

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. ANUHCV 2022/0456

BETWEEN:

YONATAN BEN SHIMON

Respondent/Claimant

and

[1] EMERGENT FIDELITY TECHNOLOGIES LTD

1st Defendant

[2] SAMUEL BENJAMIN BANKMAN-FRIED

Applicant/2nd Defendant

Appearances:

No appearance for the Claimant

Mr. David Joseph KC and with him Mr. Kendrickson Kentish, Counsel for the Provisional Liquidators/Interim Receivers of the First Defendant

Dr. David Dorsett and with him Javid Hewlett, Counsel for the Second Defendant

2023: January 25th
February 21st

JUDGMENT

[1] **FORRESTER, J (Ag.):** Before the Court for consideration is an Application filed by the second defendant, Samuel Bankman Fried, for an Order to discharge the stay of proceedings imposed on these proceedings by the Court in **Claim No. ANUHCV0480/2022 Angela Barkhouse and Toni Shukla (as receivers of shares in Emergent Fidelity Technologies Ltd) (Petitioner) and Emergent Fidelity Technologies Ltd (Respondent)** (hereinafter referred to as "**Claim 480**") on 5th December 2022.

[2] The 5th December 2022 Order in **Claim 480** (hereinafter referred to as the "5th December 2022 Order") imposing the stay of proceedings states the following insofar as the same is relevant to this Application to lift the stay:

“...8. No suit, action or other proceeding 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. ANUHVC2022/0456. 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.

...

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 the Applicants’ 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.”

Preliminary Objection

- [3] As a preliminary issue, the Second Defendant objected to the firm Lake, Kentish & Bennett Inc. being on record as the Legal Practitioners for the Claimant herein whilst acting as the Legal Practitioners of the court-appointed Interim Receivers/Provisional Liquidators on the basis that it gave rise to a conflict of interest. Notably, all of the filings made by the Interim Receivers thus far in these proceedings were done via the e-litigation portal by the Claimant through Lake, Kentish & Bennett Inc. After hearing oral submissions from both Parties, Counsel for the Interim Receivers indicated that Lake, Kentish & Bennett Inc. undertakes not to represent the Claimant, Yonatan Ben Shimon in these proceedings without the leave of the Court given that it represents the Interim Receivers/Provisional Liquidators. As such, that ended consideration of the preliminary objection of the Second Defendant without the Court needing to rule on the objection.

Background

- [4] These proceedings were commenced by Yonatan Ben Shimon by filing a Claim Form without a Statement of Claim on 17th November 2022. Subsequently, the Claimant filed an ex parte Notice of Application seeking interim remedies against the Defendants submitted to the Court’s e-litigation portal on 17th November 2022 but deemed filed on 18th November 2022 supported by the Affirmation of Yonatan Ben Shimon of even date together with exhibits. Additionally, there was an application for service out of the jurisdiction and or alternative service also filed on 17th November 2022 supported by the said Affirmation of Yonatan Ben Shimon.

- [5] The Claimant's ex parte Notice of Application was heard by Justice Williams on 18th November 2022 who made the following Orders, the relevant parts of which are reproduced for the purposes of this application:

- "1. This is a Freezing Injunction made against Emergent Fidelity Technologies Ltd and Samuel Benjamin Bankman-Fried (the "Respondents") on 18th November 2022 by Justice Colin Williams on the application of Yonatan Ben Shimon (the "Applicant"). The Judge read the affirmation of the Applicant dated 17 November 2022 and accepted the undertakings set out in Schedule A at the end of this Order.*
- 2. This order was made at a hearing without notice to the Respondents. The Respondents have a right to apply to the court to vary or discharge the order – see paragraph 14 below.*
- 3. **There will be a further hearing in respect of this order within 28 days (the "Return Date"), such date to be fixed by the Registrar on the application of the Applicant.***
- 4. References in this order to the Respondents means all of them and this order is effective against any of the Respondents on whom it is served or who is given notice of it.*

FREEZING INJUNCTION

- 5. Until the Return Date or further order, the First Respondent must not in any way cause or permit:*
 - (a) the removal from Antigua and Barbuda of any of its assets which are in Antigua and Barbuda up to the value of US\$10,818,600; or*
 - (b) the disposal of, dealing with, encumbrance or diminution of the value of any of its assets whether they are in or outside Antigua and Barbuda up to the same value.*
- 6. Until the Return Date or further order, the Second Respondent must not in any way cause or permit:*
 - (a) the removal from Antigua and Barbuda of any of his equity and/or debt interests in the First Respondent which are in Antigua and Barbuda up to the value of US\$10,818,600; or*
 - (b) the disposal of, dealing with, encumbrance or diminution of the value of any of his equity and/or debt interests in the First Respondent whether they are in or outside Antigua and Barbuda up to the same value.*

7. Paragraphs 5 and 6 apply to all of the Respondents' assets whether or not they are in the Respondents' own name, whether they are solely or jointly owned and whether the Respondents [sic] are interested in them legally or beneficially. For the purpose of this order the Respondents' assets include any asset which a Respondent has the power, directly or indirectly, to dispose of or deal with as if it were the Respondent's own. The Respondents are to be regarded as having such power if a third party holds or controls the property in accordance with the Respondents' direct or indirect instructions.

8. This prohibition includes the following assets in particular:

(a) The First Respondent's shares in Robinhood Markets, Inc; and

(b) The Second Respondent's majority ownership interest in the First Respondent

...

10. (1) Unless paragraph (3) applies, the First Respondent must within 7 days of service of this order and to the best of its ability inform the Applicant's legal representatives of all its assets worldwide whether in its own name or not, whether solely or jointly owned and whether the First Respondent is interested in them legally or beneficially, giving the value, location and details of all such assets.

(2) Unless paragraph (3) applies, the First and Second Respondents must within 7 days of service of this order and to the best of their ability inform the Applicant's legal representatives of all equity and/or debt interests held by the Second Respondent in the First Respondent whether in his own name or not, whether solely or jointly owned and whether the Second Respondent holds those interests legally or beneficially, giving the value, location and details of all such assets.

(3) If the provision of any of this information is likely to incriminate the Respondents, they may be entitled to refuse to provide it, but is [sic] recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondents liable to be imprisoned, fined or have their assets seized.

11. Within 14 days after being served with this order, the Respondents must swear and serve on the Applicant's legal representatives affidavits setting out the above information.

...

VARIATION OR DISCHARGE OF THIS ORDER

14. 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 the Applicant's legal representatives. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant's legal representatives in advance.

APPOINTMENT OF RECEIVERS

22. Until the Return Date or further order, 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 "Receivers") are appointed on an interim basis, for the purpose of preserving the value of the assets over which they are appointed, as joint receivers of:

(a) All of the First Respondent's assets, whether they are in or outside Antigua and Barbuda; and

(b) All of the Second Respondent's equity and/or debt interests in the First Respondent, whether they are in or outside Antigua and Barbuda, including but not limited to any shares in the First Respondent registered in the name of the Second Respondent.

23. The Receivers shall have, to the exclusion of the Second Respondent, all of the powers of a receiver in equity and/or under section 24(1) of the Eastern Caribbean Supreme Court Act (CAP. 143).

24. Without prejudice to paragraph 23 above, the Receivers shall have the power to exercise any voting rights in respect of any shares in the First Respondent registered in the name of the Second Respondent, or beneficially owned and controlled by the Second Respondent, to remove any director(s) of the First Respondent and to appoint themselves or their nominee(s) as director(s) of the First Respondent, whereupon the Receivers or their nominees shall have in their capacity as director(s) of the First Respondent all powers conferred on such directors by law and by the First Respondent's Memorandum and Articles of Association.

25. The Receivers are not required to give security for their appointment.

26. The Receivers are not required to file accounts but may from time to time report to the Court in relation to the conduct of the receivership.

27. *The Receivers are entitled to reasonable remuneration for their time spent in the performance of their duties as receivers and (if so appointed) as directors of the First Respondent, such remuneration to be assessed by the Court if not agreed by the parties.*

28. *The Receivers are entitled to be indemnified for their remuneration and expenses from the First Respondent's assets. Insofar as the Receivers' remuneration and expenses are paid by or on behalf of the Applicant, the Applicant is entitled to be indemnified for those amounts from the First Respondent's assets.*

SERVICE

29. *The Applicant is permitted to serve the claim form and all other documents in these proceedings on the Second Respondent out of the jurisdiction.*

30. **The Applicant is permitted to serve the claim form without a statement of claim.**

31. **The Applicant must file a statement of claim within 14 days.**

32. *The Second Respondent shall have 35 days from service on him of the statement of claim to file an acknowledgment of service.*

33. *The Second Respondent shall have 56 days from service on him of the statement of claim to file a defence."*

[Emphasis added]

[6] Notably, subsequent to the 18th November 2022 Order:

- a) the Second Defendant did not comply with the disclosure aspects of the 18th November 2022 Order of the Court within the time period stated therein;
- b) the Claimant did not file a Statement of Claim though the 14 day period given for that filing did not expire prior to these proceedings being stayed;
- c) prior to the 28th day period for a Return Hearing, there was no application filed by the Claimant for there to be a Return Hearing and the matter was stayed before the expiration of that period;
- d) the Interim Receivers on 2nd December 2022, commenced **Claim 480** by way of a Petition to wind up the First Defendant pursuant to the provisions of the International Business Corporations Act, Cap. 222 seeking to have the interim receivers as holders of the shares of the 2nd Defendant in the 1st Defendant pursuant to the 18th November 2022 Order appointed as Liquidators of the First Defendant. Additionally, in **Claim 480**, a without Notice of Application was also filed on 2nd December 2022 by the Interim Receivers as holders of the shares of the Second Defendant to be

appointed as the provisional liquidators of the First Defendant pending, the determination of the Petition;

- e) on 5th December 2022 in **Claim 480**, an Order was made by Justice Ramdhani appointing the Interim Receivers herein as the provisional liquidators of the First Defendant and an order was made to stay these proceedings herein – see paragraph [2] above. No notes of that hearing or transcript have been provided by the Interim Receivers to this Court in relation to the 5th December 2022 Order of the Court. What this Court does have is the following passing comment of Justice Ramdhani: “[w]hen the Court granted the order appointing Provisional Liquidators, the Court was satisfied that events had overtaken the need to simply have receivers in place to manage the state of affairs. It was considered that the risk and urgencies had escalated which required the appointment of Provisional Liquidators. This is the context within which Claim Number 456 was stayed. This context requires that at the very least, the stay does not affect the appointment of receivers for the purposes of maintaining and prosecuting the petition before this Court.”¹
- f) the 5th December 2022 Order placed these proceedings on hold such that, no Statement of Claim has been filed by the Claimant, there has been no Return Hearing Date, and the Interim Receivers are now joint Provisional Liquidators seeking to wind up the First Defendant.
- g) by Notice of Application dated 12th December 2022, the Second Defendant filed an application seeking the discharge of the 18th November 2022 Order supported by the Affidavit of the Second Defendant.
- h) by Notice of Application dated 14th December 2022, the Second Defendant seeks an Order to lift the Stay Order imposed by **Claim 480** on these proceedings and for the Second Defendant’s 12th December 2022 Notice of Application to be listed for hearing. This is the application that the Court is considering in this decision.
- i) in **Claim 480**, the Second Defendant herein filed an application for a stay of those proceedings pending the hearing of the applications in these proceedings which application was dismissed by Justice Ramdhani in an oral decision delivered on 28th December 2022.

[7] On 18th January 2023, the Court conducted a directions hearing, wherein the parties were ordered to file evidence on affidavit and submissions in relation to the Second Defendant’s Notice of Application to discharge the Stay Order. After the directions hearing and also on 18th January 2023, the Second Defendant filed an Amended Notice of Application to supersede its 14th December 2022 pending Application.

[8] On 24th January 2023, the Second Defendant filed the Affidavit of Annie Bowen with exhibits in support of its application to lift the stay.

¹ 28th December 2022 Hearing Transcript in Claim 480 Page 17 lines 16 to 25

- [9] The matter came on for hearing on 25th January 2023 and the decision of the Court was reserved.
- [10] It is useful to note the present status of the proceedings in **Claim 480** at the date of this decision. The Petition for the appointment of Liquidators came on for hearing on 27th January 2023 with that decision being reserved, but concurrently on even date, the Court of Appeal granted the Second Defendant leave to appeal the 28th December 2022 decision of the Court and a stay of **Claim 480** pending the determination of the appellate proceedings. On 20th February 2023, this Court was belatedly advised that the stay imposed by the Court of Appeal in **Claim 480** was lifted on 3rd February 2023.
- [11] Further, it is important to note that at the date of delivering this decision, the written reasons for the 28th December 2022 Judgment of the Court in **Claim 480** were not yet issued. As such, the transcript provided by the parties which has the oral delivery of that decision and the discussion in relation to that decision insofar as it is relevant to these proceedings are referenced at various stages of this decision.

Submissions on behalf of the Second Defendant

- [12] The Second Defendant's Notice of Application to lift the Stay Order as amended on 18th January 2023 contains the followings grounds in particular as the basis for his application:

"...The proceedings in the 480-action were made under section 301 of the International Business Corporations Act. Proceedings made under section 301 are to be made by the shareholder(s) of the corporation to be liquidated. The court-appointed receivers are not shareholders of the corporation for which liquidation is sought and accordingly have no locus standi to initiate the proceedings.

...Without locus standing [sic] in the 480-action the said action brought by the court appointed receivers is liable to be struck out and with it the order imposing the stay in the instant proceedings

In any event, the 2nd Defendant has filed an application seeking a discharge of the order made on 18th November 2022 which among other things, appointed the receivers

...To date the 2nd Defendant has not been granted any opportunity to have his say with respect to the appointment of the receivers by order of 18th November 2022 and in the circumstances has not been accorded natural justice, particularly in circumstances where the appointment of the receivers pertains to a company in which the 2nd Defendant is the 90% majority shareholder.

...It accords with the overriding objective that the stay be lifted so that the 2nd Defendant's application seeking the discharge of the order made on 18th December [sic] 2022 can be heard and determined."

[13] The submissions of the Second Defendant focused on the Interim Receivers now Provisional Liquidators lacking locus standi to commence **Claim 480**, that he has a right to be heard on the ex parte order made against him on 18th November 2022 that he has been denied that opportunity to be heard as a result of the stay imposed on that matter, and that the existence of a freezing order made against him ex parte is highly prejudicial to him. In terms of locus standi, Counsel for the Second Defendant asserts that the Interim Receivers are not the shareholders of the First Defendant, therefore, do not satisfy the requirements of Section 301 of the International Business Corporations Act to function as a shareholder of the First Defendant but highlight that that issue of locus standi of the Interim Receivers to have commenced **Claim 480** is now before the Court of Appeal. In terms of the right to be heard, the Second Defendant wishes to be heard on essentially all aspects of the 18th November 2022 Order made against him ex parte. In particular, the Second Defendant contends that the Claimant:

- (a) did not have a good arguable case as he stated in his evidence on Affidavit in support of the 18th November 2022 ex parte Order that he does not know the source of funds used by the First Defendant to acquire a 7.6% interest in Robinhood;
- (b) failed to demonstrate that there is a real risk that unless the Defendants are restrained, they would deal with the assets or take steps which make them less valuable other than in the ordinary course of business with the result that the availability or value of the assets being protected are impaired and a judgment in favour of the Claimant is left unsatisfied;
- (c) did not have proper grounds on which to serve the Second Defendant outside of the jurisdiction;
- (d) has failed to demonstrate that the Second Defendant is a proper party to the proceedings;
- (e) engaged in material non-disclosure on the hearing of his application ex parte having failed to present to the Court arguments adverse to the Orders being sought that the Defendant would have made if present at that hearing;
- (f) pursuing this matter is an abuse of the process of the Court.

Submissions on behalf of the Interim Receivers/Provisional Liquidators of the First Defendant

[14] The Interim Receivers/Provisional Liquidators oppose the Second Defendant's Application to lift the Stay Order. The evidence relied on by the Interim Receivers/Provisional Liquidators is contained in the Affidavit of Angela Barkhouse filed on 23rd January 2023 with exhibit AB-1 in opposition to the Application. At the hearing, Counsel for the Interim Receivers/Provisional

Liquidators clarified that the affidavit is not filed on behalf of the Claimant indicating that such references were erroneous.

- [15] In summary, the submissions of the Interim Receivers are that the Second Defendant has brought its application to lift the stay in the wrong proceedings as it should have been made in **Claim 480** because, the lifting of the stay has to be examined in the context of the 5th December 2022 Order that is, in the action in which the stay was imposed. Further, the same issues are being relitigated here by the Second Defendant as in **Claim 480** where he was unsuccessful in his request to impose a stay on **Claim 480** pending determination of the application at bar and to discharge the 18th November 2022 Order and there are no proper grounds for the stay to be lifted.
- [16] The Interim Receivers'/Provisional Liquidators' evidence indicates that it is important for the First Defendant to enter into liquidation so that its assets can be fairly protected for the benefit of all creditors, such as Mr. Shimon. The Second Defendant was the 90% holder of shares in the First Defendant and one Gary Wang held 10% of the shares of the First Defendant. The Second Defendant was also the sole director of the First Defendant. There are allegations that the Second Defendant misappropriated funds of customers of FTX Trading Ltd ("FTX") with there being an ineluctable connection between the misappropriation of customer assets and the assets that have been registered in the name of the First Defendant. Further, it is alleged that the Second Defendant orchestrated a vast criminal conspiracy pursuant to which depositor monies were taken from FTX and transferred to another company named Alameda Research Ltd ("Alameda") whilst there is a failure to explain how there was any independent source of finance for the money injected into the First Defendant.² More concisely, it is contended that the evidence supports the position that third party deposits in FTX were simply taken from depositors and poured into the First Defendant via Alameda it seems which, is another vehicle under the control and direction of the Second Defendant. The United States Department of Justice has issued an indictment against the Second Defendant containing eight criminal charges which include (i) conspiracy to commit wire fraud on customers; (ii) wire fraud on customers; (iii) conspiracy to commit wire fraud on lenders; (iv) wire fraud on lenders; (v) conspiracy to commit commodities fraud; (vi) conspiracy to commit securities fraud; (vii) conspiracy to commit money-laundering; and (viii) conspiracy to defraud the United States and violate the campaign finance laws.³ The other shareholder of the First Defendant, Gary Wang, pleaded guilty to the charges of the United States Department of Justice⁴ which charges included conspiracy to commit wire fraud on customers, conspiracy to commit commodities fraud and conspiracy to commit securities fraud in connection with the unlawful use of FTX's deposits.

² See affidavit of Angela Barkhouse filed 23rd January, 2023 at paragraph 11

³ See Exhibit AB-1 to the affidavit of Angela Barkhouse filed 23rd January, 2023 at page 8 paragraph 18

⁴ Ibid 2 paragraph 29

- [17] The Interim Receivers/Provisional Liquidators contend that the Second Defendant has failed to cooperate with them as Interim Receivers and or Provisional Liquidations of the First Defendant to enable them to assemble the full financial records of the First Defendant and the only significant asset that has been identified is the valuable shareholding in Robinhood Markets, Inc. held in the name of the First Defendant which was purchased in May 2022 at a cost of about US\$546 Million.
- [18] Moreover, the Interim Receivers/Provisional Liquidators assert that it is clear that the First Defendant is insolvent, and that what needs to happen, in order to protect the interests of its creditors, is that it should be placed into liquidation without further ado and that all necessary steps are taken to preserve its assets – for the benefit of all its creditors.⁵ The US Department of Justice on 20th January, 2023 froze approximately US\$700 million of assets of FTX, which included the Robinhood shares owned by Emergent and the sum of US\$20,746,713.67, being the proceeds of those shares following a sale of approximately 1 million of the Robinhood shares.⁶
- [19] Counsel for the Interim Receivers/Provisional Liquidators avers that the same argument advanced by the Second Defendant in **Claim 480** to have those proceeding stayed, are the same arguments being advanced in these proceedings for the stay herein to be lifted. The Second Defendant advanced an application in **Claim 480** for a stay of the 5th December 2022 Order in **Claim 480** where the issue for the Court's determination was "*whether there is sufficient merit in his proposed challenge to the receivership order [that is the 18th November 2022 Order] to merit a pause in 0480 to allow SBF [that is the Second Defendant] to bring that challenge*"⁷ which, is "*precisely the same issue as whether there is sufficient merit in the challenge to the receivership order to merit a lift to [sic] of the stay in 0456 to allow SBF to bring that application.*"⁸ Consequently, the only option available to the Second Defendant is for him to appeal the decision of Justice Ramdhani. To allow the Second Defendant to essentially reargue the same matter amounts to relitigating the same issue. The Court's attention was directed to the learning in the judgment of Lord Hoffman in **JS Arthur Hall v Simmons** [2002] 1 AC 615 as it relates to re-litigation of the same issues.
- [20] In relation to whether there are proper grounds for the lifting of the stay, Counsel for the Interim Receivers'/Provisional Liquidators' advanced that the 18th November 2022 Order was properly made and has now been superseded by the 5th December 2022 Order in **Claim 480** where there is a Petition to orderly wind up the First Defendant. The Second Defendant is said to have had multiple occasions to challenge the 18th November 2022 Order with reference to Justice Ramdhani's finding that there is a serious issue to be tried in these proceedings when dismissing

⁵ Ibid 2 paragraph 12

⁶ Ibid 2 paragraph 35

⁷ Paragraph 33 of Interim Receiver's Skeleton Arguments filed 24th January, 2023

⁸ Ibid 2 paragraph 34

the Second Defendant's request for a stay in **Claim 480**. Further, it is contended that the appointment of Interim Receivers was not a faulty decision as valuable shares need to be protected and the First Defendant's affairs must be conducted separately from the Second Defendant who is accused of and at the centre of a multi-million dollar fraud and this is the most orderly manner in which that may be done.

Issues to be determined

[21] The following are the issues that the Court deems necessary to determine on consideration of the Second Defendant's Application to lift the stay of proceedings:

- (a) Has the Second Defendant properly moved the Court in the right claim to lift the stay of proceedings?
- (b) Whether the stay of these proceedings should be lifted?

Discussion

Has the Second Defendant properly moved the Court in the right claim to lift the stay of proceedings?

[22] The stay imposed by **Claim 480** on these proceedings expressly preserves the rights of parties or individuals interested in the same, to apply for that stay to be lifted. As is evident in paragraph 9 of the 5th December 2022 Order of the Court imposing the stay, the Court did not restrict the application for the stay to be lifted to be undertaken solely in **Claim 480** and not these proceedings. There have been no arguments presented to this Court to confirm that it was procedurally incorrect insofar as it was contrary to the express words of that part of the 5th December 2022 Order for the Second Defendant to seek in these proceedings to have the stay lifted.

[23] This Court notes that in the 28th December 2022 decision in **Claim 480** Justice Ramdhani stated *"this Court retains the discretion if the stay is lifted in the earlier proceedings to continue the appointment with the interim receiver if that becomes necessary as being in the interest of justice to do so."*⁹ That statement of Justice Ramdhani in relation to the earlier proceedings being these proceedings puts into context that though issues relating to the application under his consideration in **Claim 480** touched and concerned these proceedings, he acknowledged that there was still a need to consider whether the stay imposed on this Claim should be lifted. Moreover, the learned Judge stated *"Mr. Joseph, listen. I am struggling not to agree with Dr. Dorsett. I think Dr. Dorsett is making good sense, that he has an application there [there meaning*

⁹ 28th December 2022 Hearing Transcript in Claim 480 Page 18 lines 11 to 14

in these proceedings]. *This court opened the facility of allowing persons to apply to lift the stay so they can do certain things in proceedings.*¹⁰ After a lengthy discussion, the learned Judge concluded *"I cannot hear -- I will not -- I will not determine the application to lift the stay today... I will not rule on it.... I will indicate to the Court office that the application needs to be sent to the judge who will come following, and that judge will set it down for a date, I expect."*¹¹ On considering the exchange, it is apparent that advancing the application for the stay placed on these proceedings in these proceedings to be lifted was an act that Justice Ramdhani who made both the 5th December 2022 and 28th December 2022 Orders of the Court envisioned was permissible. This Court is not persuaded that the Second Defendant's application to lift the stay should have been restricted to an application in **Claim 480**. Even on a literal reading of the Court's express words in the 5th December 2022 Order, *"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"*, it presents as an available option to be pursued. As such, this Court finds that it is in keeping with the 5th December 2022 Order for the Second Defendant to have lodged his application in these proceedings to lift the stay.

Whether the stay of these proceedings should be lifted?

- [24] This matter cries out for judicial intervention is the common thread of the arguments of the parties herein and the Court's position in **Claim 480**. The Second Defendant's position is that judicial intervention is needed to preserve his rights to be heard and challenge an interim order made against him ex parte. The Interim Receivers'/Provisional Liquidators' position is that judicial intervention is needed to keep the Second Defendant from controlling the First Defendant and for them to collect, defend, conserve, recover and preserve the assets of the First Defendant for the benefit of all its creditors so that creditors' claims may be orderly dealt with as the company is wound up.
- [25] This Court observes that in these proceedings, apart from the initial hearing on 18th November 2022, there has been no further hearing in this matter in relation to that Order. The Second Defendant has not had an opportunity to advance any form of representations in these proceedings in relation to the ex parte 18th November 2022 order made against him which, is not the usual course that occurs in relation to an ex parte application. The commencement of **Claim 480** by the Interim Receivers in their capacity as having authority over the shares of the First Defendant to be appointed as provisional liquidators and for a stay of future proceedings against the First Defendant and these proceedings at bar, has given rise to the unusual state of affairs in relation to these proceedings. This Court also notes that the Claimant has not participated in this application having advanced no evidence in response and or written submissions in relation to the Second Defendant's Application to lift the stay of proceedings. In short, the Claimant has not opposed the Second Defendant's Application for the stay to be lifted. The latter matters on

¹⁰ 28th December 2022 Hearing Transcript in Claim 480 Page 46 lines 24 to 25, Page 47 lines 1-3

¹¹ 28th December 2022 Hearing Transcript in Claim 480 Page 58 lines 14 to 16, lines 18 to 23

a determination of this Application, as these proceedings were initiated by the Claimant who obtained orders adverse to the Second Defendant that the latter seeks to challenge. The only opposition to this Application comes from the Interim Receivers/Provisional Liquidators.

[26] There was extensive focus by the Interim Receivers/Provisional Liquidators on the findings of Justice Ramdhani in relation to his 28th December 2022 oral judgment denying the Second Defendant's Application in **Claim 480** to stay **Claim 480**. The emphasis on those representations, whilst useful, is not particularly determinative of what this Court has to consider on the Second Defendant's Application now before the Court as Justice Ramdhani was not asked there to determine the status of these proceedings or the status of the 18th November 2022 Order of the Court - his focus was on the 5th December 2022 Order of the Court which, was the Order he was being asked to stay. As seen in the transcript for the delivery of the oral decision of 28th December 2022 in **Claim 480**, the Learned Judge makes the point that in the 5th December 2022 Order he *"did not appoint the receivers as Provisional Liquidators. On the face of the order appointing Ms. Barkhouse and Ms. Shukla, there is nothing to suggest that they were so appointed in their respective interim receiver capacity. In fact, the December order expressly states that it is Ms. Barkhouse and Ms. Shukla who were appointed Provisional Liquidators... I cannot, therefore, see how their appointment can be nullified on the basis that Ms. Barkhouse and Ms. Shukla have lost their status of receivers... If that is the effect of the stay imposed by Paragraph 9 of the 5th of December order granted by this Court...."*¹² It is clear to this Court, that the Learned Judge was making the point that the application for the appointment of provisional liquidators and the order of 5th December 2022 making that appointment, was not done on the basis of the existence of interim receivers per the 18th November 2022 Order the application was grounded differently, having regard to Section 301 of the **International Business Corporations Act**. Consequently, the status of the interim receivers as interim receivers did not affect the 5th December 2022 Order in the manner contended by the Counsel for the Second Defendant.

[27] It is customary when a liquidation order is being pursued, including the appointment of provisional liquidators, that a request for a moratorium to be placed on proceedings against the entity to be liquidated is sought. Granted, that does not always extend to proceedings existing prior to the commencement of liquidation proceedings, but the Court has wider discretionary powers to make such an order. The benefit of there being one form of insolvency proceedings continuing against the First Defendant is useful to avoid there being Interim Receivers and Provisional Liquidators functioning at the same time. Notwithstanding, this Court does properly heed that the Claimant did not commence these proceedings seeking to liquidate the First Defendant. Instead, the Claimant commenced these proceedings seeking interim injunctive relief to preserve the assets of the First Defendant and Second Defendant respectively insofar as he asserted, he has a real issue to be tried against those Defendants as a proprietary tracing claim

¹² 28th December 2022 Hearing Transcript in Claim 480 Page 15 lines 2 to 8 and 14 to 19

where they are alleged to have knowingly received assets of another dishonestly in breach of trusts and, not liquidation proceedings. Without a Statement of Claim having been filed, this Court is not aware of the full intended particulars of the Claimant's claim and or what may be additional causes of action (if any) advanced by the Claimant against the Defendants herein. It is evident that the Interim Receivers, on being given the authority to control the shares of the Second Defendant in the First Defendant, opted to petition the Court in **Claim 480** to liquidate the First Defendant and have themselves appointed as Provisional Liquidators to protect the interest of the First Defendant's creditors.

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

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

- (a) *The purpose of the stay imposed by **Claim 480** on the appointment of provisional liquidators on these proceedings*

- [29] The purpose of staying proceedings against a company being wound up is to facilitate the orderly winding up of a company in the interest of its creditors. In **Re David Lloyd & Co** [1877] 6 Ch D 339 at page 344 that Court stated "*These sections (in the UK statute) ...were intended not for the purpose of harassing or impeding or injuring third persons, but for the purpose of preserving the limited assets of the company.... in the best way for distribution among all the persons who have claims upon them. There being only a small fund of a limited fund to be divided amongst a greater number of persons, it will be monstrous if one or more of them should be harassing the company with actions and current costs which would increase the claims against the company and diminish the assets which would be divided among the creditors*". The stay imposed in **Claim 480** does not stem from statute, as the **International Business Corporations Act** which governs the First Defendant, does not contain such provisions and there are no corresponding rules or regulations related to how liquidation of such entities should be undertaken passed by the Parliament of Antigua and Barbuda. The Learned Judge must have deemed imposing a stay on these present proceedings and future proceedings against the First Defendant a necessity

on making the 5th December 2022 Order. That said, it explains the need for a stay in relation to the First Defendant as a company, but what is the purpose of the stay in relation to the Claimant's claim against the Second Defendant? The Interim Receivers/Provisional Liquidators have advanced that the reason for the stay is to prohibit the Second Defendant from taking steps to regain control of the First Defendant. However, if proceedings against the First Defendant are stayed but allowed to be continued between the Claimant and the Second Defendant, neither the Claimant nor the Second Defendant can advance these proceedings against the First Defendant other than in the liquidation, if the First Defendant is put into liquidation.

- [30] Also, this Court considers what was the purpose for which the Interim Receivers were appointed in these proceedings versus what is taking place in **Claim 480** seeking to liquidate the First Defendant. An Interim Receiver's appointment is usually sought on injunctive relief to preserve an asset or class of assets so that there is something against which the Claimant to the proceedings may enforce against, if successful in obtaining judgment whereas liquidators seek to preserve assets for all creditors of a company by orderly winding up its estate. The 18th November 2022 Order states that the purpose for appointing interim receivers was "*to preserve the value of assets over which they are appointed*". The decision of the Interim Receivers to seek to liquidate the First Defendant by starting fresh proceedings, was not a prohibited step and it must have been in their opinion, necessary to protect the assets of the First Defendant. However, there is no step being taken in **Claim 480** in relation to the Second Defendant, certainly not in the context of the Petition that was lodged against the First Defendant or the application to appoint provisional liquidators. The Second Defendant is an Interested Party in **Claim 480** having been added as such by the Court therein, but is not a named litigant. That means, the proceedings between the Claimant and the Second Defendant may well be able to carry on between them as **Claim 480** does not seek to take steps against the Second Defendant and the Court was engaged in **Claim 480** in relation to protecting the First Defendant.

(b) Whether the nature of the claim can be dealt with in the winding up process

- [31] The Claimant's claim against both the First Defendant and or the Second Defendant respectively is a proprietary tracing claim for knowing receipt and or dishonest assistance alleging that those funds are held in trust for the Claimant wherein he seeks damages in tort. It is useful to state again that there has been no Statement of Claim filed in this matter, so apart from the relief stated in the Claim Form filed on 17th November 2022 and the Claimant's submissions before the Court in relation to the 18th November 2022 Application, the true extent of the Claimant's claim in these proceedings is not yet particularised. Notwithstanding and using the snippet that has been provided, it is evident that the Claimant's claim is being made individually against the First Defendant and the Second Defendant and though the latter was the majority shareholder of the former (and sole director), the two have separate legal personalities. In relation to the First Defendant, the Claimant stands as an unsecured creditor, and claims of unsecured creditors may be lodged in the liquidation of a company. In relation to the Second Defendant, the

Claimant's claim against him can properly proceed on its own as the Second Defendant is not a company so the claim in relation to him cannot be part of the winding up process of the First Defendant - the Interim Receivers'/Provisional Liquidators' Petition to liquidate the First Defendant was not filed against the Second Defendant.

(c) The merits of the Claimant's Claim and intended Application(s) of the Second Defendant

- [32] In the absence of a Statement of Claim having been filed by the Claimant, this Court cannot properly examine what are the merits of the Claimant's claim as it has no particulars of that claim before it.
- [33] The Interim Receivers/Provisional liquidators have urged the Court to look at the merits of the Second Defendant's application to discharge the 18th November 2022 Order. In particular, it has asked the Court to find that the locus standi arguments of the Second Defendant challenging the ability of the Interim Receivers to have commenced Claim 480 is without merit. Though locus standi in the context of the actions taken to initiate Claim 480 having stemmed from these proceedings was advanced as a key argument for this Court to consider in determining whether to lift the stay insofar as the Second Defendant argues that these proceedings did not properly give the interim receivers standing to commence Claim 480, this Court notes that that issue of locus standi to commence Claim 480 is now before the Court of Appeal for determination. In addition to being before the Court of Appeal, this Court as a Court of concurrent jurisdiction is not poised to determine the issue of locus standi arising in relation to Claim 480. Consequently, this Court declines to make any findings on the issue of locus standi.
- [34] In relation to the various arguments that the Second Defendant intends to advance on its application for the discharge of the 18th November 2022 Order, this Court notes that those are all matters that may properly be advanced when seeking to discharge an interim order made ex parte such as the 18th November 2022 Order and is cautious to not predetermine how the Court may rule on that application, as there was no full ventilation of those issues on this application to lift the stay on these proceedings.

(d) The effect which lifting the stay would have on the parties

- [35] There is clear evidence of harm or prejudice to be sustained as advanced by the Interim Receivers/Provisional Liquidators, if the stay is lifted insofar as it gives the Second Defendant an opportunity to take further steps to regain control of the First Defendant in circumstances where there are significant allegations of illegality pending against him in other jurisdictions in which the assets of the First Defendant are entangled and the interest of creditors of the First Defendant is a salient matter. But, with provisional liquidators having been appointed there may

well be no utility in the Second Defendant taking any steps in these proceedings given the state of affairs in **Claim 480** and or ability to do the same. Counsel for the Second Defendant contends that the Second Defendant's prejudice is that a freezing order was made against him, without notice to him and, there has been no hearing in these proceedings other than this application at bar since that ex parte 18th November 2022 Order.

- [36] It cannot be disputed that in these proceedings, the Second Defendant has never had the opportunity to be heard on his challenge to that interim order of the Court as is the usual procedural course that occurs when an ex parte Order is challenged though that Order contains several orders adverse to him which includes the appointment of Interim Receivers over his assets within this jurisdiction and elsewhere. The right to be heard is sacrosanct and to this Court, stands as a greater prejudice to be suffered in this adversarial system of litigation in the context of a litigant seeking to be heard on an adverse order made in his absence, because the application was heard ex parte despite it having been overtaken by a series of events that put into question aspects of the continued utility of those proceedings or at least part of these proceedings.
- [37] Again, the Court notes that the Claimant who successfully moved the ex parte application against the Second Defendant has not opposed this application though it was he who obtained interim injunctive relief ex parte. The Interim Receivers/Provisional Liquidators are not in a position to speak on behalf of the Claimant, and or advance arguments on behalf of the Claimant on any aspect of the Claimant's case in these proceedings and its Counsel has made it clear orally that it is not representing the Claimant. They can only act within the powers and discretion granted to them as Interim Receivers/Provisional Liquidators who are officers of the Court acting independent of the parties. So, though they may be able to contend that it is necessary for the stay on these proceedings to be maintained, the Interim Receivers/Provisional Liquidators have not shown what prejudice would be sustained in relation to these proceedings continuing between the Claimant and the Second Defendant though have done so in relation to the First Defendant.

(e) Public Interests

- [38] It is apparent that the Second Defendant's legal contentions in these proceedings are framed in like manner to what was presented in **Claim 480** for a stay of those proceedings. This Court acknowledges that **Claim 480** and these proceedings are intertwined, but **Claim 480** relates to a Petition to liquidate a corporate entity wherein an ex parte order was made for provisional liquidators to be appointed and a stay was imposed on these proceedings whereas these proceedings have to be considered in the context of the Claimant seeking to advance a cause of action in tracing, knowing assistance and or dishonest assistance likewise breach of trusts against the respective Defendants where an ex parte order was made with adverse consequences to the Second Defendant who has not been heard on that order made in his

absence. So, though the Court in Claim 480 was asked to stay Claim 480 to allow the pursuit of these proceedings, the actual substantive context for considering whether to stay Claim 480 is different in several aspects from that arising in these proceedings to lift the stay. That distinction includes that the Second Defendant seeks to challenge several aspects of the 18th November 2022 Order specific to him and not merely the appointment of interim receivers against the First Defendant.

- [39] Moreover, this Court notes from the transcript of the oral judgment of Justice Ramdhani of 28th December 2022 that Counsel for the Interim Receivers herein who are also Counsel for the Provisional Liquidators invited the Court after the Court dismissed the application of the Second Defendant in Claim 480 to stay those proceedings, to dismiss the Second Defendant's application to lift the stay in these proceedings as he therein acknowledged that that application was pending and contended that the findings made in that 28th December 2022 decision has that inevitable consequence. That led to a lengthy discourse between the Judge and Counsel for the Parties in Claim 480, parts of which are useful in examining if the Court in Claim 480 actually decided on matters in these proceedings as the Interim Receivers/Provisional Liquidators assert. The learned Judge in Claim 480 stated "*a determination has to be made of your application to lift this stay granted by paragraph 9.*"¹³ This Court views that reference to "*paragraph 9*" to be paragraph 9 of the 5th December 2022 Order. Further, the learned Judge queried "*why is it that what I have just ruled on and what I have stated is [sic] my reasons does not lead inexorably to the conclusion that no stay should be -- that stay in paragraph 9 should not be lifted? Why does it not lead to that logic?*"¹⁴ He also stated "**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 state of affairs. It was considered that the risk and urgencies had escalated which required the appointment of Provisional Liquidators. This is the context within which Claim Number 456 was stayed.** This context requires that at the very least, the stay does not affect the appointment of receivers for the purposes of maintaining and prosecuting the petition before this Court."¹⁵ Notably, the learned Judge stated "*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** (Emphasis added). There are no good reasons shown to me why Bankman-Fried should be allowed to intervene which will follow if a stay is granted.*"¹⁶ Putting those representations into context, it is apparent that the Learned Judge rendered his decision in the context of balancing the interest of the parties in relation to the Order for provisional liquidators and made decisions in relation to that consideration. This Court infers that the 28th December 2022 decision acknowledges the interplay between Claim 480 and these proceedings yet, also acknowledged that Claim 480 had a particular focus that, is not the same as in these

¹³ 28th December 2022 Hearing Transcript in Claim 480 page 37 lines 24 to 25

¹⁴ 28th December 2022 Hearing Transcript in Claim 480 page 38 lines 15 to 18

¹⁵ 28th December 2022 Hearing Transcript in Claim 480 Page 17 lines 16 to 25

¹⁶ 28th December 2022 Hearing Transcript in Claim 480 page 21 at lines 15 to 20

proceedings. In fact, the evidence of Angela Barkhouse as seen in Exhibit AB-1 at page 22 paragraph 55, highlights for the Court that the application that was before Justice Ramdhani does not deal with the issues that the Second Defendant seeks to advance in these proceedings as she deposes:

*“55...If and to the extent SBF wishes to advance any such allegations further, however, I would contend that these should only be argued (a) after he has cured his breaches of the Order dated 18 November 2022; (b) after he has demonstrated he has standing to advance such a case in relation to Emergent; (c) after giving notice to the Provisional Liquidators of Emergent so that Emergent can respond to it; and (d) in the proper forum and in the relevant proceedings, namely after he has obtained leave of the Court (in the PL Proceedings **Claim 480**), in which the stay was ordered) to lift the stay in the Receivership Proceedings [these proceedings], and in a subsequent application in the Receivership Proceedings. It does not arise in the Application before the Court on 23 December 2022 [the application to impose a stay on **Claim 480**].”*

- [40] Is this, therefore, a relitigating of issues that arose in **Claim 480** in the oral decision of Justice Ramdhani rendered on 28th December 2022 in relation to the application to impose a stay in **Claim 480** which was refused? This Court was helpfully referred to **Arthur J S Hall & Co (a firm) v Simons Barratt v Woolf Seddon (a firm) Harris v Scholfield Roberts & Hill (a firm)** [2002] 1 AC 615 at paragraph 20 where the Court there stated:

“The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are nemo debet bis vexari pro una et eadem causa and interest rei publicae ut finis sit litium. They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The first is concerned with the interests of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: autrefois acquit, res judicata and issue estoppel. The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the rules.”

- [41] The Court in **Claim 480** on orally delivering its judgment on 28th December 2022 did state that there is a real issue to be tried in these proceedings, but other than that passing statement, at all times both the Court and the Interim Receivers/Provisional Liquidators acknowledged that the application to stay **Claim 480** was not the same as the application to lift the stay imposed on these proceedings. Coupled with the above, the Second Defendant has indicated that there are numerous issues to be fully ventilated in relation to the 18th November 2022 Order with regards to him which, he has not been heard on and must be heard on. That is not the state of affairs in

relation to the First Defendant, as notably, the interim receivers' appointment has been overtaken by provisional liquidators being appointed, so there is no need for there to be interim receivers as the two categories of officers need not oversee the First Defendant on behalf of the Court, particularly as provisional liquidators perform a much wider function in the interest of all creditors to that of interim receivers whose interest is protecting and preserving assets pending judgment.

- [42] This Court finds that the public interest in the circumstances at hand favours the orderly liquidating of the First Defendant being advanced and that there would be no need for both Interim Receivers and Provisional liquidators to function at the same time as officers of the Court. Further, that the Second Defendant should be permitted to be heard on the ex parte 18th November 2022 Order obtained by the Claimant adverse to him as his right to be heard is sacrosanct.

Conclusion

- [43] In view of the totality of the circumstances, I make the following orders:

- (a) The stay imposed by **Claim 480** on these proceedings is lifted in relation to the Claimant and the Second Defendant, so that these proceedings in relation to them may continue.
- (b) In relation to the First Defendant, the stay imposed in **Claim 480** preventing these proceedings from continuing against the First Defendant is maintained.
- (c) Costs on this application are awarded in favour of the Second Defendant having succeeded in having the stay imposed on him lifted to be paid by the Interim Receivers/Provisional Liquidators who initially sought the stay and opposed its lifting. The Second Defendant's costs is to be assessed if not agreed.

Justice Dia C Forrester
High Court Judge (Ag.)

By the Court

Registrar