

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV2021/0105

BETWEEN

**Neil Cave
Simon Butler
Jude Jolie
Daren Weste
Linda De Costa
Kevin Simon
Desroy Demming
St. Rose Verneuil
Richard Jumi
Joseph Nixon**

CLAIMANTS

And

The Attorney General

DEFENDANT

Appearances:

Ruggles Ferguson appearing with Ms Luann DeCosta for the claimant

Anthony Astaphan Q.C. appearing with Ms. Carla Brookes Harris for the defendant

2021: August 5th

2022: March 30th

JUDGMENT

[1] **Robertson J. A Summary.** LIAT (1974) Limited is an airline carrier which engages in the commercial transportation of passengers, cargo and mail between and among nation-states of the Caribbean. Several Caribbean nation states have shareholding interests in the aircraft carrier. During the initial period of the COVID 19 pandemic countries which held a majority shareholding interest in LIAT (1974) Limited indicated that the airline carrier should go into liquidation.

- [2] The claimants are pilots who initiated previous proceedings before the court against LIAT (1974) Limited. Those proceedings remain pending.
- [3] The Parliament of Antigua and Barbuda in or around July 2020 enacted legislation, the Companies (Amendment) Act 2020, Act No. 17 of 2020, to amend the Companies Act 1995. The amendment treated with the rehabilitation of an insolvent corporate debtor and other incidental or connected matters.
- [4] In July of that same year the Minister of Finance filed a petition for a rehabilitation order under the provisions of section 556 of the recently passed legislation. The Minister indicated that LIAT (1974) Limited was insolvent and unable to pay its debts as they fell due and that the company was a “systemically important company” as defined by section 551 of the Companies Amendment Act 2020.
- [5] An order for rehabilitation was granted by the court on 24th July 2020.
- [6] The effect of the filing of the petition for a rehabilitation order was that an automatic stay was triggered with respect to all entities preventing the commencement or continuation of, among other things, judicial proceedings. The stay also covered claims against the debtor that arose before the filing of the petition. As a consequence of the defendant filing a petition for LIAT (1974) Limited under section 556 of the Companies (Amendment) Act 2020 the previous court proceedings of the claimants were stayed.
- [7] The claimants issued these proceedings challenging the constitutionality of the provisions of the Companies (Amendment) Act on the grounds that the provisions of section 564 (1) (a), which treats with the granting of an automatic stay infringes on the right of access to the court and infringes on the doctrine of separation of powers.
- [8] This court has determined for the reasons outlined in its judgment that the section 564(1) (a) is unconstitutional as it infringes on the right of access to the court and that it infringes on the doctrine of separation of powers.

[9] **Robertson J. The Judgment.** The claimants initiated these proceedings seeking a declaration that section 564(1) of the Companies (Amendment) Act 2020, No. 17 of 2020 [herein after called “the Companies (Amendment) Act] is in contravention of section 15 (8) of the Antigua and Barbuda Constitution Order. The claimants contend that the breach arises as the amendment limits the right of the claimants to access the court for the determination of civil proceedings filed in 2015 which was pending before the court when the Companies (Amendment) Act was enacted. The claimants also contend that the provisions of the legislation transgress the separation of powers principles.

The Relevant Background

[10] The claimants are pilots employed by LIAT (1974) limited, a commercial airline carrier. LIAT (1974) Limited primarily engages in the air transportation of passengers, cargo and mail between and among the Caribbean Islands. The claimants, filed proceedings against LIAT (1974) in 2015 seeking certain declarations regarding pension monies deposited into a CLICO fund and later into a local Antiguan Bank. The claimants contended that the sums were deposited without the authority of the pilot’s union (LIALPA) and in breach of the collective and other agreements¹. The 2015 claim contended that LIAT (1974) Limited ought to have deposited the funds as provided under the rules of the LIAT (1974) Limited Staff Provident Fund 1989 and Trust Deed dated 27th June 1990 arising out of a 1977 Arbitration Award.

[11] In the 2015 proceedings the claimants also alleged that when CLICO collapsed the pilots at LIAT (1974) Limited lost over five million dollars in monies improperly deposited into a CLICO fund. LIAT (1974) Limited defended the 2015 proceedings.

[12] The 2015 action by the claimants was case managed and the matter came up for trial 11th August 2020. At the date of the trial counsel for LIAT (1974) Limited took a preliminary point that the trial could not proceed since LIAT (1974) Limited was placed into the hands of an administrator by order of the court dated 24th July of the said year.

¹ See Affidavit of Neil Cave filed 10th Marcy 2021 paragraph 5.

[13] Specifically, the counsel for the LIAT (1974) Limited indicated that the petition for rehabilitation was filed under section 556(1)(c)(i) and (ii) of the Companies (Amendment) Act and that the filing of the petition imposed an automatic stay on matters in which LIAT (1974) Limited was involved. The automatic stay of proceedings is applicable to and in respect of the commencement or continuation of, among other things, judicial action or proceedings against the company². Specific exceptions to the application of the automatic stay are provided by the Act. The order of 24th July 2020 also made provisions for the granting of a stay with respect to all steps, actions or proceedings taken by LIAT (1974) Limited, its shareholders, directors, officers or creditors to wind up or liquidate the company.

[14] The order 24th July 2020 provides:

“1. Pursuant to Section 557 of the Companies (Amendment) Act, 2020 Mr. Cleveland Seaforth is appointed as Administrator.

2. Without prejudice to the generality of the automatic stay under section 564(1) (a) of the Companies (Amendment) Act, 2020 all steps, actions or proceedings taken by LIAT (1974) Limited, its shareholders, directors, officers or creditors to wind up or liquidate the Company are hereby stayed.”

[15] The counsel for the defendant submitted to the trial judge that the claimants were creditors within the meaning of the provisions of the Companies (Amendment) Act and therefore the automatic stay applied to the 2015 proceedings. The counsel for the appointed administrator was present and articulated a similar position.

[16] The trial judge found favour with the submissions made by the counsel for LIAT (1974) Limited and the counsel for the administrator. Accordingly, the trial did not proceed. The claimants in their submissions in these proceedings indicated to the court that the claimants were unable to have the decision reversed before the appellate court.

² The debtor is defined as an entity concerning which a case under Part VI (Company rehabilitation) has been commenced. See Companies (Amendment) Act 2020, section 551.

[17] **The Companies (Amendment) Act 2020.** During the period of the COVID 19 pandemic it was determined that it was appropriate for the Companies Act to be amended to treat with the rehabilitation of insolvent companies like LIAT (1974) Limited.

[18] **The Relevant Background regarding LIAT (1974) Limited.** The Government of Antigua and Barbuda is shareholder of LIAT (1974) Limited and one of its creditors. Eleven countries of the Caribbean have shares in this company. The majority shareholders are Barbados, Antigua and Barbuda, St. Vincent and the Grenadines and the Commonwealth of Dominica.

[19] The company, since 2010, experienced financial difficulties and as of May 2020 the assets of the company amounted to \$183,500,000.00 of which Fixed Assets amounted to \$114,500,000.00 and liabilities which amounted to \$316,900,000.00. The effect of this balance sheet was that there was a negative shareholders' equity in the amount of \$133,400,000.00.

[20] The financial challenges of LIAT (1974) Limited were exacerbated by the COVID-19 pandemic. During this period the company was forced to suspend its operations since many countries in the Caribbean took public health precautions which included the closure of airports. The evidence of the Minister of Finance is that despite the suspension of operations the company still had a significant payroll and recurring monthly liabilities which it was unable to service when these payments fell due. The Board of Directors of the company recommended that the company should be liquidated, and the majority shareholders met to consider the recommendation. At a meeting in June 2020 a majority shareholding Governments indicated their unwillingness to consider a new entity and recommended that LIAT (1974) Limited should be liquidated.

[21] The shareholders met virtually on 20th July 2020 and a decision was taken that the company would sell its three aircraft to reduce the liabilities owed to the Caribbean Development Bank and that certain majority shareholders would sell their shares to Antigua and Barbuda for \$1.00 each.

[22] The Government of Antigua and Barbuda was of the view that forced liquidation was not the best available option. The Minister of Finance noted that since LIAT (1974) Limited was insolvent an administrative order would be of benefit since it could result in the survival of the company or some

part of its undertaking as a going concern, or result in the re-organization of the company and create opportunities to improve the financial situation of the company for the benefit of the unsecured creditors.

[23] In support of the petition for rehabilitation filed under the provisions of section 556 of the Companies Amendment Act 2020, the Minister of Finance deposed that LIAT is important to the economy of Antigua and Barbuda and identified it as being of “systemically important company”. It was also indicated that the company has more than 50 million assets and liabilities and has over three hundred employees who are citizens or residents of Antigua and Barbuda. The evidence in support of the petition for a rehabilitation order referred to the fact that the Classes and Memorandum of shares that LIAT (1974) Limited is authorised to issue is \$10,000,000.00, 2.5% cumulative preference shares and \$10,000,000.00 ordinary shares.

[24] A systemically important company is defined by the Companies (Amendment) Act as a company which:

- a. “Has either at least fifty million dollars in assets or liabilities or has at least 300 employees who are citizens or residents of Antigua and Barbuda; or
- b. That the Minister of Finance has determined is important to the economy of Antigua and Barbuda taking into consideration-
 - i. The nature, scope, size, scale, concentration, interconnectedness of the activities of the company in relation to other aspects of the national economy;
 - ii. Whether such entity is subject to specific regulatory or public and safety matters; and
 - iii. Any other factors that the Minister deems appropriate for the public interest”³.

The Constitutional Challenge.

[25] The claimants contend that section 564(1) of the Companies (Amendment) Act is in contravention of section 15 (8) of the Constitution. The claimants contend that the breach arises as the amendment creates an automatic stay of proceedings which interfere with their right of access to the court to

³ See section 551 of the Companies (Amendment) Act 2020.

determine a pending proceedings and that the provisions of section conflict with the doctrine of separation of powers.

[26] Section 564(1) provides that:

“(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 or 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;
- (b) The enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this Part;
- (c) Any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (d) Any act to create, perfect, or enforce any lien against property of the estate;
- (e) Any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this Part;
- (f) Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this Part; and
- (g) The setoff of any debt owing to the debtor that arose before the commencement of the case under this Part against any claim against the debtor.”

(2) The filing of a petition under section 555 or 556 does not operate as a stay-

- (a) under subsection (1), of the commencement or continuation of a criminal action or proceedings against the debtor;
- (b) under subsection (1), of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the administrator’s rights and powers are subject to such perfection under section 583(2) or to the extent that such act is accomplished within the period provided under section 584(6)(a); (c) under paragraph (a), (b), (c), or (f) of subsection (1), of the commencement or continuation of an action or proceeding by a governmental unit, to enforce such governmental unit’s or organization’s police and regulatory power, including the enforcement of a judgment other than a money judgment,

obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

(d) under subsection (1), of any act by a lessor to the debtor under a lease of non-residential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; and

(e) under subsection (1), of any transfer that is not avoidable under section 581 and that is not avoidable under section 586.

[27] Section 15 (8) of the Constitution provides that:

“(8) 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.”

The Law

[28] The general position is that persons asserting a breach of their fundamental rights must establish the existence of the right and present a *prima facie* case that such breach occurred. The provisions of section 15(8) of the Constitution, although not explicitly stated, do indicate that there is a right of access to the court. The Court of Appeal considered and determined this question in the case of **Capital Bank International v. Eastern Caribbean Central Bank**⁴ when that court considered a similar provision, section 8(8), of the Grenada Constitution⁵. It is noted that the proceedings must

⁴ Civil Appeal Nos. 13 & 14 of 2002.

⁵ At paragraph 12 the court expressed:

“[12] In this case, section 8(8) of the Constitution is derived from section 6(1) of the European Convention of the Protection of Human Rights. The linkage between this Constitution and International norms for the protection of human rights and fundamental freedoms were expressed in **Minister of Home Affairs v Fisher** (1979) 3 A.E.R. 21 at p. 25 in the well-known words of Lord Wilberforce....

[13] Section 6(1) of the European Convention has been construed by the European Court of Human Rights. This has been adopted in the participating states and should inform the meaning that we give to section 8(8) of the Constitution. The fact that it is regarded

be instituted or be likely instituted before the provision comes to life, the section is subject to, as all rights, the rights of others and the public interest, and that the question of the determination of that right can be raised before the court for its consideration.

[29] It is to be noted, however, that the right to access to the court is not absolute. It is settled law that constitutional interpretation is *sui generis* and that in giving consideration to the fundamental rights of the Constitution and the possible infringement of those rights the court gives generous and wide interpretation to the fundamental rights. Although not every infraction is unlawful, an infraction should be only what is necessary to support an enactment which is legitimate in a modern democratic society.

[30] In the circumstances of this case the respondent, through the enactment, has successfully prevented the claimants from prosecuting the action which was filed in 2015 and which was readied for trial. In those circumstances the claimants have, in this court's view, made out a *prima facie* case that their right of access to the court has been infringed. The court must consider whether the purpose of the enactment is sufficiently important to limit the right, whether the provision is rationally connected to the enactment, and whether the provision in question is no more than necessary for the purpose of the enactment.

The Law

(a) Justification of the Limitation.

[31] The applicable principles have been set out in case law. In the case of ***de Frietas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing***⁶ it was indicated that:

as conferring a right of access to the court which is subject to limitations was explained, in terms that I adopt and apply, by Lord Bingham in ***Brown v Stott (PC)*** (2001) 2 W.L.R. 817 at 826:

"Article 6 contains no express right or access to a court, but in ***Golder v United Kingdom*** (1975) 1 ERR 524, 536, para 35 the European Court held that it would be "inconceivable" that article 6 should describe in detail the procedural guarantees afforded to parties in a pending law suit and should not first protect that which alone makes it possible to benefit from such guarantees, namely access to a court."

⁶ Privy Council Appeal No. 42 of 1997.

“... [I]n 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.”

[32] There has been some modification to these principles.

[33] Reference is also made to the often-quoted Canadian case of **R v Oakes**⁷. In that case the Supreme Court of Canada considered legislation which infringed on the fundamental provisions of the Canadian Constitution and noted that:

“ To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, **in each case courts will be required to balance the interests of society with those of individuals and groups.** There are, in my view, three important components of a proportionality test. **First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must**

⁷ [1986] 1 SCR 103.

be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". [Emphasis Added]

71. ... Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

(b) Separation of Powers

[34] The separation of powers principle is one of the principles which is an intrinsic part of the Westminster-styled constitutions. The principle arises through implication, and it is justiciable. In the Privy Council case of *In The State of Mauritius v Khojraty*⁸ it was noted that:

"12. ... The idea of a democracy involved a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive and the judiciary is necessary.

13. In *Director of Public Prosecutions of Jamaica v Mollison* [2003] UKPC 6, [2003] 2 AC 411 Lord Bingham of Cornhill examined the separation of powers under a Westminster constitution, viz Jamaican Constitution. In a unanimous judgment of the board Lord Bingham observed [at para. 13]:

⁸ [2007] 1 AC 80.

“Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative power, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as a ‘characteristic feature of democracies’: R (Anderson) v Secretary of State for Home Department [2003] 1 AC 837,890-891, para 50”.

The Application of the Law

[35] The Companies (Amendment) Act 2020 is, according to its provisions, an act to amend the Companies Act 1995 to provide for the rehabilitation of an insolvent corporate debtor and for other incidental and connected purposes. It is generally accepted that solvent commercial entities are important for the well-being of free democratic economies. Accordingly, legislation which supports companies in financial difficulties is of general importance. The Companies (Amendment) Act makes provisions for insolvent entities to be rehabilitated, if possible, whether through a voluntary case under section 555 or an involuntary case under section 556.

[36] The Attorney General and Minister of National Security in his affidavit in opposition in this matter indicated that the legislation was enacted by the Parliament to “protect companies like the airline LIAT, save jobs and protect the economy of Antigua and Barbuda”.

[37] The Companies (Amendment) Act makes certain interventions to achieve its objective. One such intervention is found in section 564 (1) (a) of the Act. Section 564 (1)(a) of the Companies (Amendment) Act provides that a petition filed under the rehabilitation provisions (section 555 and 556), except in specific circumstances, operates as a stay. The stay applies, except as provided in the legislation, to “the commencement or continuation, including the issuance or employment of process, of a judicial, statutory, administrative, or other action or proceeding against the debtor”. The stay also relates to matters, that was or could have been commenced before the filing of the petition

or the recovery of a claim against the debtor that arose before the commencement of the case under Part IV (Company Rehabilitation) of the Companies (Amendment) Act.

[38] Some of the other relevant provisions of the Companies (Amendment) Act are indicated hereunder.

- a. Section 569 provides that a creditor or an indenture trustee may file a claim which is deemed to be allowed unless an interested party objects.
- b. Section 569(2) provides that except as provided in the Act if there is an objection to a claim the court, after notice and hearing, shall determine the amount of such claim as at the date of the filing of the petition and shall allow such claim except as indicated in the legislation.
- c. Section 596 provides that a party including the administrator, creditor, debtor, an equity security holder or any indenture trustee has a right to be heard on any issue in a case in a matter treating with re-organisation of the company.
- d. Section 558 (2) provides that the appointed administrator has the capacity to sue and to be sued as the administrator and is not personally liable for any act or omission taken on behalf of the debtor entity or the estate except for wilful misconduct.

[39] The Companies (Amendment) Act imposes an automatic stay when petitions for rehabilitation orders are filed and provides a regime to treat with claims involving the debtor entity. In simple terms the automatic stay provides an insolvent company and the appointed administrator with an opportunity to consider the circumstance of the company, rehabilitate or restructure the company, if possible, and, if necessary, manage its dissolution. There is value in having legislation which stays all litigation involving an insolvent company under a petition for a rehabilitation order. The most obvious value is that an administrator for a company in financial difficulties would be in a better position to initially order and manage its financial affairs once it can stay existing and potential proceedings.

[40] The imposition of an automatic stay by legislation, in and of itself, does not breach a right to access to the court. To determine whether there was a breach of this right the court must address its mind to the nature of the stay, the possible length of the stay, how the stay is to be lifted and any other avenues for an aggrieved party to resolve its dispute.

[41] In the circumstances of this case, it is noted that the automatic stay applies to a wide range of actions including judicial proceedings whether the actions are to be commenced or have commenced. The definition of creditor is given a wide ambit and includes entities that have a claim against the company which is under the rehabilitations order whether the claim arose at the time of or before the order for relief or a claim against the estate in relation to involuntary cases, an objection arising from the rejection of executory contracts and unexpired leases and a claim arising from the recovery of property under sections 587⁹ and 590¹⁰ of the Act.

[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] Additionally, this court notes that the fact that other legislative enactments such as the Banking (Amendment) Act contain provisions which allow for lifting of an automatic stay suggests that there are less intrusive mechanisms to achieve the legislative objectives.

[45] The counsel for the claimants also contends that the automatic stay which section 564(1) (a) imposes on judicial proceedings breaches the doctrine of separation of powers since the maintenance of a stay ought to be within the purview of the court. This submission of the counsel for the claimants has found favour with this court. Additionally, this court makes a distinction between the legislative stay

⁹ Liability of transferee of avoided transfer.

¹⁰ Post petition effect of security of interest.

which is imposed though the provisions of the Companies (Amendment) Act and the stay imposed by other legislative enactments such as the Banking (Amendment) Act 2015. It is noted that section 144¹¹ of the Banking Act makes provisions for the oversight of the stay to remain within the judicial assessment of the court.

[46] In the opinion of this court the issue of the oversight of the stay is not addressed by the fact that the claimants could under the provisions of the Companies (Amendment) Act file a claim. Additionally, this mechanism would be of little comfort to the claimants who have spent time and resources to prosecute their matter to the point of trial only to be now told that they must file a claim under the provisions of the Companies (Amendment) Act¹².

[47] This court is cognisant that judicial deference is required with respect to enactments of Parliament. This deference has been duly considered in its determination on this matter. It is noted that the legislative provisions as they stand mean that an aggrieved creditor would not have an opportunity to have a judicial assessment made of whether the court ought to proceed with the matter as initially filed before the court. Additionally, the court is not in a position to determine the most appropriate procedure. Further, the aggrieved creditor has been shut out of the process in which he was engaged and channelled to another process albeit that other process allows for the adjudication of the court.

[48] Prior to concluding this court indicates that this court is not of the view that it ought to decline the granting of relief to the claimants because LIAT (1974) Limited is an 'insolvent company'. This court notes that the evidence of the Minister of Finance that an administrative order may result in the survival of the company or some part of its undertaking as a going concern or result in the re-

¹¹ Section 144 of the Banking (Amendment) Act provides that "*Upon and after the appointment of a receiver:... (c) all legal proceedings against the licensed financial institution or licensed financial holding company are stayed and a third party shall not exercise any right against the licensed financial institution's or licensed financial holding company's assets without the prior leave of the court unless the court directs otherwise*"

¹² The claimants have also indicated to the court that during the process of prosecuting its 2015 action:

- a. The defence for LIAT (1974) Limited was filed a year and six months late.
- b. The deadline for the parties to file and exchange their witness statements was 30th April 2018. While the claimants' witness statements were filed on-time the defendant's witness statements were filed on 12th April 2019.

organization of the company and create opportunities to improve the financial situation of the company.

[49] Accordingly, for the reasons indicated herein this court has determined that section 564(1) (a) is unconstitutional as the breadth of application of the stay is not rationally connected to the objective of the legislation and/or is more than required to meet the legislative objectives. Additionally, the provisions remove the matter of maintenance of the stay out of the judicial assessment thereby infringing on the principle of separation of powers.

[50] Costs to be assessed if not agreed and payable to the claimants by the defendant.

Justice Marissa Robertson
High Court Judge

By The Court

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Registrar