

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2022/0011

BETWEEN:

THE ATTORNEY GENERAL

Appellant

and

[1] NEIL CAVE
[2] SIMON BUTLER
[3] JUDE JOLIE
[4] DAREN WESTE
[5] LINDA DE COSTA
[6] KEVIN SIMON
[7] DESROY DEMMING
[8] ST. ROSE VERNEUIL
[9] RICHARD JUMI
[10] JOSEPH NIXON

Respondents

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mde. Margaret Price-Findlay	Justice of Appeal
The Hon. Mr. Trevor Ward	Justice of Appeal

Appearances:

Mr. Anthony Astaphan, SC with him Mrs. Carla Brookes-Harris for the Appellant
Mr. Ruggles Ferguson and Ms. Luann De Costa for the Respondents

2022: October 21;
2023: March 10.

Civil appeal – Company law – Companies Amendment Act 2020 – Section 564(1)(a) of the Companies Act 1995 – Automatic stay - Whether the learned judge misconstrued the Act when she held that the automatic stay imposed by section 564(1)(a) of the Act was unconstitutional – Whether automatic stay infringed on the doctrine of separation of powers

*Section 15(8) of Constitution of the Antigua and Barbuda Constitution Cap 23 Order 1981-
Whether automatic stay unduly restricted the right to access the court*

In July 2020, the Parliament of Antigua and Barbuda enacted the **Companies Amendment Act, 2020** (the “Act”) to amend the **Companies Act 1995**, to ‘provide for the rehabilitation of an insolvent corporate debtor and other incidental and connected matters. Upon the enactment of the Act, the Minister of Finance of Antigua and Barbuda, filed a petition for a rehabilitation order under section 556 of the Act, indicating that the airline carrier LIAT (1974) Limited (“LIAT”), was insolvent and unable to pay its debts and was a ‘systematically important company’ under section 551 of the Act. The court subsequently granted the rehabilitation order which provided for the appointment of an administrator and stayed all steps, actions or proceedings taken by LIAT, its shareholders, directors, officers, or creditors to wind up or liquidate it.

The respondents, former employees of LIAT, had in 2015 filed a claim in the High Court (“2015 proceedings”) against LIAT seeking to recover pension funds which had been automatically stayed by virtue of section 564(1)(a) of the Act. The respondents subsequently instituted proceedings against the appellant seeking a declaration that section 564(1)(a) of the Act was in contravention of section 15(8) of the **Constitution** of Antigua and Barbuda. The respondents contended that section 564(1)(a) of the Act limited the respondents’ right to access the court and had infringed on the doctrine of separation of powers.

The learned judge in her judgment found favour with the respondents’ contentions and determined that section 564(1)(a) was unconstitutional as it infringed on the right to access to the court and the doctrine of separation of powers doctrine. The appellant being dissatisfied with the judgment of the learned judge has appealed. The appellant has filed 4 grounds of appeal which can be condensed into one issue, that being, whether the learned judge misconstrued the law when she held that the automatic stay imposed by section 564(1)(a) of the Act was unconstitutional, as it infringed on the doctrine of separation of powers and unduly restricted the right to access the court.

Held: allowing the appeal; setting aside the order of the learned judge; ordering that the respondents pay the appellant’s costs on this appeal to be assessed by the court below at no more than two-thirds of the costs awarded in the court below, that:

1. Automatic stays created by Parliament are not by virtue of their nature, *de facto* unconstitutional. To determine the constitutionality of an automatic stay, such as the automatic stay prescribed by section 564(1)(a) of the Act, the court must look at the nature of the automatic stay – the permanence or indefiniteness of the stay and/ or whether it removes judicial oversight from the hands of the court. In this case, section 564(1)(a) of the Act does not remove judicial oversight from the hands of the court as the court is empowered to hear an application for relief from the automatic stay pursuant to section 564(4) of the Act and make a determination as to whether the criteria thereunder has been satisfied. Further by virtue of section 564(5) of the Act, 30 days after the request for relief under section 564(4) is made, the automatic stay would be terminated unless the court, after notice and hearing, orders that the stay remain in effect. When reading the entirety of section 564, it is

clear that the automatic stay does not oust the court from providing relief. The learned judge therefore erred in her determination that section 564(1)(a) is unconstitutional as it infringes the doctrine of separation of powers doctrine.

Section 564(1)(a) of the Companies Amendment Act, 2020 Act No. 17 of 2020 Laws of Antigua and Barbuda applied; **Hinds and others v The Queen** [1976] 1 All ER 353 applied; **Cerise Jacobs v Minister of Tourism** ANUHCVP2019/0011 (delivered 24th May 2022, unreported) applied; **The Superintendent of Prisons and another v Hamilton** [2016] UKPC 23 applied; **Ritzen Grp., Inc. v Jackson Masonry, LLC** 140 S. Ct. 582, 205 L. Ed. 2d 419 (2020) considered; **Stone Street Capital Limited v The Attorney General of Trinidad and Tobago** CV 2012 – 04383 distinguished; **Nicholas v The Queen** 193 CLR 173 applied; **Bourne and others v Charit-Email Technology Partnership LLP (in liquidation)** [2009] EWHC 1901 (Ch) applied.

2. Section 15(8) of the Constitution of Antigua and Barbuda provides the right to access to the court. This right to access is not absolute. However, if a person seeks to challenge undue restrictions on their right to access, the court must engage the test of justifiability to determine whether the right has been infringed. The test of justifiability requires the court to ask itself: whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

Section 15(8) of the Constitution of Antigua and Barbuda Cap 23 Order 1981 applied; **De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing** [1999] 1 AC 69 applied; **Re Alpha Natural Res. Inc** 544 B.R. 848, 855 (Bankr. E.D. Va. 2016) considered; **Ritzen Grp., Inc. v Jackson Masonry, LLC** considered 140 S. Ct. 582, 205 L. Ed. 2d 419 (2020) considered; **Stone Street Capital Limited v The Attorney General of Trinidad and Tobago** CV 2012 – 04383 distinguished.

3. In this case, while the imposition of a temporary automatic stay to maintain the status quo of a company significant to the economic well-being of Antigua and Barbuda would be sufficiently important to justify limiting the right to access to the court, the respondents' right of access to the court is not impaired and the respondents may at any time under section 564(4) of the Act apply for relief from the automatic stay or under section 568(1) of the Act file a proof of claim or interest. The learned judge therefore erred in her determination that the respondents had their right to access the court unduly restricted by the imposition of the automatic stay and she erred in finding that the court's adjudicatory power was usurped by Parliament. Section 564(1)(a) of the Companies Amendment Act 2020 is constitutional and does not unduly restrict the right to access the court.

JUDGMENT

- [1] **THOM JA:** This is an appeal by the appellant, The Attorney General of Antigua and Barbuda (“the AG”) seeking to set aside the learned judge’s finding and order that section 564(1)(a) of the **Companies Amendment Act, 2020**,¹ (“the Act”) is unconstitutional as it contravenes the separation of powers doctrine and the right to access to the court.

Background

- [2] In July 2020, the Parliament of Antigua and Barbuda enacted the Act to amend the **Companies Act 1995**,² to ‘provide for the rehabilitation of an insolvent corporate debtor and other incidental and connected matters.’
- [3] Upon the enactment of the Act, the Minister of Finance of Antigua and Barbuda, filed a petition for a rehabilitation order under section 556 of the Act, indicating that the airline carrier LIAT (1974) Limited (“LIAT”), was insolvent and unable to pay its debts and was a ‘systematically important company’ under section 551 of the Act. The court subsequently granted the rehabilitation order which provided for the appointment of an administrator and stayed all steps, actions or proceedings taken by LIAT, its shareholders, directors, officers, or creditors to wind up or liquidate it.
- [4] The respondents, former employees of LIAT, had in 2015 filed a claim in the High Court (“2015 proceedings”) against LIAT seeking to recover pension funds deposited by LIAT in the Colonial Life Insurance Company, (“CLICO”) and later in an Antiguan bank, that the respondents contended was done without their authority and in breach of a collective agreement. By virtue of section 564(1) (a) of the Act these 2015 proceedings had been automatically stayed.

¹ Act No. 17 of 2020 Laws of Antigua and Barbuda.

² Act No. 18 of 1995 Laws of Antigua and Barbuda.

- [5] The respondents subsequently instituted proceedings against the appellant and sought a declaration that section 564(1)(a) of the Act was in contravention of section 15(8) of the **Constitution**³ of Antigua and Barbuda. The respondents contended that section 564(1)(a) of the Act limited the respondents' right to access the court and had infringed on the doctrine of separation of powers.
- [6] The learned judge in her judgment found favour with the respondents' contentions and determined that section 564(1)(a) was unconstitutional as it infringed on the right to access to the court and the doctrine of separation of powers doctrine. In doing so, the learned judge considered the rationality of the provision. She considered not only the provisions of section 564(1)(a) but also considered the section as it related to a 'creditor' as defined in section 551 of the Act. The learned judge concluded that the breadth of the application of the automatic stay extended beyond what could be considered to be 'rationally connected to the objectives of Act when read in light of the meaning given to creditor in section 551 of the Act.' The learned judge also concluded that the automatic stay imposed by section 564(1)(a) on judicial proceedings, breached the doctrine of separation of powers since the maintenance of a stay ought to be within the purview of the court.

The Appeal

- [7] The appellant being dissatisfied with the judgment of the learned judge has appealed. The appellant has filed 4 grounds of appeal which I find can be neatly condensed into one issue, that being, whether the learned judge misconstrued the law when she held that the automatic stay imposed by section 564(1)(a) of the Act was unconstitutional, as it infringed on the doctrine of separation of powers and unduly restricted the right to access the court.

³ The Antigua and Barbuda Constitution CAP. 23:1 Order 1981, Laws of Antigua and Barbuda.

Whether the learned judge misconstrued the law when she held that the automatic stay imposed by section 564(1)(a) of the Act was unconstitutional as it infringed on the doctrine of separation of powers and unduly restricted the right to access the court

Appellant's submissions

- [8] Counsel for the AG, Mr. Astaphan, SC, submitted that the learned judge misdirected herself when she held that the automatic stay under section 564(1)(a) of the Act contravened the section 15(8) of the Constitution and the doctrine of separation of powers and was therefore unconstitutional. Mr. Astaphan, SC advanced that it has long been accepted that Parliament may provide for stays in commercial matters, whether automatic or not, in relation to claims, new or pending, in matters of receivership or administration. However, Mr. Astaphan, SC argued that it appeared from the judgment that the learned judge did not take this into account and failed to properly consider section 564 of the Act in its entirety along with other surrounding provisions.
- [9] Mr. Astaphan, SC submitted that the learned judge treated the automatic stay under section 564(1)(a) of the Act as being permanent with there being no basis upon which the court could exercise its jurisdiction. He further submitted that it is clear from a reading of the judgment that the learned judge viewed section 564(1)(a) of the Act under a myopic lens, giving it a narrow interpretation and further disregarding surrounding provisions, including subsections (2) to (11) of section 564 of the Act. Mr. Astaphan, SC stated that these subsections when considered with section 564(1)(a) shows that Parliament did not intend that the automatic stay be permanent or immunised from review or change by the court. He argued that it means no more than a stay imposed by operation of law on the submission of a petition which is subject to review by the High Court under and in accordance with subsections (2) to (11) of section 564 and particularly subsection (4) of the Act, interested parties may apply for relief from the stay provided under subsection (1), such as terminating, annulling, modifying or conditioning such stay.

[10] Mr. Astaphan also argued that in the alternative, that in the absence of an application for modification of the automatic stay, the respondents would have been able to engage the court's jurisdiction by filing a specific claim by virtue of sections 568 and 569 of the Act. Sections 568 and 569 of the Act enables a creditor to file a proof of claim against a debtor that had arisen before the date of the filing of the petition. Mr. Astaphan argued that the respondents have resisted being called creditors to avoid implications of the Act, however, based on the reading of the definition of creditors under the Act, it is clear that the respondents are creditors who are entitled, if not required to claim and seek protection of the court under the Act.

[11] Mr. Astaphan submitted that the respondents having redress under these provisions at their disposal did not have their right to access unduly restricted by the Act nor was the doctrine of separation of powers infringed. He as such asked the Court to consider the Act in its entirety and find that there was no breach. Failure to do this, he stated would undermine the *pari passu* rule and give advantage to unsecured creditors over others should the administrator succeed in rehabilitating LIAT.

Respondents' submissions

[12] Mr. Ferguson submitted that section 15(8) of the Constitution provides the right to access the court. While section 15(8) does not give an absolute right to access the court, any limitations to the right must not restrict access in such a way or to an extent that the very essence of the right is impaired. Any provision which seeks to unduly restrict the right to access the court, such as section 564(1)(a) of the Act, must be for a legitimate objective.

[13] Mr. Ferguson argued that the objective of section 564(1)(a) of the Act, goes beyond limiting the enforcement of debts which would be legitimate. It extends to preventing access to the court to determine rights. Section 564(4) of the Act does not apply to the commencement or continuation of judicial proceedings against the debtor as listed in subsection (1)(a) but in fact only makes provision for the determining, annulling, modifying or conditioning of the stay on matters related to interest in

property as provided for in subsections 564(1)(b) to (e). Mr. Ferguson also submitted that subsections (2) to (11) of section 564 do not provide for the removal of the automatic stay. The effect of section 564(1)(a) is to prohibit access to the court which is a fundamental right under section 15(8) of the Constitution and cannot be amended by ordinary legislation. The Act prohibits the court from hearing and completing pending proceedings against LIAT indefinitely.

- [14] Mr. Ferguson rejected the appellant's contention that the respondents are creditors and ask this court to do the same. He argued that the respondents have filed its own claim before the court in 2015 and that there is no need to remove the claim and place it before the administrator for determination. Further, Mr. Ferguson submitted that two years after granting the rehab order, the stay remains and no final report has been submitted by the Administrator, who is not a person trained in law or a court established by law capable of giving the respondents a fair hearing within a reasonable time. Mr. Ferguson argued that in imposing the stay automatically, section 564(1)(a) of the Act removed a core judicial function and as such violated the doctrine of separation of powers.

Discussion

- [15] The appellants have submitted that the learned judge misconstrued the law when finding that the automatic stay imposed by section 564 (1)(a) of the Act is unconstitutional as it infringes on the doctrine of separation of powers and unduly restricts the right to access the court.

Separation of Powers

- [16] The separation of powers doctrine refers to the distribution of a state's power between the three branches of government, the Legislative, the Executive and the Judicial, for good governance and structure. It which is a characteristic feature of democracy which seeks to ensure that one arm of government does not encroach on the functions and duties of the other arm.⁴

⁴ Per Lord Steyn, *Regina L Anderson v Secretary of State for the Home Department* [2002] UKHL 46.

[17] In the seminal case of **Hinds and others v The Queen**,⁵ Lord Diplock in delivering the majority judgment, established that the principle of separation of powers is applicable to Westminster model constitutions. Lord Diplock stated that:

“Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject-matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.”⁶

[18] This Court has applied on several occasions the dicta of Lord Diplock in **Hinds and others v The Queen**. In **Cerise Jacobs v Minister of Tourism**,⁷ this Court reaffirmed that Westminster model constitutions such as the Constitution of Antigua and Barbuda recognises the doctrine of separation of powers.

[19] The respondents have argued that the learned judge’s decision is unimpeachable and that the automatic stay by section 564(1)(a) of the Act violates this doctrine as it removes judicial oversight from the court and places it into the hands of the legislative arm of government.

⁵ [1976] 1 All ER 353.

⁶ Ibid at 359.

⁷ ANUHCVP2019/0011 (delivered 24th May 2022, unreported).

[20] This appeal is concerned with the interpretation and application of section 564, in particular, subsection (1)(a) of the Act. In **The Superintendent of Prisons and another v Hamilton**,⁸ the Privy Council stated that when embarking upon the exercise of statutory interpretation “Questions of construction begin with the ordinary and grammatical meaning of the words used.” I intend to do the same.

[21] Section 564(1)(a) of the Act provides:

“564. Automatic stay

(1) Except as provided in subsection (2) of this section, a petition filed under section 555 or 556 operates as a stay, applicable to all entities, of—

(a) the commencement or continuation, including the issuance or employment of process, of a judicial, statutory, administrative, or other action or proceeding against the debtor, except as required by this Part, that was or could have been commenced before the commencement of the case under this Part, or to recover a claim against the debtor that arose before the commencement of the case under this Part;”

[22] Section 564(1)(a) along with the other amendments within the Act are modelled after Chapter 11 of the United States Bankruptcy Code (“US Bankruptcy Code”). In the case of section 564(1)(a) of the Act, it is specifically modelled after section 362(a)(1) of the US Bankruptcy Code. Section 362(a)(1) of the US Bankruptcy Code states:

“(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;”

[23] While it must be acknowledged that the states of Antigua and Barbuda and the United States (or “US”) do not share a common legal system and that decisions

⁸ [2016] UKPC 23.

emanating out of the US are not binding on this Court, I am of the view that the US Supreme Court's judicial pronouncement's on section 362(a)(1) of the US Bankruptcy Code can be instructive and at its highest, of great persuasive value in terms of the interpretation of section 564(1)(a) especially as it relates to the doctrine of separation of powers.

[24] Like Antigua and Barbuda, US courts have long recognised the doctrine of separation of powers.⁹ US courts have also adjudicated extensively on section 362 of the US Bankruptcy Code's operation. In **Ritzen Grp., Inc. v Jackson Masonry, LLC**,¹⁰ Justice Ginsburg in delivering the unanimous opinion of the US Supreme Court stated:

"...the filing of a bankruptcy petition automatically halts efforts to collect prepetition debts from the bankruptcy debtor outside the bankruptcy forum. 11 U.S.C. § 362(a). The stay serves to "maintain[n] the status quo and preven[t] dismemberment of the state during" during the pendency of the bankruptcy case... Among other things, the stay bars commencement or continuation of lawsuits to recover from the debtor, enforcement of liens or judgments against the debtor, and exercise of control over the debtor's property. § 362(a).¹¹ (emphasis added)

In addition to preserving the status quo – freezing debt collection efforts – section 362 provides that the freeze will persist until the court disposes of the bankruptcy case or the stay is lifted. In **Ritzen Grp., Inc. v Jackson Masonry, LLC**, Justice Ginsburg stated that:

"A creditor may seek relief from the stay by filing in the bankruptcy court a motion for an order "terminating, annulling, modifying, or conditioning" the stay, asserting in support of the motion either "cause" or the presence of specified conditions. § 362(d)."¹²

⁹ "It is the intention of the Constitution that each of the great coordinate departments of the government, the Legislative, the Executive and the Judicial – shall be, in its sphere independent of the others." Per Chief Justice Chase in *United States v Klein* 80 U.S. 13 Wall. 128 128 (1871).

¹⁰ 140 S. Ct. 582, 205 L. Ed. 2d 419 (2020).

¹¹ 140 S. Ct. 582, 589 (2020).

¹² *Ibid*, 589 (2020).

[25] The respondents in their submissions relied on **Stone Street Capital Limited v The Attorney General of Trinidad and Tobago**¹³ a decision from the Court of Appeal of the Republic of Trinidad and Tobago as authority that the automatic stay under section 564(1)(a) of the Act is unconstitutional as it infringed on the doctrine of separation of powers. In **Stone Street Capital Limited**, the Parliament of Trinidad and Tobago passed the Central Bank (Amendment) Act, No. 18 of 2011 which enabled the Central Bank to automatically stay or suspend all court proceedings by any “creditor, shareholder, depositor, policyholder or any other person” against an institution which had been the subject of the exercise of its special emergency powers. The court in giving background to the appeal stated at paragraph 6 of the judgment:

“This stay occurs on publication of a notice of assuming control. The stay on court proceedings continues indefinitely until the Central Bank publishes a notification to lift the stay or where the Central Bank relinquishes control of the institution and publishes a notice under section 44G(1) of the **Central Bank Act**. Control need only be relinquished where the circumstances under which the Bank assumed control have ceased to exist; where the Central Bank is of the opinion that it is no longer necessary for it to remain in control of the institution; or where the Central Bank has sold or disposed of the property, assets and undertakings of the institution. More than this, the Amendment Act barred all claims against the Central Bank arising out of its acts or omissions in respect of the institution until the publication of a notification under section 44G(1): see section 44E(5) (c).” (emphasis added)

[26] It is clear from a reading of **Stone Street Capital Limited** and the Central Bank Amendment, that the automatic stay imposed under that provision and the automatic stay imposed under section 562(1)(a) are disguisable in terms of their characteristics and outcome.

[27] In **Stone Street Capital Limited**, Boodoosingh J, opined that the automatic stay under the Central Bank Amendment Act ousted the supervisory power of the High Court in favour of the Central Bank and it therefore infringed on the doctrine of

¹³ CV 2012 – 04383.

separation of powers. Boodoosingh J opined at paragraphs 53, 57 and 62 of the judgment that:

“53. ...In other words, the court, in these instances, remains the ultimate arbiter as to whether the claim can go forward and when. As a result of the Amendment Act, the Central Bank has de facto been given this power as a consequence of the publication of a notification and the exercise of this power is not reviewable by the court. Based on this formulation, the Amendment Act must be seen as being unconstitutional.

57. ...It cannot be for the legislature to impose an automatic stay without recourse to the court. And it cannot be for a litigant, such as the Central Bank, against whom a claim may have been brought or who has supervisory jurisdiction over an institution against whom a claim has been brought, to determine whether that claim is stayed or for how long that claim should be stayed. That is taking away a core function of the judiciary and placing it in the hands of a litigant or potential litigant. A law which does that patently infringes the separation of powers which is a fundamental feature of our Constitution. It is an encroachment on the judicial function. Such a law must be unconstitutional.

62. What Parliament has done by this Amendment Act is to provide for an automatic stay which when shorn of its “temporary” cloak is to direct the court to stay pending matters or not hear claims which are validly brought until the Central Bank says so. Is this Amendment Act seeking to direct the “manner and outcome” of the exercise of the court’s jurisdiction, as contemplated by the cases? The Act does not take away the jurisdiction to hear and deliver a judgment on the claims eventually, but it proscribes when those claims are to be heard. It “directs” that the proceedings be stayed. The stay is of an indefinite duration. In some instances, it may well be possible that the indefiniteness of the stay will determine the outcome. A party may die, or become bankrupt, or become so ill that he is unable to prosecute his claim. In the present case, the Amendment Act is in effect directing the court to postpone its management and determination of a case for an indefinite period where it would have granted leave to the claimant to bring a claim against CIB. That impacts on the outcome of the application insofar as it prohibits the court for an indefinite period from granting leave and from managing and determining the case. At very least it impacts on the manner of the court’s determination of the claim in that it prohibits the determination of the leave application until the stay is lifted. This in my view amounts to an impermissible direction to the court which infringes the separation of powers.” (emphasis added)

[28] Boodoosingh J’s analysis of the unconstitutionality of the automatic stay does not seek to pronounce that all automatic stays created by Parliament are by virtue of

their nature, *de facto* unconstitutional. Instead, Boodoosingh J seeks to highlight that it was the indefiniteness of the stay and the absence of provision for any judicial oversight in the process that made the stay under the Central Bank Amendment Act unconstitutional. That automatic stay totally removed from the court any adjudicatory power, leaving the court with its hands tied awaiting the Central Bank's decision. It also removed the ability of any aggrieved party to apply for relief before the Court and have the court determine upon that application, whether the stay should be terminated or modified. In other words the court was unable to take any action in the matter until the Central Bank lifted the stay. This is what made it made the automatic stay under the Central Bank Amendment Act unconstitutional. Further, the permanence and indefiniteness of the stay would as Boodoosingh J described would have 'directed the court to postpone its management and determination of a case thereby removing these important judicial functions away from the court and into the purview of the Central Bank. This runs afoul of the court's power to direct the judgment or order that it should make. In **Nicholas v The Queen**¹⁴ Brennan CJ stated that:

"Subject to the constitution the Parliament can prescribe the jurisdiction to be conferred on a court but it cannot direct the court as to the judgment or order which it might make in exercise of a jurisdiction conferred upon it..."

[29] In this case, section 564(1)(a) of the Act does not remove judicial oversight from the hands of the Court. The Court is empowered to hear an application for relief from the automatic stay pursuant to section 564(4) of the Act and make a determination as to whether the interested party has satisfied the criteria thereunder. Section 564(4) of the Act states:

"(4) At the request of an interested party and after notice and a hearing, the court shall grant relief from the stay provided under subsection (1), such as by terminating, annulling, modifying, or conditioning such stay—

(a) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(b) with respect to a stay of an act against property under subsection (1), if—

(i) the debtor does not have an equity in such property;
and

¹⁴ 193 CLR 173.

(ii) such property is not necessary to an effective rehabilitation of the debtor.”

[30] The court is not shut out of the process for any indefinite period because once an interested party makes an application for relief pursuant to section 564(4) of the Act, the court will make its determination. Further by virtue of section 564(5) of the Act, 30 days after the request for relief under section 564(4) is made, the automatic stay would be terminated unless the court, after notice and hearing, orders that the stay remain in effect. Section 564(5) states:

“(5) Thirty days after a request under subsection (4) for relief from the stay of any act against property of the estate under subsection (1), such stay is terminated with respect to the interested party making such request, then, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (4) of this section.”

[31] The court is empowered to oversee this process and make interventions unlike the court in Trinidad and Tobago in relation to the Central Bank (Amendment) Act. There is no period during which this court is unable to perform its adjudicatory function, as a result of the automatic stay under section 564(1)(a) of the Act.

[32] Further, sections 552(1) and (3)(b) of the Act provide that the court is not to be precluded from overseeing its adjudicatory function. These sections read:

(1) The court may issue any order, instructions, process, or judgment that is necessary or appropriate to carry out the provisions of this Part. No provision of this Part providing for the raising of an issue by a party in interest shall be construed to preclude the court from, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(3) The court, on its own motion or at the request of an interested party —
(b) shall provide for notice and an opportunity to be heard that is appropriate under the circumstances to any relief sought under this Part, and, in conducting any evidentiary proceedings, may require the disclosure of information relevant to such proceedings and the appearance of witnesses as necessary to the fair adjudication of the matter;”

- [33] While the learned judge accepted that the process under section 564 allows for the adjudication of the court, she seemed to hinge her decision on the fact that the respondents or any aggrieved creditor would be shut out of the process in which they were previously engaged because of the implementation of the automatic stay. I do not agree with the learned judge, and I find it to be an irrelevant consideration when considering whether the legislative arm of government has usurped on the province of the Judiciary. In this case it has not, when reading the entirety of section 564(4), it is clear that the court is not ousted from exercising its judicial function.
- [34] Automatic stays are also provided for in other parts of the **Companies Act** where the making of the winding-up order or appointment of a provisional liquidator automatically stays any 'action or proceeding' against a company.
- [35] Section 386 of the **Companies Act** states:
- Actions stayed on winding-up order**
"386. When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose."
- [36] Section 386 of the Companies Act mirrors section 130(2) of the **English Insolvency Act**¹⁵. Section 130(2) of the English Insolvency Act states:
- "When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose."
- [37] The philosophy behind these provisions is the same, that is, to protect the company's assets and ensure that claims against the company are dealt with by way of submitting a proof in liquidation. Further, in the case of section 130(2) of the Insolvency Act, the English court maintains its discretion to lift the stay imposed. It is not ousted from hearing an application and making a determination in relation to the stay. In **Bourne and others v Charit-Email Technology Partnership LLP** (in

¹⁵ 1986 c. 45

liquidation),¹⁶ Proudman J highlighted that the court had to exercise its discretion cautiously when lifting a stay under section 130(2) of the Insolvency Act. Proudman J stated:

“3. There are two statements of principle in decided cases which are of particular assistance as to the exercise of the discretion. The first is in **Re Exchange Securities & Commodities Limited** [1983] BCLC 186, where it was said that permission should be refused if the issues can conveniently be decided in the liquidation because it will ordinarily be quicker and less expensive for matters to be determined in the course of the liquidation. Secondly, there is the unreported decision of Etherton J in **New Cap Reinsurance Corp Limited v. HHH Casualty & General Insurance Limited** (approved on appeal at [2002] 2 BCLC 228) in which (while giving permission under s. 130(2)) he said that, particularly taking into account the resources available to the liquidator,

“... the court must be very cautious before exposing the ... liquidators to the burden of coping with difficult and time-consuming litigation”.

4. I also accept the submission of Mr Templeman QC for the respondent that in construing the section the Court will start from the premise that proceedings may not be brought against a company in liquidation. It is therefore a question of lifting a stay. It follows that the Court should (subject always to the overriding objective) adopt the primary objective of achieving an orderly resolution of all matters arising in the winding up for the benefit of the creditors as a whole.” (emphasis added)

[38] It is plainly clear that none of these ‘automatic stays’ oust the court from providing relief, nor do they prevent access to court, an issue which will be address further in this judgment.

[39] In the round, I therefore agree with counsel for the appellant that the automatic stay pursuant to section 564(1)(a) of the Act does not oust the court from adjudicating in relation to the automatic stay.

¹⁶ [2009] EWHC 1901 (Ch).

Right to access the court

- [40] Section 15(8) of the Constitution of Antigua and Barbuda provides the right to access to the court. It states:

“Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any persons before such a court or other authority, the case shall be given a fair hearing within a reasonable time.”

- [41] This right to access is not absolute.¹⁷ However, if a person seeks to challenge undue restrictions on their right to access, the court must engage the test of justifiability to determine whether the right has been infringed. The test has been laid down in the Privy Council case **De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing**,¹⁸ where the Board determined whether section 10(2)(a) of the Civil Service Act infringed the applicant’s rights under section 12 and 13 of the Constitution of Antigua and Barbuda. The test states as follows:

“In determining whether a limitation is arbitrary or excessive, the court must ask itself: whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.” (emphasis added)

Whether the legislative objective is sufficiently important to justify limiting a fundamental right

- [42] The Act amends the Companies Act 1995 to provide for the rehabilitation of an insolvent corporate debtor and for other incidental and connected purposes.
- [43] Without this legislation, companies which face financial difficulties would be placed into liquidation regardless of the negative impact on employment and their economic contribution to the country. The provisions of the Amendment Act provides a mechanism for the appointment of an administrator to ensure that such companies

¹⁷ Fayed v United Kingdom (1994) 27 EHRR 393 at para 65.

¹⁸ [1999] 1 AC 69 at page 80.

continue to contribute to the economy and at the same time take steps to return the company to financial stability. Such legislative objective would be sufficiently important to justify limiting the right to access to the court.

Whether the measures designed to meet the legislative objective are rationally connected to it

The learned judge dealt with this limb of the test at paragraphs 42 and 43. It is as follows:

[42] In considering the rationality of the provision as it relates to the objective of the legislation this court is required to consider not only the provisions of section 564(1) (a) but is also required to consider this section as it relates to a “creditor” in proceedings as defined in section 551 of the Companies (Amendment) Act. The creditor is the entity to which the automatic stay would apply.

[43] In this regard the court accepts the submission of counsel for the claimants that the breadth of the application extends beyond what can be considered to be rationally connected to the objectives of the Act when read in light of the meaning given to ‘creditor’ in section 551 of the Companies (Amendment) Act 2020. This position stands as a creditor within the meaning of the Companies (Amendment) Act 2020 includes any entity with a claim, whether or not reduced to judgment, against the debtor. This would therefore include circumstances where a court has, as in the Claimant’s 2015 action, to make a preliminary finding on a matter in dispute.”

- [44] In section 551 of the Act ‘creditor’ is defined as an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor or that has a claim against the estate of a kind specified in section 569(7), 569(8), or 569(9). Upon a plain and ordinary reading, the respondents who filed a claim in 2015 against LIAT seeking to recover pension funds, would be a creditor pursuant to this definition. As creditors, the respondents have access to the court to seek relief from the stay by filing a motion for an order “terminating, annulling, modifying, or conditioning” the stay, in accordance with 564(4) as discussed above, if they are so aggrieved. In any event, even if the respondents resist this labelling, section 564(4) uses the term ‘interested party’. While Justice Ginsburg in **Ritzen Grp., Inc. v Jackson Masonry, LLC** confirmed that the term ‘interested party’ includes creditors, the actual term is not defined in the US Bankruptcy Code. In **Re**

Alpha Natural Res. Inc.,¹⁹ Huennekens J of the Virginia US Bankruptcy Court stated:

“Although the term “party in interest” is used throughout the Bankruptcy Code, the term is not defined, and the Court of Appeals for the Fourth Circuit has not elaborated on its meaning in § 1109(b). However, the Fourth Circuit has discussed the term in other sections of the Bankruptcy Code. Generally, “a term is presumed to have the same meaning throughout a statute.”... In § 502 of the Bankruptcy Code, the Fourth Circuit has defined “party in interest” as “one who has a pecuniary interest in the distribution of assets to creditors.” ... Similarly, in § 102 of the Code, the Fourth Circuit has stated that a “party in interest” is “generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings.” *In re Hutchinson*, ... Relying on the previous Fourth Circuit rulings, the United States District Court for the Eastern District of Virginia has stated that “ ‘a party in interest’ under Title 11 includes the debtor itself, a trustee, or a creditor.”

[45] If this definition is to be applied, the respondents, parties with a pecuniary interest or a monetary interest in the outcome of the legal dispute would be able to apply to the court for relief from the stay.

[46] The respondents may also by virtue of section 568(1) of the Act file a proof of claim or interest before the court. Section 568(1) of the Act states:

“Filing of proofs of claims or interests

(1) A creditor or an indenture trustee may file a proof of claim; an equity security holder may file a proof of interest.”

[47] Therefore, the respondents’ right of access to the court is not impaired and the respondents may at any time under section 564(4) of the Act apply for relief from the automatic stay or under section 568(1) of the Act file a proof of claim or interest.

Whether the means used to impair the right are no more than is necessary to accomplish the objective

[48] In **Stone Street Capital Limited**, the court when engaging in this aspect of the balancing exercise weighed the important right of persons to have access to the

¹⁹ 544 B.R. 848, 855 (Bankr. E.D. Va. 2016).

court to file and prosecute their claims against the need to manage the claims in a way that would not have caused systemic risk to the financial system and so that the government would not be faced with having to pay a number of judgments, all at once. Boodoosingh J in doing so stated:

“Conducting the balancing exercise, the imposition of a stay of proceedings while the liquidator and government could get some room to manoeuvre, as it were, cannot be seen to be disproportionate. The greater good (or risk) would temporarily trump the individual right of a litigant to pursue a claim. What could be disproportionate is the length of time the stay remains.”

- [49] The economic contribution to Antigua and Barbuda is not in dispute. The imposition of a temporary automatic stay to maintain the status quo of a company significant to the economic well-being of Antigua and Barbuda would not be disproportionate. In the balancing exercise, the risk of LIAT’s liquidation is an important consideration. It is equally important to note that the right to access the court has not been infringed as the respondents can make application for relief at any time pursuant to sections 564(4) and 568 of the Act. This is quite unlike the circumstances in the **Stone Street Capital Limited** case. The learned judge therefore erred in her determination that the respondents had their right to access the court unduly restricted by the imposition of the automatic stay and she erred in finding that the court’s adjudicatory power was usurped by Parliament. Section 564(1)(a) of the Companies Amendment Act 2020 is constitutional and does not unduly restrict the right to access the court. It is for these reasons that the appeal must be allowed and the learned judge’s judgment set aside.

Conclusion and Disposition

- [50] For the reasons given above, I would make the following orders:
- (i) The appeal is allowed and the order of the learned judge is set aside.

- (ii) The respondents shall pay the appellants' costs on this appeal, such costs to be assessed by the court below at no more than two-thirds of the costs awarded in the court below.

I concur.
Margaret Price-Findlay
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar