERGENT FIDELITY TECHNOLOGIES LTD

AND

IN THE MATTER OF THE INTERNATIONAL BUSINESS CORPORATIONS ACT, CAP. 222

BETWEEN:

[1] ANGELA BARKHOUSE AND TONI SHUKLA (AS RECEIVERS OF
SHARES IN EMERGENT FIDELITY TECHNOLOGIES LTD)

Petitioners / Applicants

-and-

[1] EMERGENT FIDELITY TECHNOLOGIES LTD

Respondent

[2] SAMUEL BANKMAN FRIED

Interested Party

Appearances:

Mr. David Joseph, KC and Mr. Kendrickson Kentish for the Petitioners

Mr. David Dorsett, PhD for the Interested Party Samuel Benjamin Bankman Fried

2022: December 19
December 21

JUDGMENT

Application for stay of proceedings – Exercise of the court’s discretion to grant a stay of proceedings - Principles to be applied – Whether a stay should be granted pending the determination of the interested party’s application to revoke the appointment of the applicants as interim receivers in claim no. ANUHCV2022/0456- Whether based on the pleadings before the court, the interim receivers were properly appointed – CPR 17- Whether the order appointing the interim receivers had been spent by an effluxion of time – Locus Standi - Whether the claimants have standing to maintain their provisional liquidator status or to continue prosecuting the underlying petition- Balance of Justice- Whether a stay is necessary to do justice between the parties in keeping with the overriding objective of the CPR - Civil Procedure Rules 2000.

- [1] **RAMDHANI J [AG.]**: This is an application filed by the Interested Party for a stay of these proceedings including an order granted by this Court on the 5th December 2022 which *inter alia* appointed the Applicants as provisional liquidators of the Respondent company Emergent Fidelity Technologies Limited. The application was heard on the 23rd December 2022, and a decision was reserved. A brief oral decision was delivered on the 28th December 2022, dismissing the application with an indication that detailed reasons would be provided. This fulfils that indication.

The Parties

- [2] The Applicants are accounting professionals. Angela Barkhouse and Toni Shukla were appointed provisional liquidators by an Order of this Court made on 5th December 2022. They were earlier appointed interim receivers of the 90% shareholding interest held by the Interested Party in an Antiguan company Emergent by an Order of Justice Williams made on the 18th November 2022.
- [3] The Respondent, Emergent Fidelity Technologies Ltd, of Unit 3B, Bryson's Commercial Complex, Friars Hill Road, St John's, Antigua (the "Respondent"), is a corporation incorporated under the International Business Corporations Act, Cap. 222 (the "Act").
- [4] Samuel Bankman Fried was made an 'Interested Party' in these proceedings by this Court. He is a 90% shareholder of the Respondent Company. No one sought to dispute that his interests were affected by these proceedings and or that he had a right to be joined as an 'Interested Party'.

The Petition and the Order Appointing Provisions Liquidators

- [5] The Petition which was filed on the 2nd December 2022 is to wind up Emergent Fidelity Technologies Ltd.
- [6] On 18th November 2022, the Petitioners were appointed on an interim basis as joint receivers of the Respondent's worldwide assets, and of the equity and/or debt interests (including the majority shareholding) held by Samuel Benjamin Bankman-Fried ("SBF") in the Respondent. The order making the appointment (the "Order") was made in Claim No. ANUHVC2022/0456, in which a

creditor of the Respondent and SBF, Yonatan Ben Shimon ("Mr. Ben Shimon"), makes claims in equity and tort against the Respondent and SBF and proprietary claims in respect of their assets.

[7] According to the Petition before the Court, in 'broad terms' Ben Shimon claims that:

- (a) *"He invested funds with FTX Trading Ltd ("FTX"), of which SBF was a founder and director, which were improperly diverted to Emergent (of which SBF is the sole director and majority owner) in circumstances which give rise to Mr. Ben Shimon having a proprietary tracing claim in respect of those funds and/or claims against the Respondent and/or SBF in knowing receipt and/or dishonest assistance; and*
- (b) *The Respondent and SBF conspired to perform and did perform lawful and/or unlawful acts, involving the improper diversion of funds invested by Mr Ben Shimon and other investors with FTX to the Respondent, for the predominant purpose of injuring Mr. Ben Shimon and other investors by expropriating those funds to the personal benefit of SBF, and thereby causing loss to Mr Ben Shimon."*

[8] The Petition further contends as follows:

- '5. The Respondent's sole known asset is its 7.6% shareholding in NASDAQ-listed Robinhood Markets, Inc ("Robinhood"), which it purchased for approximately US\$650 million in May 2022. Mr. Ben Shimon claims that funds which he and other investors invested with FTX, or their traceable proceeds, were used to purchase those shares.*
- 6. On 21 November 2022, the Petitioners exercised the power granted to them in paragraph 24 of the Order by passing a written resolution of the Respondent's shareholders under s.119 of the Act, which removed the Respondent's incumbent directors (including SBF) and appointed the Petitioners in their place. The Order and the other court papers filed in Claim No. ANUHVC2022/0456 have been served on the Respondent, care of its resident agent, and on SBF, care of his attorneys, and those parties have been duly notified of the Petitioners' appointments as receivers and as directors.'*
- 7. However, the Respondent and SBF have not cooperated with the Petitioners or provided the Respondent's corporate documents, such as its registers of members and directors or its memorandum and articles of association. Without this cooperation or these documents, the Petitioners are unable to prove to the satisfaction of third parties in the United States (including prospective legal representatives) their authority as the Respondent's directors or their rights as receivers of its assets. Consequently, the Petitioners have been unable to take control of the Respondent's shares in Robinhood. Additionally, the Respondent and SBF are in breach of their asset disclosure obligations under paragraph 10 of the Order.'*

8. *On 28 November 2022, a cryptocurrency lender named BlockFi Inc. ("BlockFi") filed for Chapter 11 bankruptcy protection in the United States. The same day, BlockFi filed a complaint in the bankruptcy proceedings against the Respondent, seeking to take possession and ownership of the Respondent's shares in Robinhood.*
9. *According to the complaint, on 9 November 2022 the Respondent (under SBF's directorship) allegedly agreed to pledge its shares in Robinhood to BlockFi in consideration for BlockFi forbearing from enforcing certain unspecified loans. Those loans were not made to Emergent but, rather, are understood to have been made to other parties associated with SBF, including his cryptocurrency trading firm, Alameda Research Ltd ("Alameda"). Having forbore for a single day, on 10 November 2022 BlockFi purported to exercise the security. The same day, the Supreme Court of the Bahamas appointed provisional liquidators to FTX. The following day (11 November 2022) SBF resigned from FTX, which immediately (under its new management) applied for Chapter 11 bankruptcy protection in the United States.*
10. *It is difficult to conceive of a more transparent fraud on the Respondent's creditors. FTX's financial difficulties were public knowledge when the alleged forbearance agreement was made. Despite this, it appears from the complaint that, on the eve of FTX 's bankruptcy, SBF purported to encumber one of the few known valuable assets against which FTX's investors (such as Mr Ben Shimon) might seek to pursue recovery actions by way of claims against the Respondent as contingent creditors. This was done for no apparent consideration to or corporate benefit for the Respondent.*
11. *If this ploy succeeds, BlockFi will make a windfall from the Respondent at the expense of the Respondent's creditors. Without the appointment of liquidators to the Respondent, so that steps can be taken on the Respondent's behalf in the United States to contest BlockFi's complaint, the complaint is likely to succeed and the Respondent's creditors will be irremediably prejudiced.*
12. *The declaration made in support of FTX's Chapter 11 petition stated that "Never in my career have I seen such a complete failure of corporate controls and such a complete absence of trustworthy financial information as occurred here. From compromised systems integrity and faulty regulatory oversight abroad to the concentration of control in the hands of a very small group of inexperienced, unsophisticated and potentially compromised individuals, this situation is unprecedented." That statement was made by the man who was appointed to take control of Enron Corporation following its collapse in 2001, which was the largest bankruptcy reorganisation in United States history at that time and which saw several people convicted of criminal charges and sent to prison.*
13. *Additionally, SBF has admitted that US\$8 billion of FTX's client assets (being half of all FTX's client assets) were loaned to Alameda. This is illustrative of (at minimum) a lack of probity on SBF's part. His behaviour with respect to BlockFi, as a director*

of the Respondent, demonstrates a similar lack of probity and bears the indicia of fraud.

14. In the premises, the Respondent's business or affairs have been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, and which disregards the interests of, the Respondent's creditors, such that liquidators should be appointed to the Respondent under s.301(1)(a) of the Act.

15. Alternatively, it is just and equitable for liquidators to be appointed to the Respondent under s.301 (1) (b) of the Act.

16. Alternatively, liquidators should be appointed to the Respondent under the provisions of the Act on the Court's own motion, applying the principles in Lancefield v Lancefield [2002] BPIR 1108.

[9] It is this context within which the *ex parte* application of even date was made for an order appointing provisional liquidators on the basis that the appointment was necessary to preserve and maintain the value of the Respondent's assets. The application was grounded on two main contentions.

[10] First, it was contended that despite being notified of the appointment of interim receivers and being served with the court order and papers, the Respondent has not cooperated with the receivers, nor has it provided its corporate documents which resulted in the receivers being unable to take control of the Respondent's assets which included the Respondent's shareholding in a NASDAQ-listed company named Robinhood Markets, Inc. It was contended that the Respondent was also in breach of its asset disclosure obligations under the Court's Order.

[11] Second, it was contended that on 28 November 2022, a cryptocurrency lender named BlockFi commenced proceedings against the Respondent, seeking to enforce an alleged pledge of the Respondent's shares in Robinhood as security for obligations owing from SBF's cryptocurrency trading firm, Alameda, to which SBF has admitted lending half of FTX's US\$16 billion in client assets. The pledge is alleged to have been created on 9th November 2022, which was one day before the Supreme Court of the Bahamas appointed provisional liquidators to FTX and two days before FTX applied for Chapter 11 bankruptcy protection in the United States.

[12] It was contended on behalf of the Applicants that '[t]he creation of the alleged security interest on the eve of FTX's bankruptcy bears the indicia of fraud on the Respondent's creditors and would appear to be a fraudulent conveyance. However, the Applicants are unable to investigate the position

or to participate in the proceedings commenced by BlockFi without being recognised by the United States Bankruptcy Court as the Respondent's lawful representatives; and further that [e]ven if the Applicants eventually procure the Respondent's cooperation, they are unlikely to be recognised in their capacity as asset receivers (or as directors appointed by share receivers) as having standing to participate in the BlockFi proceedings. It is, therefore, necessary for provisional liquidators to be appointed to the Respondent, pending the determination of the Petition, whereupon they can seek recognition under Chapter 15 of the United States Bankruptcy Code and take steps to protect the Respondent's assets.

- [13] At the hearing of this application, the Court accepted that the relevant test to guide the Court in its deliberation on whether provisional liquidators should be appointed following the presentation of a winding up petition is established by case law. In **Revenue and Customs Commissioners v Rochdale Drinks Distributors Ltd**¹, Rimmer J stated:

"76. The appointment of a provisional liquidator to a trading company is, however, a most serious step for a court to take. It is likely in many cases to have a terminal effect on the company's trading life. It is not an order to be made lightly and its making requires the giving by the court of the most anxious consideration. In Union Accident Assurance, Plowman J explained the twofold approach that he proposed to adopt. He said, at [1972] 1 All ER 1105, 1110b:

'There are two matters though, which seem to be relevant for me to consider. The first is whether the department has made out a good prima facie case for a winding-up on the hearing of the petition. Any views I express about the matter now are of course provisional only because I am not trying the petition at the present time. If the department has not made out a good prima facie case for a winding-up order then clearly I think it would not be right to appoint a provisional liquidator. On the other hand, if the department has made out a good prima facie case for a winding-up order then the second matter for my consideration arises, namely, whether in the circumstances of this case it is right that a provisional liquidator should have been appointed.'

77. With one qualification, I would respectfully regard that as a good working approach to the disposition of an application for the appointment of a provisional liquidator. The qualification is that I would, however, regard the continued use in this context of the phrase 'good prima facie case' as unsatisfactory. In American Cyanamid Co v. Ethicon Ltd [1975] AC 396, at 404F, Lord Diplock said of the phrase 'prima facie case' that it 'may in some contexts be an elusive concept', and Plowman J's chosen phrase also included a 'good', which may perhaps tend to increase the risk of elusiveness. Given the potential seriousness

¹ [2011] EWCA Civ 1116, at [99]-[100]

of the appointment of a provisional liquidator, I consider that in the case of a creditor's petition the threshold that the petitioner must cross before inviting such an appointment ought to be nothing less than a demonstration that he is likely to obtain a winding-up order on the hearing of the petition.

Later, Lord Justice Rimmer stated as follows:

*"99. I turn, therefore, to whether Peter Smith J's discretionary exercise of judgment in appointing Mr Defty as provisional liquidator of RDD ought to be discharged or maintained. I start from the premise that RDD is insolvent, or is at[sic] likely to be shown to be insolvent at the hearing of the petition; and that HMRC is likely to obtain an order for its winding up. That is not, I consider, sufficient without more to justify the appointment of a provisional liquidator. The usual basis on which such an appointment is sought is because of a risk of jeopardy to the company's assets, namely the risk of their dissipation before the winding up order is made, with the consequence that their collection and rateable distribution between the company's creditors will be frustrated. Such risk does not refer to (or only to) 'dissipation' in the sense in which that word is ordinarily used in the context of freezing orders, that is a deliberate making away with the assets so as to frustrate the enforcement of a future judgment; it includes any serious risk that the assets may not continue to be available to the company (see *Re a company* (No 003102 of 1991), *ex parte Nyckeln Finance Co Ltd* [1991] 1 BCLC 539, at 542, per Harman J). I consider that Harman J probably had in mind the type of case in which, despite the presentation of a petition, an apparently insolvent and loss-making company simply continues to trade without obtaining an order under section 127 of the Insolvency Act 1986.*

100. The circumstances justifying the appointment of a provisional liquidator are not, however, confined to jeopardy of this particular nature. In cases in which there are real questions as to the integrity of the company's management and as to the quality of its accounting and record-keeping function, it will be an important part of a liquidator's function to ensure that he obtains control of its books and records so that he can engage in all necessary investigations of its transactions. These will or may include investigations of those who have been managing the company with a view to considering the bringing of claims against them; and the consideration of whether any of the company's directors ought to be the subject of a report to the Secretary of State to the effect that it appears to the liquidator that they were unfit to be concerned in the management of a company. Such a report might then lead to an application to the court for their disqualification. If there is any risk that, pending the hearing of the petition, records may be lost or destroyed, that will also found the basis for the appointment of a provisional liquidator, who will be able immediately to secure them and commence his own inquiries into the affairs of the company and the conduct of its management."

[14] The Applicant also relied on *In Re SED Essex Limited*² in which provisional liquidators were appointed to a company at an *ex parte* hearing, which was held on the same day as the filing of a

² [2013] EWHC 1583 (Ch)

winding up petition. In that case, at the hearing of the company's subsequent application to set aside the *ex parte* order, the Court applied the tests set out by Rimer LJ in ***Rochdale Drinks*** and dismissed the discharge application.

- [15] It is accepted that applications to appoint provisional liquidators (including *ex parte* applications) can also be brought pending the determination of petitions brought by shareholders or other contributories to wind up companies on the just and equitable basis: see e.g. ***Re Principal Investing Fund I Limited***³. On such an application, the Court must still ask itself whether the petition is likely to be granted on the evidence presented (per Rimer LJ in ***Rochdale Drinks*** at [76]-[77]) and, if so, whether the discretion to make the appointment should be exercised in the applicant's favour (per Rimer LJ in ***Rochdale Drinks*** at [99]-[100]). However, in a winding up petition brought on the just and equitable ground rather than the insolvency ground, the first question will require the Court to ask itself whether on the evidence presented the applicant is likely to establish that the making of a winding up order would be just and equitable.
- [16] This Court was asked to give regard to the matters which were set out in the Petition and in particular note that the Respondent appears to be no more than a passive holding vehicle of a single asset. It has no known trading operations that could be disrupted by the appointment of a provisional liquidator.
- [17] The Applicants' grounded the winding up petition on multiple bases. The Applicants contended that they had standing under section 301 of the Act to bring the petition as receivers of SBF's shares in the Respondent, and they allege that liquidators should be appointed because (i) the purported BlockFi pledge is oppressive or unfairly prejudicial to and disregards the interests of the Respondent's creditors (under s.301 (1) (a)) and (ii) it is just and equitable for liquidators to be appointed (under s.301 (1) (b)).
- [18] They also contended that there is 'also evidence that the Respondent is insolvent, and it will almost certainly be insolvent if the purported BlockFi pledge is successfully enforced'.

³ (FSD 268, 269 & 270 of 2021; 17 September 2021) at [25]-[49].

- [19] The Court agreed with the Applicants that based on the evidence presented before the Court they were likely to establish that winding up order would be made and that it would be just and equitable to do so.
- [20] The Court also considered that there was sufficient evidence presented to make out a strong prima facie case that *the Respondent's sole known asset is its 7.6% shareholding in Robinhood, which it purchased for approximately US\$650 million in May 2022 and the funds used to purchase these shares were monies or their traceable proceeds invested with the cryptocurrency exchange FTX, by Mr. Ben Shimon and other investors.* There was strong prima facie evidence that all of this was done by the improper machinations of SBF and that the Respondent was no more than a holding vehicle, was not actively trading and that all of its assets likely comprised its shareholding in Robinhood.
- [21] The timing of the Respondent's (acting under SBF's directorship) pledge to BlockFi of all of the Respondent's shares in Robinhood in consideration of BlockFi forbearing from enforcing certain unspecified loans supports the underlying tracing claim in equity.
- [22] The evidence presents a strong prima facie case of a real and serious risk that the Respondent's shareholding in the Robinhood would be lost to BlockFi without anyone having an opportunity to investigate or challenge BlockFi's claim in the USA proceedings. There is nothing else to show that the Respondent has any other assets, and if the Robinhood shares are lost, then this company is likely to be rendered insolvent and all of the Respondent's lawful creditors may be irreparably prejudiced.
- [23] The Court considered that the Applicants were right in their contention that it was 'therefore necessary for liquidators to be appointed to the Respondent, and for provisional liquidators to be appointed urgently pending the determination of the petition for the appointment of liquidators so that they can seek recognition under Chapter 15 of the United States Bankruptcy Code and take steps to protect the Respondent's assets which are in grave jeopardy.
- [24] It was in these circumstances that the Court made the following Order, namely:

1. *Angela Barkhouse of Quantuma (Cayman) Ltd., Suite N404, Flagship Building, 142 Seafarers Ways, George Town, Grand Cayman, Cayman Islands, and Toni Shukla, of Quantuma (BVI) Ltd, Coastal Building, Wickhams Cay II, Road Town, Tortola,*

British Virgin Islands ('the Provisional Liquidators') are appointed as joint provisional liquidators of the Respondent.

- 2. The purposes of the Provisional Liquidators' appointment are to investigate the Respondent's affairs and preserve the value of the Respondent's assets for the benefit of those entitled to them, pending the determination of the Petition to wind up the Respondent.*
- 3. The Provisional Liquidators have all the powers of a liquidator under s.308 (1)(a)-(g) of the Act as may be necessary for these purposes, to:*
 - (a) Retain solicitors, accountants, engineers, appraisers and other professional advisors;*
 - (b) Bring, defend or take part in any civil, criminal or administrative action or proceeding in the name and on behalf of the Respondent;*
 - (c) carry on the business of the Respondent as required for all orderly liquidation save that they shall not sell any property of the Respondent, or borrow money on the security of the property of the Respondent, or settle or compromise any claims by or against the Respondent without leave of the Court;*
 - (d) Do all acts and execute any documents in the name and on behalf of the Respondent; and*
- 4. Subject to paragraph 3, the powers of the Provisional Liquidators in paragraph 3 above shall include powers to:*
 - (a) Exercise any and all rights that the Respondent may have as a shareholder in any company or any other rights that the Respondent may have in any other entity or business structure, including but not limited to exercising any voting rights in any subsidiary(ies) of the Respondent to appoint themselves or their nominee(s) as director of any such subsidiary(ies);*
 - (b) Retain attorneys and act in any foreign jurisdiction on behalf of the Respondent as permitted by the applicable foreign law, including commencing legal proceedings in their own names or in the name and on behalf of the Respondent for the recognition of their appointment by this Court or for their appointment, (whether or not with any co-appointee(s) by the foreign court, or for orders in aid of the Respondent's liquidation or for the assistance of the foreign court in carrying out their duties of Liquidators, including but not limited to proceedings under Chapter 15 of the United States Bankruptcy Code;*

- (c) *Subject to the prior approval of the Court, sell, realize and/or otherwise monetize the Respondent's shares in Robinhood Markets, Inc.; and*
- (d) *Subject to the prior approval of the Court, obtain funding on commercial terms for the performance of their duties, including in connection with any legal proceedings for which funding is permitted under the applicable law.*
5. *The Provisional Liquidators are not required to give security for their appointment.*
 6. *The Provisional Liquidators are entitled to reasonable remuneration for their time spent in the performance of their duties, such remuneration to be assessed by the Court.*
 7. *The Provisional Liquidators are entitled to be indemnified for their remuneration and expenses from the Respondent's assets.*
 8. *No suit, action or other proceedings be commenced or continued against the Respondent 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 the Respondent in this jurisdiction are stayed, including Claim No. ANUHCV2022/0456. 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.*
 10. *The application be listed for further hearing on Tuesday 13 December 2022 at 8.30 am.*
 11. *Anyone served with or notified of this Order may apply to the Court at any time to vary or discharge this order (or so much of it as affects that person), but they must first inform that Applicant's legal practitioners. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicants' legal practitioners in advance.*
 12. *The costs of this application are reserved.*

[25] It is to be noted that the Interested Party did not at all seek to challenge the appointment of the provisional liquidators. In fact, Dr. Dorsett conceded that on the evidence which was presented to the Court, there was a sufficient legal and factual basis for the appointment of the provisional liquidators. His application for a stay of the proceedings was based on other matters.

The Application for a stay

[26] The Interested Party's present Application seeks the following orders, namely:

"That there be a stay of proceedings in the instant matter pending the determination of the Applicant's application for a discharge of the receivership order in the matter of ANUHCV2022/0456 Yonatan Ben Shimon v Emergent Fidelity Technologies Ltd and Samuel Bankman Fried."

[27] In grounding this application, it was simply contended on behalf of SBF that as the 90% shareholder in the Respondent Company, he has made an application in the receivership proceedings to revoke the appointment of the Applicants as receivers of the Respondent Company and that the overriding objective would be best served if a stay was granted until that application was determined.

[28] There was no affidavit evidence filed in support of this application, though Bankman Fried relies on the documentary evidence already before the Court and in particular those of the earlier receivership proceedings to contend that justice would be served if these proceedings were stayed so that application to revoke the appointment of the receivers were heard and determined.

[29] On behalf of SBF, Learned Counsel Dr. Dorsett argued that the applicants had been improperly appointed as interim receivers as the underlying proceedings in which that application to appoint interim receivers was made did not disclose any cause of action and that this was clear from the pleadings before the Court. Learned Counsel pointed out that the claimant in the earlier proceedings had grounded his claim in a contention that SBF had sought to improperly divert investors' funds from FTX, a cryptocurrency trading platform to Emergent, and that he had a tracing claim against those funds. Learned Counsel however, contended that the claimant himself had admitted that he 'knew nothing regarding the source of funds used to acquire the 7.6% interest in Robinhood', and that SBF had explained where those funds came from and that they were monies loaned by Alameda and did not come from FTX; the claimant's lack of knowledge could not ground a cause of action such as tracing in equity, learned Counsel asserted.

[30] Two other primary arguments which were not grounded in the application were also argued by Dr. Dorsett. The first was that in any event, the interim order appointing the applicants as receivers had been spent by the effluxion of time and that therefore the applicants had lost their respective receiver

status. That in turn meant that they no longer had locus standi to maintain their provisional liquidator status nor to continue to prosecute the underlying Petition; the Petition and all application had lost all their legal viability.

- [31] In making this argument, SBF contended through his counsel, Dr. Dorsett, that the 'stay' that had been imposed on the Claim No. 456 did not operate to stop the clock ticking on the 28 days 'shelf life' that had been given to the *ex parte* order that had been made appointing the interim receivers. The logic was, that order being made *ex parte* required another order [at an *inter partes* hearing] to continue beyond the prescriptive 28 days, and that since there was no *inter partes* hearing and no subsequent order of the court continuing the interim order, the order simply expired.
- [32] There were other arguments made by Dr. Dorsett which I have considered.
- [33] The provisional liquidators opposed the application.
- [34] Learned King's Counsel Mr. Joseph, on their behalf contended that if the Court were right to grant the *ex parte* order appointing the provisional liquidators, and they maintain that the Court was right to do so, there are far greater reasons in the rapidly escalating series of events not only to validate this order at this stage but more importantly to dismiss the application for a stay.
- [35] Learned King's Counsel opposed the grant of stay so that an application to revoke the appointment of the interim receivers could be heard in Claim No. 456. Learned KC effectively contended that such a cause of action was disclosed by the pleadings and substantial portions of the evidence, which has not been answered, shows that SBF most probably improperly diverted investors' funds eventually to Emergent; this was a real triable issue.
- [36] The provisional liquidators point out that since the application for a stay was filed, SBF was arrested in the Bahamas, he was denied bail and has since been extradited to the United States to face eight counts of fraud and conspiracy in relation to his conduct of his cryptocurrency empire involving FTX, Alameda and companies to whom he unlawfully transferred customers' assets (or their proceeds) such as that of Mr. Ben Shimon. The indictment covers the period 2019 to 2022 and includes charges of wire fraud on customers, wire fraud on lenders, and conspiracy to commit securities fraud.

- [37] They point out that ‘the principal asset of Emergent, identified to date as a block of 56,273,469 shares in Robinhood believed to be valued at around US\$500m is at stake in legal action advanced in New Jersey by BlockFi who is seeking to have these shares transferred into its name to satisfy a pledge made by Emergent. This is likely to render Emergent insolvent and Emergent’s creditors would be left with an empty shell of a company against which there could be no real prospect of recovery.
- [38] Learned King’s Counsel pointed out that this application for a stay was only grounded on the need to hear that other application to revoke appointments in Claim No. 456. Learned King’s Counsel nonetheless did respond to the other arguments.
- [39] As far as the ‘effluxion of time argument was concerned, Learned King’s Counsel, Mr. Joseph argued that paragraph 9 of the order granted on the 5th December 2022 did not operate to invalidate the order appointing the interim receiver. In any event, KC pointed out that there is no issue that the appointment of the interim receivers was subsisting and valid when the application to appoint provisional liquidators was made. It was contended that this is determinative of the issue as there was standing at that stage and the court did not appoint ‘interim receivers’ as ‘provisional liquidators’ but appointed two qualified professionals as provisional liquidators. There is no challenge to their respective competence nor to the grounds and the legal basis justifying and grounding their appointment.
- [40] Learned King’s Counsel further contended that SBF did not present any evidence of any prejudice being caused to him if the stay was not granted. Emergent was not a trading company; it was simply a holding company. It had no employees and had no business to carry on. There was nothing before the Court to suggest that allowing the provisional liquidators to intervene in the Chapter 11 proceedings in the USA to seek to protect Emergent’s assets would cause harm, either to Emergent or to SBF for that matter.
- [41] I now address each of these matters in turn. But first a short discussion on the relevant principle applicable to the grant of a stay of proceedings such as the present.

A Stay of Proceedings – Relevant Legal Principles

[42] The grant of a stay of proceedings is a discretionary remedy and is usually grounded in the court's exercise of its inherent jurisdiction or in certain circumstances or may be made on the basis of some applicable statutory provision⁴. Treating with a grant of a stay, the learned authors of ***Halsbury's Laws of England 4th Edition Volume 37***, stated at paragraph 437:

"The court's power to stay proceedings may be exercised under particular statutory provisions, or under the Rules of the Supreme Court or under the Court's inherent jurisdiction, or under one or all of these powers, since they are cumulative, not exclusive, in their operation."

[43] A stay will only be granted if after considering the interests of the parties the court concludes that to grant a stay would best serve the interests of justice⁵.

[44] As was noted by Rawlins JA (as he then was) in ***Enzo Addari v Edy Gay Addari (Civil Appeal BVI No. 21 of 2006)***, the discretionary jurisdiction...

'Is exercisable where the court thinks that it is just and convenient to make such an Order, in order to prevent undue prejudice to the parties or is an abuse of the process of the court. The court is entitled to exercise the power upon such terms as it determines.'

[45] Where the stay is being sought in relation to concurrent proceedings a primary and general consideration would be having regard to all the relevant circumstances, whether the balance of justice requires that one of these proceedings be stayed.⁶

[46] The test should be the same for two sets of proceedings which are grounded in substantially the same evidential complaints, such as receivership proceedings and liquidation proceedings).

[47] Particular matters for the court's consideration would be the stage at which each of these proceedings is at, and whether the surrounding circumstances indicate that one of those proceedings has been overtaken and that it is no longer necessary to continue those proceedings at present.

⁴ (Red Bull GMBH v Sun Mark Ltd and another Chancery Division Arnold J 24 July 2012)

⁵ See *Berlei v Bali* [1970] RPC 469 at 477

⁶ (See *Glaxo Group Ltd v Genentech Inc and another* - [2008] All ER (D) 282 (Jan)).

- [48] It is also relevant to consider whether there is any utility in continuing one of these proceedings having regard to the subsequent events which may have taken place.
- [49] I now turn to Dr. Dorsett's arguments in contending that 'the overriding objective is best served by the imposition of a stay in the instant proceedings pending the determination of the application concerning the receivership order'.

The Cause of Action Argument

- [50] I have examined the evidence supporting the application for the freezing order and interim receiver order in the earlier proceedings.
- [51] The case which was presented in those proceedings and in these proceedings was that Funds invested by the claimant with FTX (of which SBF was a founder and director) have been improperly diverted to Emergent (of which SBF is the sole director and majority owner) in circumstances which give rise to the Claimant having a proprietary tracing claim against those funds and/or claims against the Emergent and/or SBF in knowing receipt and/or dishonest assistance.
- [52] The Claimant's statement that he does not know the source of the funds which Emergent used to acquire the Robinhood shares must be taken in context. This is what he says in paragraph 7 of his affidavit dated the 18th November 2022, which was filed in support of his application for the freezing order and the interim receiver order, namely:

"According to the filings with the US Securities and Exchange Commission... [Emergent] is a company incorporated in Antigua and Barbuda with its principal place of business at Unit 3B, Bryson Commercial Complex, Briar's Hill Road, St John's Antigua and its principal business being the making of investment securities and other assets. In May 2022, [Emergent] acquired 56,273,469 shares in Robinhood Markets Inc. at a costs of US\$648,293,886.33. This acquisition was sourced from 'working capital'. Robinhood Markets Inc. is a company listed on NASDAQ (Ticker: HOOD) ('Robinhood'). The 56 million shares in question represent a 7.6% interest in Robinhood and at today's market prices have an approximate value of US\$571,175,510. (56,273,469 at US\$10.15 per share). In the SEC filing in question, [Emergent and Bankman Fried] are described as beneficial owners of the 56 million shares in Robinhood and [Bankman Fried] is described as the sole director and majority shareholder of [Emergent]"

- [53] I have examined the SEC statement itself. I see that on its face, it states that it is filed on behalf of Emergent and SBF. On its face, it is signed by SBF as 'director' of Emergent, and in his own personal capacity. I see that the claimant's statement in paragraph 7 is indeed grounded in this document.

SBF in his 'affirmation' dated the 11th December 2022, does not dispute the accuracy of this document. In fact, at paragraph 4 of his 'affirmation,' he acknowledges the SEC filing.

[54] I have noted carefully the averments contained in SBF's affirmation. There, he asserts that the funds used to purchase the Robinhood shares did not come from any investor funds held by FTX. He states he and one Zixio Wang ('Wang') borrowed monies from Alameda Research Ltd... He was loaned the sum of \$491,743, 563.39 and Wang was loaned \$54,638,173.71.

[55] The Chapter 11 proceedings speak to the FTX group of companies or 'silos' which includes (a) a group of companies in which FTX belongs, (b) the Alameda 'silo' which includes Alameda Research LLC, (c) the 'Ventura silo', and (d) the 'Dotcom silo'. The filing state that:

'Each of the Silos was controlled by Mr. Bankman-Fried. Minority equity interests in the Silos were held by Zixio "Gary" Wang and Nishad Singh, the co-founders of the business along with Mr. Bankman-Fried. The WRS Silo and Dotcom Silo also have third party equity investors, including investment funds, endowments, sovereign wealth funds and families.'

[56] John J Ray III, the Chief Executive Officer of the Chapter 11 proceedings in the USA has expressed the view that:

'Never in my career have I seen such a complete failure of corporate controls and such a complete absence of trustworthy financial information as occurred here. From compromised systems integrity and faulty regulatory oversight abroad to the concentration of control in the hands of a very small group of inexperienced, unsophisticated and potentially compromised individuals, this situation is unprecedented.'

[57] I note that in the chapter 11 Proceedings filed by FTX and Alameda and others as debtors, SBF and Wang are described as the 90% and 10% respective owners of Alameda Research LLC. Paragraph 24 of this Chapter 11 filing shows that Alameda Research Ltd. gave a loan of US\$1 billion to SBF. It is relevant to note that these filings do not show any record of a loan from Alameda to Wang.

[58] This material was served on SBF. When he made his affirmation on the 11th December 2022, he must have been aware that documents, including the Chapter 11 documents had been presented to this Court and that these documents made out a case that he, SBF was the majority owner of the FTX group of companies which included Alameda Research Ltd. (or LLC). Yet he only sought to dispute that investor funds held by FTX were not the monies used to capitalize Emergent because it

was really monies which came from Alameda. This Court is well aware that it is not making any findings of fact on the material before it. But this material, unchallenged at this stage, present a compelling case of intermingling and improper diversion of investor funds; whether this is done with traditional criminal intent or simple gross incompetence is yet to be seen.

- [59] At this stage, it is sufficient to say that this Court is satisfied that there is a real triable issue before the Courts of Antigua and Barbuda as to whether investor funds have been improperly diverted to Emergent (of which the SBF is the sole director and majority owner) in circumstances which give rise to the Claimant having a proprietary tracing claim against those funds and/or claims against the Emergent and/or Bankman Fried in knowing receipt and/or dishonest assistance.

Locus Standi

- [60] These arguments fell outside of the pleaded grounds of the application for a stay. I have nonetheless considered them in the round.
- [61] The Interested Party's argument on this point is that the receivers did have standing to file the Petition and the application for the appointment of provisional liquidators, but since the order appointing them as receivers have expired and they have lost such standing, and consequently, the right to continue as provisional liquidators.
- [62] Several questions arise here for the Court's determination. First, it is whether the stay imposed on Claim No. 456 operated to prevent CPR Part 17 from having any effect on the orders made in those proceedings through the effluxion of time. Second, it is whether an order made under claim No. 456 may continue to have force and effect notwithstanding the stay of the proceedings.
- [63] I turn to answer the first question.
- [64] Ms. Barkhouse's and Ms. Shukla's standing to make the application for an order appointing provisional liquidators was indeed grounded in their appointment as receivers under the earlier proceedings.

[65] An examination of their application reveals that whilst they did apply as ‘receivers of shares in Emergent’ the ‘order’ which was sought, and which was granted was as follows, namely:

“Angela Barkhouse, of Quantuma (Cayman) Ltd, Suite N404, Flagship Building, 142 Seafarers Way, George Town, Grand Cayman, Cayman Islands, and Toni Shukla, of Quantuma (BVI) Ltd, Coastal Building, Wickhams Cay II, Road Town, Tortola, British Virgin Islands (the “Provisional Liquidators”) are appointed as joint provisional liquidators of the Respondent.

[66] This order did not appoint the ‘receivers’ as ‘provisional liquidators’. On the face of the order appointing Ms. Barkhouse and Ms. Shukla as provisional liquidators, there is nothing to suggest that they were so appointed in their respective ‘interim receiver’ capacities. In fact, the 5th December order expressly states that it is Ms. Barkhouse and Ms. Shukla who are appointed provisional liquidators. There has been no challenge to their respective qualification or competence. There is also no challenge to the legal and evidential basis for their respective appointments as interim receivers. I cannot, therefore, see how their appointments can be nullified on the basis that Ms. Barkhouse and Ms. Shukla have lost their status as receivers if that is the effect of the stay imposed by paragraph 9 of the 5th December order granted by this Court.

[67] This really ends this issue.

[68] In any event, if it is necessary, I do not agree that the 28 days prescription of CPR Part 17 has affected the appointment of the receivers in this case. Paragraph 9 of the order made by this Court on the 5th day of December 2022 was that:

“...all claims brought against [Emergent] in this jurisdiction are stayed, including Claim No. ANUHCV2022/0456. 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 part.”

[69] It is difficult to see how the proceedings could be stayed for all intents and purposes and that CPR could continue to operate in relation to orders made on those proceedings. If the order continued to have valid force, then neither CPR Part 17 nor the effluxion of time could escape the embrace of a stay imposed on the proceedings.

[70] Did the order appointing the interim receiver continue to operate? This is the second question.

- [71] Did the stay which was ordered by paragraph 9 of my order of the 5th December 2022 operate to suspend the effect of the *ex parte* order made in Claim No. 456? Did it operate to affect the standing of the applicants in relation to the underlying petition?
- [72] Generally, a stay of proceedings may have the effect of suspending the legal operation of all orders made during the course of those proceedings.⁷ There may be situations where depending on the expressed terms of the order granting the stay, that stay may not suspend every order or every aspect of an order which is granted in those proceedings. In certain cases, the context within which the stay is granted may also inform whether each and every order made in the course of those proceedings is suspended.
- [73] In Claim 456, an order had been made appointing Ms. Barkhouse and Ms. Shukla as interim receivers because the court was satisfied that it was proper to do so.
- [74] The interim receivers immediately took steps pursuant to that Order. They appointed themselves as directors of Emergent under the authority of that order. It was pursuant to that order they filed the Petition to wind up the company and the application for the order appointing provisional liquidators. When they did all of this, there was no question that their appointment was valid and subsisting. It would seem that the context within which the paragraph 9 stay was ordered was to facilitate one set of proceedings to continue brought under section 301 the Act to protect the interests of those investors who may have lost their investments by improper diversion to Emergent. When 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 current state of affairs. It was considered that the risk and urgency had escalated which required the appointment of provisional liquidators. This is the context within which Claim No. 456 was stayed. This context requires that at the very least, the stay should not affect the appointment of 'receivers' for the purposes of maintaining and prosecuting the Petition before this Court.
- [75] Even if I am wrong on this matter that is on whether the stay imposed by paragraph affected the standing of the applicants to continue to prosecute the underlying Petition I will decline to use this

⁷ R (on the application of Ashworth Hospital) v Mental Health Review Tribunal for West Midlands and Northwest Region and others; R (on the application of H) v Ashworth Hospital Authority and others [2002] EWCA Civ 923

loss of status as any substantive basis to determine this application and to grant the stay order which is being sought by SBF.

[76] My discretion is grounded on the following reasons.

[77] First, this was not pleaded as a ground for the application for the stay.

[78] Second, this is a matter which the substantial and undisputed material before the court cries out for judicial intervention.

[79] Third, a court retains the discretion, if the stay is lifted on the earlier proceedings, to continue the appointment of the interim receivers if that becomes necessary as being in the interests of justice so to do.

The Balance of Justice

[80] Is a stay of these proceedings necessary to do justice between the parties in keeping with the overriding objective?

[81] There is un-contradicted material before this Court that on 28 November 2022, *BlockFi* issued an adversary complaint against inter alia Emergent contending that the Emergent Robinhood shares referred to above had been pledged to *BlockFi* on 9 November 2022 and that an event of default arose on the pledge on 10 November 2022. On 10 November 2022, the Supreme Court of Bahamas appointed provisional liquidators to FTX Digital Marketing and on 11 November 2022 FTX applied for Chapter 11 bankruptcy protection in the United States. The specific relief sought by BlockFi is an order directing the transfer of the Emergent Robinhood shares to BlockFi. The Defence is due on 29 December and is in the course of being prepared by Emergent's lawyers instructed by the Provisional Liquidators.⁸

[82] This Court is informed that 'BlockFi's claim to the Emergent Robinhood shares has to be fully investigated alongside all relevant records which to date are incomplete but the timing of the grant of the pledge just two days before the filing of bankruptcy proceedings in the United States gives

⁸ The third Affidavit of Barkhouse at para. 35

credible grounds to believe that the alleged pledge and/or alleged guarantee relied upon in the United States adversary complaint were in fact designed to convey assets in fraud of creditors⁹. Moreover, the Provisional Liquidators are investigating all other defences, including the validity of the creation of the alleged pledge.

[83] There is a court hearing fixed in New Jersey on 9 January 2023 (moved from 5 January 2023)¹⁰. Emergent, through the Provisional Liquidators, has to appear to advance Emergent's position and opposition to the adversary claims of BlockFi.¹¹ The hearing on 9 January 2023 is an interim, not final hearing. It is understood that BlockFi will seek to argue at this hearing that it should take custody of the shares pending any final determination or that provision should be made with regard to the custody. Emergent intends to oppose BlockFi taking custody of the shares and having the provisional liquidators in place with a continuing power and legal duty to preserve and secure the assets for the benefit of all creditors will be of significance and relied upon by Emergent at this hearing. It may be that for this reason SBF and BlockFi oppose the continued work of the Provisional Liquidators. Standing back, it is of the utmost importance that neither BlockFi nor SBF have any control of the asset pending final determination of its ultimate status. They cannot be its guardian in the light of the serious underlying facts at play and the orders made by this Court on 5 December 2022, and prior to that on 18 November 2022. Further at the hearing on 9 January 2023, Emergent will have to outline its substantive position with regard to the adversary proceedings brought by BlockFi.'

[84] I agree with the submissions made on behalf of the provisional liquidators that the 'defence of the BlockFi proceedings must be undertaken urgently, but also can only really be undertaken by neutral court-appointed representatives whose job it is to protect the creditors of Emergent. SBF is hopelessly conflicted in any such defence at least because, if there was a fraudulent conveyance, it would appear likely to be a fraudulent conveyance in which he was involved. An independent and neutral person has taken over the US proceedings. I do not consider that SBF is suitable to undertake any such defence of the BlockFi proceedings; there is even that question as to whether he even intends to do so.

⁹ The third Affidavit of Barkhouse at para. 36

¹⁰ The third Affidavit of Barkhouse at para. 30

¹¹ The third Affidavit of Barkhouse at para. 35

[85] I also note that in this case, by virtue of the order made by Justice Williams 'Emergent was obliged to inform the lawyers for Yonatan Ben Shimon of all its assets worldwide whether in its own name or not, whether interested in them legally or beneficially and giving the value, location and details of all such assets.'

[86] I do not see how this was complied with. The seven days expired before the stay order was granted in Action on 5 December 2022. Emergent did not provide that information and so this was another reason justifying the appointment of provisional liquidators to ensure that the process of identifying and gathering assets was performed.

[87] Further, it is the urgent task of the Provisional Liquidators to secure the complete financial records, emails, transactional records, telephone records and an accurate statement of the assets of Emergent. To date, SBF has not assisted with respect to the financial records and has merely stated in his affirmation that he is not aware of any asset other than the Emergent Robinhood shares.

I consider that in this case, the events which are continuing provide an urgent and compelling basis for the provisional liquidators to continue to act in accordance with their duties. There is no good reason shown to me why SBF should be allowed to intervene in any of these proceedings; that is yet to be seen whether those other proceedings the stay would be lifted. In fact, from all that is shown to the court so far, it may be that should not happen.

[88] I have not been shown anything (and I have considered all of the arguments made by Dr. Dorsett on behalf of the Interested Party SBF) which justifies the grant of any stay of these proceedings. The Interested Party has conceded that the Court had ample material before it to justify the grant of the order of the 5th December 2022 which appointed the provisional liquidators. To date, he has shown nothing to justify an exercise of discretion to vary that order.

[89] In the circumstances, I will decline to grant any stay of these proceedings. The Application for the stay is therefore dismissed. The costs order included in this decision is made with the parties consent.

[90] On the oral delivery of the decision, Mr. Joseph asked the court to also determine the application to lift the stay of Claim no. 456 by dismissing it as it had become clear that the application had no merit,

now that the cause of action argument had been determined. This Court declined to dismiss that application being mindful that the orders made in Claim No. 456, including the appointment of interim receivers, had been made *ex parte*.

[91] Mr. Joseph also asked the Court to give directions on the hearing of the Petition. The Parties were heard on this request. Having regard to the Court's view of this case and the rapidly escalating events which are ongoing, the Court considers that it would be proper to give directions on the hearing of the Petition.

[92] Based on the foregoing, I hereby make the following orders:

- (1) The Applicant/Interested Party's Stay Application is dismissed.
- (2) The Applicant/Interested Party do pay the Provisional Liquidators' costs of the Stay Application to be assessed if not agreed within 14 days. For the avoidance of doubt, it is considered reasonable and appropriate for the Provisional Liquidators to have instructed Leading Counsel in respect of the Stay Application.
- (3) For the purposes of the presentation of the Petition as shareholders of 90% of the shares of the Corporation pursuant to the receivership order of the Court made on 18 November 2022 in Claim 0456/2022 (which proceedings remain stayed), the receivers appointed by the said order shall have standing to present the petition.
- (4) The following directions are given for the prompt and urgent hearing of the Petition:
 - (i) The Petition be listed for hearing in open court on Thursday 26 or Friday 27 January 2023 with a time estimate of one day or on a date considered suitable by the Judge hearing the matter.
 - (ii) Any person wishing to oppose or support the Petition shall file and serve by noon on Monday 9th January 2023 written grounds of such opposition or support which must, in either case, be verified by affidavit and must set out the basis of that person's interest in the Corporation.
 - (iii) Any affidavit filed on behalf of BlockFi is to be filed and served by noon on 9th January 2023 and shall set out, with such supporting documentary as BlockFi may wish to rely on in relation to the alleged pledge ("pledge") referred to in paragraph (d) of their Notice of Acting:

- a. The terms of the pledge (which may be done by exhibiting the same);
- b. The circumstances in which the pledge was allegedly consummated by the Corporation, and by whom;
- c. How it is contended the Corporation authorized the entry into the pledge agreement;
- d. The steps taken by BlockFi to verify the said authority; and
- e. The consideration, if any, alleged to have been received by the Corporation for entering into the pledge.

If it is contended that BlockFi has any other interest in the Corporation other than that arising from the pledge, it should also be stated.

- (iv) The Respondents, whether in their capacities as Provisional Liquidators and/or petitioners, shall file and serve any evidence in response by 4 pm on Monday 16 January 2023.
- (v) The parties shall file and exchange skeleton arguments together with any written authorities relied upon by 4 pm on 24 January 2023.
- (vi) The requirement that the Petition be advertised be dispensed with.
- (vii) Parties at liberty to apply.

[93] I thank the parties for their assistance to the Court.

Darshan Ramdhani
High Court Judge (Ag.)

By the Court
Registrar