THE EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE

Claim No. AXAHCV2016/0032

Between:

1. **NATIONAL BANK OF ANGUILLA (PRIVATE BANK AND TRUST) LIMITED**
   (In Administration)

2. **CARIBBEAN COMMERCIAL INVESTMENT BANK LIMITED**
   (In Administration)

Claimants

And

1. **NATIONAL BANK OF ANGUILLA LIMITED**
   (In Receivership)

2. **CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED**
   (In Receivership)

3. **NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED**

Defendants

Before:

Master Fidela Corbin Lincoln

Appearances:

Mr. Ronald Scipio Q.C with Ms. Eustella Fontaine for the Claimants
Mr. Anthony Gonsalves Q.C with Ms. Navine Fleming for the 1st and 2nd Defendants
Mr. William Hare with Mr. Alex Richardson for the 3rd defendant

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2016: August 10, 12, 24

Application for Lifting of a Stay imposed by Section 143 (c) of the Banking Act 2015 – Whether Section 143 (c) requires a claimant to obtain leave to initiate a claim - Factors to which the court should have regard in determining whether to lift a stay in the absence of express criteria

[1] **CORBIN LINCOLN M**: On 6th May 2016 the claimants commenced a claim against the defendants for, among other things, a declaration that in procuring or permitting monies belonging to the claimants to be paid to the 1st and 2nd defendants, the Conservator Directors of the 1st and 2nd defendants acted in breach of fiduciary duties owed to the claimants and a declaration that such part of the funds or their traceable proceeds are held by the defendants on trust for the claimants.

The Claimants' Application

[2] The claim form was not served on the 1st and 2nd defendants but on the same day that the claim was filed the claimants filed an application "*pursuant to section 143 (c) of the Banking Act 2015* " for *"leave to be granted by this Honourable Court for the Claimants to bring proceedings against the First and Second Defendants in Receivership as formulated in their statement of Claim exhibited as "WT3" to the Affidavit of William Tacon*".

[3] The claimants' application was fixed for hearing on 19th May 2016. At that hearing I noted that there was no evidence of service of the application on the defendants. Counsel appearing for the claimants at that hearing proposed that the application should be heard ex-parte. I considered the issue of whether the claim ought to have been filed without leave of the court. Of my own motion, pursuant to the powers conferred by Part 26.2 of the **Civil Procedure Rules 2000** ("**CPR**"), I ordered the claimants to show why the claim should not be struck out for being commenced without leave of the court and directed that the application be served on the defendants.

[4] Following a further adjournment of the hearing at the request of the 1st and 2nd defendants the application was fixed for hearing on 10th August 2016 since the claimants submitted that a determination of the application was critical in view of the time fixed by the receiver of the 1st and 2nd defendants for filing proof of claims.

[5] At the hearing on 10th August 2016, I informed the parties that having considered the matter further I formed the view that the powers conferred by **CPR** 26.2 could not be used

to make an order of my own initiative as done on 19th May 2016 because the **CPR** does not apply to insolvency matters.[1] Further, there are no procedural rules made under the **Banking Act 2015** ("**the Act**") and it is arguable that Section 165 of **the Act** excludes the adoption of the UK Insolvency Rules which may have otherwise been applicable by virtue of Section 9 of the **Eastern Caribbean Supreme Court (Anguilla) Act Cap E15.**

[6] Section 165 of **the Act** states:

> **"Non-application of Companies Act**
> **165. The provisions of the Companies Act or any law on or relating to company bankruptcy, reorganisation, insolvency or liquidation shall not apply to the liquidation of a licensed financial institution under this Act."**

[7] However, even if **the Act** permitted the application of the UK Insolvency Rules the court would still not be permitted to raise the issue of striking out the claim for failure to obtain prior leave of its own initiative in the absence of an application.[2]

[8] In the circumstance there appeared to be no procedural rules or at least no local rules governing **the Act**. I was of the view that in the absence of any rules the court could use its inherent power to make the order it did on 19th May 2016. Alternatively, the parties could agree to the application being made orally by the 1st and 2nd defendants since the parties had already filed submissions on this issue or the 1st and 2nd defendants could be given time to file a written application to strike out the claim against the 1st and 2nd defendants.

[9] Counsel representing the 1st and 2nd defendants at that hearing submitted that based on the fact that the court had already raised the issue of whether leave was required to initiate the claim the 1st and 2nd defendants did not see the need to make an application. Counsel indicated that the 1st and 2nd defendants would like to make a written application.

[1] CPR 2.2
[2] Igors Kippers et al v Stanford International Bank (In Liquidation) ANUHCVAP2010/0025

[10] Mr. Scipio Q.C, lead counsel for the claimants, expressed the view that he could see no reason why the court could not exercise the powers it did using its inherent jurisdiction and the matter be allowed to proceed that day. There was however no objection to the 1st and 2nd defendants filing an application limited to the issue raised by the court.

[11] I therefore granted the 1st and 2nd defendants time to file an application limited to the sole issue raised by the court *i.e* whether the claim against the 1st and 2nd defendants should be struck out on the ground that the claimants were required to obtain leave prior to commencing the claim. The matter was adjourned to 12th August 2016 for hearing.

[12] The 1st and 2nd defendants filed the application within the time fixed by the court. The claimants filed a short affidavit in answer in which it was asserted that the application went beyond the ambit of the order made on 10th August 2016.

[13] In my view the application goes outside the terms of the order in that it is asking the court to strike out the claim on the ground that it is an abuse of process not only because leave was not obtained to commence the claim but also on the ground that the proper parties have not been named. I informed the parties that I will not address any part of the 1st and 2nd defendants' application to strike out the claim which goes outside the scope of the order of 10th August 2016. This is of course without prejudice to the 1st and 2nd defendants' right to raise those issues subsequently.

Issues

[14] The applications before the court are therefore the claimants' application for leave *"to bring"* proceedings and the application by the 1st and 2nd defendants for the claim to be struck out as an abuse of process on the ground that the claimants failed to obtain leave prior to commencing the claim.

[15] The applications before the court only relate to the 1st and 2nd defendants and thus for ease of reference the 1st and 2nd defendants are hereinafter referred to as **"the defendants".**

[16] The issues arising for consideration are therefore :

(1) Whether the claimants required leave of the court to commence the claim.

(2) If yes, what is the effect of the failure to obtain leave?

(3) If no, whether the court should lift the stay imposed by section 143 (c) of **the Act** and grant the claimants leave to proceed with the claim.

ISSUE 1 - IS LEAVE OF THE COURT REQUIRED TO COMMENCE THE CLAIM?

[17] Section 143 (c) of **the Act** states

> **"Upon and after appointment of a receiver— …**
>
> **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"**

Submissions by the Claimants

[18] The claimants submitted, in summary, that:

(1) Section 143 (c) of **the Act** does not state that leave must be obtained *prior* to commencing the claim. However, if the claim is commenced it is stayed.

(2) The starting point is whether the legislative intent of section 143 (c) is clear and unambiguous.[3]

[3] PDV Caribe Antigua and Barbuda Ltd v ABI Bank ANUHCV2014/0643

(3) Section 143 (c) clearly contemplates two separate types of enforcement proceedings. It is contemplating a claimant other than a depositor or creditor of the company using the court to go against the financial institution. The second part refers to a third party seeking to enforce directly against the assets of the financial institution.

(4) Section 143 (c) should be read as follows:

> "all legal proceedings **[whether issued before or after the appointment of the receiver]** against the licensed financial institution or licensed financial holding company are stayed unless the court directs otherwise; *(first part);* 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 *(second part)*
>
> unless the court directs otherwise"

(5) It makes sense to limit the "*prior leave*" language to exercising rights against assets because any such exercise of rights will or could immediately affect the entity's interests whereas court proceedings will always have to be adjudicated by and controlled by the court.

(6) On this interpretation no prior leave is required for the first part. A party may therefore commence a claim but the claim is immediately stayed once commenced. Prior leave only relates to claims falling within the second part i.e. where a third party going against the assets of the financial institution.

(7) The claimants' claim falls within the first part and therefore no leave is required to commence a claim.

(8) The language used on Section 143 (d) of **the Act** supports this position. Section 143 (d) of the Act states:

> "**no depositor or other creditor may sell or take possession of any assets of the licensed financial institution or licensed financial holding company as a means of enforcing a claim or initiate or continue any legal proceeding to recover the debt or perfect security interests in the licensed financial institution's or licensed financial holding company's assets"**

(9) Section 143 (d) specifically states that a claim may not be **initiated or continued.** Section 143 (c) is more widely worded and there is no express requirement for "prior leave".

(10) Consequently there is no proper basis to suggest that the claim commenced on 6th May 2016 is a nullity or should be struck out.

(11) Alternatively, if the court is of the view that leave must be obtained prior to filing the claim then the court may grant leave retrospectively. The claimants rely on the case of **In the matter of Colliers International UK PLC (In Administration) and in the Matter of the Insolvency Act (1986) (1) The Governor & Company of the Bank of Ireland (2) Bank of Ireland (UK) PLC v Colliers International UK PLC (In Administration) et al**[4]

Submissions by the Defendants

[19] The defendants submitted, in summary, that:

(1) Leave was required prior to commencing the claim.

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[4] [2012] EWHC 2942 (Ch).

(2) The application seeks leave to "*bring proceedings*" and having brought the proceedings the application cannot assist them in the relief being sought. The court cannot give permission to bring proceedings that have already been brought.

(3) In the application the claimants refer to parties as "intended". If they were in fact committed to the argument that no leave was required why were they referring to the parties as "intended"? The formulation of the application clearly betrays the belief of the claimants (with which the defendants agree) that permission of the court was required before the claim form could be filed.

(4) The claimants' position changed in written submissions where it is stated that they are seeking a lifting of the stay. Skeleton arguments do not constitute a part of or amend the application. The skeleton arguments seek to reformulate the premise of and the order sought in the application. This is unacceptable and on a procedural ground presents difficulties for the claimants since **CPR** 11.13 states that an applicant may not ask at the hearing for an order which was not sought in the application unless the court gives permission.

(5) The claimants are seeking to rely on an overly technical and convenient interpretation of Section 143 to escape the consequences of their failure to obtain leave.

(6) In the context of Section 143 (d) a claim form is a "legal proceeding" even before it is filed at the court. That must be the case since the claimants accept in their skeleton arguments that the initiation of a legal proceeding is expressly prohibited in Section 143 (d). If that were not the case, a claim form would never be caught as a "legal proceeding" until after it was filed and the prohibition against instituting legal proceedings would have no teeth.

(7) Bearing this in mind and adopting a proper purposive approach, the stay of legal proceedings in Section 143 (c) must therefore cover all legal proceedings at whatever

stage they may be, including pre-filing. Section 143 (c) would prohibit the initiation of legal proceedings.

(8) The claimants have fallen into error in failing to appreciate that a claim form is "a legal proceeding" even before it is filed.

(9) The issue is whether the word "stay" requires pre-action approval. The case of **Social Security Board v Clico**[5] is cited. It is submitted that the operative parts of the legislation under consideration in that case are almost the same as section 143 (c). In that case the court found that pre-action leave was required.

(10) The clear purpose of the stay imposed by Section 143 (c) is to permit the court to act as gatekeeper to determine what actions if any are to be permitted to be instituted and continued against a company in receivership.

(11) The claimants' application has not addressed Section 184 of **the Act**.

(12) In written submissions it was contended that the effect of the failure to obtain leave means that the entire claim is a nullity. However, in oral submissions it was accepted that the effect of failure to obtain leave is that the claim against the 1st and 2nd defendants would have to be struck out.

(13) In written submissions it is contended that this is not a case in which the court can grant retrospective leave because the claim form is a nullity and cannot be brought back to life by retrospective leave.

(14) It having been accepted that the issue is one of striking out rather than the entire claim being a nullity, in relation to the issue of retrospective leave it was submitted that:

[5] SKBHCV2012/0212

(a) The case of **Colliers** being relied upon by the claimants is a decision of the UK High Court which is not binding on this court.

(b) Even the case of **Colliers** acknowledges that there are decisions going either way with respect to whether the court can grant retrospective leave.

(c) This court has a discretion which should be exercised judicially. The test for granting retrospective leave cannot be solely based on the fact that the court would have granted leave in the first place. It would mean that the requirement to obtain leave in the first place is irrelevant.

(d) The test must be why leave was not sought in the first place.

(e) In **Colliers** the court considered the circumstances. It should be noted that in that case the administrators did not oppose the application and the application was not argued.

(f) The learned trial judge in that case also made reference to fact that court will only grant retrospective leave in appropriate circumstances. There is no evidence given by the claimants with respect to the issue of why the court should exercise its discretion to grant retrospective leave.

(g) If the court considers that the claimants proceeded without leave based on fact that they did not think leave was acquired that is an error of law. An error of law is no excuse.

(h) The claimants have not asked for retrospective leave or given reasons why retrospective leave should be granted.

Analysis

[20] For ease of reference, I find it useful to restate Section 143 (c) of **the Act.** It states:

> **"Upon and after appointment of a receiver— …**
>
> **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"**

[21] I start by trying to ascertain how Section 143 (c) should be read. It appears to me that there are at least three (3) possible options:

<u>Option 1</u>

Upon and after the appointment of a receiver all legal proceedings against the licensed financial institution or licensed financial holding company are stayed; *(first limb*) 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**"** *(second limb)*

<u>Option 2</u>

Upon and after the appointment of a receiver all legal proceedings against the licensed financial institution or licensed financial holding company are stayed; *(first limb*) and

a third party shall not exercise any right against the licensed financial institution's or licensed financial holding company's assets ; *(second limb)* *without the prior leave of the court unless the court directs otherwise**"***

<u>Option 3</u>

(1) Upon and after the appointment of a receiver all legal proceedings against the licensed financial institution or licensed financial holding company are stayed; *(first limb)* **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; *(second limb)*

***unless the court directs otherwise*"**

[22] The option 1 reading would appear to result in all legal proceedings being stayed but there would be no express provision for the court to lift a stay in that words "*unless the court directs otherwise"* would not apply to the first limb.

[23] The option 2 reading also does not appear to me to be the best reading of the section because:

(1) Legal proceedings will be stayed by virtue of the words "…*all legal proceedings…are stayed."*

(2) "*Unless the court directs otherwise"* means that the court has the power to lift the stay imposed whether upon an application *or* of its own motion. Legal Proceedings cannot proceed "*unless the court directs otherwise*".

(3) If the words *"unless the court directs otherwise*" already provide for the stay to be lifted upon an application to the court (*thus in essence providing for the granting of leave for the legal proceeding to proceed)* the words "without the prior leave of the court" do not

appear to me to be necessary for that part as the effect of the stay and the words *"unless the court directs otherwise*" already imposes a requirement for leave of the court to be sought.

[24] The option 3 reading appears to me to be the best reading of Section 143 (c). By virtue of the first limb "all legal proceedings" are stayed unless the court directs otherwise.

[25] The second limb of the option 3 reading only applies "*without the prior leave of the court"* to the second part of the section i.e. to third parties seeking to exercise rights against the assets of the financial institution. I note that the second part of the section is not referring to *"legal proceedings*" but to the *"exercise*" of "*any rights"* against the assets of the financial institution. This appears to me to cover any step which a third party may be able to take against the assets of the financial institution which may not fall within the definition of "legal proceedings" (*and consequently not subject to an automatic stay)* or even require "legal proceedings". Thus for example in some jurisdictions a mortgagee is entitled to exercise the right of sale against assets used as security without commencing "legal proceedings" or a landlord may have a contractual right to distrain against assets without commencing "legal proceedings". In my view the second limb of Section 143 (c) seeks to prevent such third parties from exercising those rights, which are not "legal proceedings" "*without prior leave of the court*." Having regard to the objective of a winding up it appears to me that there would be valid reasons why the legislature would seek to curtail the exercise of such rights against the assets of the financial institution by imposing the requirement that those rights cannot be exercised *"without the prior leave of the court"*. It brings the exercise of such rights under the supervision of the court.

[26] In this case the claimants are asserting that the funds paid to the defendants by the conservators of the defendants were funds belonging to the claimants and were transferred by the conservators in breach of fiduciary duties owed by the conservators to the claimants. Consequently, the claimants are alleging that the funds are held by the defendants subject to a trust in favour of the claimants. Trust monies do not form part of

the insolvency estate [6] and are excluded whether the trust is express, implied or constructive. The claimants are therefore seeking to recover what they allege is their property.

[27] While a determination of the claim will entail a determination of whether the funds belong to the claimants or form part of the assets of the defendants the claimants are not in my view, at this stage, seeking to exercise any rights against the assets of the defendants as it is yet to be determined to whom the funds belong. It has not been determined that the funds form part of the assets of the defendants. I therefore find that the second limb of Section 143 (c) does not apply to the claimants' claim.

[28] While I find that the option 3 reading is the best reading and propose to adopt same for the purposes of my analysis, in my view, whichever reading is used the question that still arises is whether a claimant must get leave before initiating **"legal proceedings"** even though this is not expressly stated. This turns on the true construction of Section 143 (c) of **the Act** and, in my view, particularly on the meaning of **" legal proceedings**". What proceedings are stayed upon the appointment of a receiver? Is it only proceedings existing at the time the receiver is appointed? Is it proceedings existing at the time of the appointment of the receiver and any other proceedings that may come into existence after the appointment of the receiver? Is it existing legal proceedings and any intended/proposed proceedings?

[29] In attempting to answer these question I remind myself of the words of Byron CJ in **Universal Caribbean Establishment v James Harrison** [7] with regard to construing statutes:

> "The first principle to affirm is to recognise the separation of power between the Legislature and the Judiciary. It is the province of Parliament to make the law and for the Court to interpret, without basing its construction of the Statute on a

[6] Goode, Ray Principles of Corporate Insolvency Law Sweet & Maxwell page 212 paragraph 6-42
[7] ANUHCVAP1993/0021

perception of its wisdom or propriety or a view of what Parliament ought to have done."

The dominant purpose in construing a Statute is to ascertain the intention of the legislature as expressed in the Statute, considering it as a whole and in its context. It is only where the words of the Statute are not clear and unambiguous [sic] that it is necessary to enlist aids for interpretation...." (emphasis mine)

[30] Sir Vincent Floissac C.J in **Charles Savarin v John Williams** (1995) 51 W.I.R. 75 at 78-79. C.J. stated:

"In order to resolve the fundamental issue of this appeal, I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention.

[31] In **Abel v Lee** Willes J stated:

"No doubt the general rule is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would entail some absurdity, repugnancy, or injustice…. But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it in accordance with his views as to what is right or reasonable."

[32] **The Act** does not define "legal proceedings" or "proceedings". These words are also not defined in **the Interpretation and General Clauses Act** Cap. I25 of the Laws of Anguilla.

[33] Blacks Law Dictionary defines "legal proceedings" as:

> **"Acquiring a benefit, interest, or right by enforcing a remedy, action or procedure established by court decision."**

[34] The Concise Oxford Dictionary of Current English 9th Edition defines "proceeding" in this way: [8]

> **"proceeding (in full legal proceeding) – "an action in law, a lawsuit."**

[35] Stroud's Judicial Dictionary of Words and Phrases 5th Edition states:

> **"PROCEEDING. (1) "The primary sense of "action" as a term of legal art is the invocation of the jurisdiction of the court by writ; 'proceeding' the invocation of the jurisdiction of the court by process other than writ."**

[36] The **Eastern Caribbean Supreme Court (Anguilla) Act** Cap E15 states:

> "**proceeding"** includes action, cause or matter
>
> **"action"** means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, but does not include a criminal proceeding by the Crown;
>
> **'cause"** includes any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding by the Crown;
>
> **"matter**" includes every proceeding in court not in a cause;

[8] Olivetti J in Virgin Island Environmental Council v The Attorney General et al BVIHCV2007/0185 at paragraph 34

[37] It is noted that the above definition of "proceeding" is found in the **Eastern Caribbean Supreme Court Act** rather than in **the Act** in question. In **Quorum Island (BVI) Limited and the Attorney General v Virgin Islands Environmental Council**[9] the Court of Appeal was considering whether an "application" constitutes a "proceeding". The Court considered the definition of "proceeding" in the **Supreme Court Act.** Barrow J.A stated:[10]

> "*Returning to the word "proceeding", it hardly matters that the definition quoted above is found in the Supreme Court Act and not the Public Authorities Protection Act, as Mr. Farara took pains to point out, because the meaning given to it in the former Act is perfectly consistent with its usage in the latter Act and provides valuable assistance by way of an example of its usage in a similar context, including its relationship with the word action. "*

[38] It was noted that the word "proceeding" seems to be of the greatest possible scope because the use of the word "includes" in the **Supreme Court Act** means it extends to more than action, cause or matter.[11] The Court held that an application is a "proceeding" which is commenced **when the application is filed.**

[39] The ordinary and natural meaning of the words "legal proceeding" therefore appears to be some permitted form or method (claim form, writ, application or such as other form as permitted by law) used to invoke the jurisdiction of the court. Legal proceedings in my view are commenced **when filed**. A claim form or other method of invoking the court's jurisdiction does not become a "legal proceeding" **until filed**.

[40] It appears to me that the literal meaning of Section 143 (c) is that whatever falls within the definition of "**legal proceedings**" is stayed upon the appointment of a receiver. The section does not state that the stay is limited to legal proceedings *in existence* at the time of the appointment of the receiver. It says *all legal proceedings* are stayed without any

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[9] BVIHCVAP2008/0004

[10] ibid paragraph 8

[11] Barrow J.A in Quorum Island (BVI) Limited et al v Virgin Islands Environmental Council BVIHCVAP 2008/0004 at paragraph 8

reference to the time it is commenced. It is therefore my view that section 143 (c) is wide enough to encompass legal proceedings in existence at the time of the appointment of the receiver and legal proceedings that may come into existence after the appointment of the receiver.

[41] The question is whether the application of this literal meaning results in some absurdity, repugnancy, or injustice. The result of this literal interpretation is that both existing legal proceedings and legal proceedings commenced after the appointment of the receiver will be stayed.

[42] Mr. Gonsalves Q.C, lead counsel for the defendants, submitted that if a claim form is not considered a "legal proceeding" before being filed it would result in an absurdity. It would result in a claimant being able to file a claim only for it to be subject to the stay. That could not be the intention of Parliament. Queen's Counsel cited the case of **Social Security Board v Clico.**[12]

[43] In **Social Security Board** the statutory provision in issue was *S*ection 62(4) of the **Insurance Act No. 8 of 2009** which states:

> "Where an application is made under this section for an order in respect of a registered insurance company all actions and the executions of all writs, summonses and other processes against the insurance company shall by virtue of this section be stayed and shall not be proceeded with, without the prior leave of the court unless the court directs otherwise".

[44] In that case the Social Security Board filed an application for leave to commence proceedings against the respondent. The respondent opposed the application on the basis that:

[12] SKBHCV2012/0212

"[T]here is no basis upon which the Court can entertain this application for leave at this time. The subsection speaks entirely to matters which were in existence at the time of the application was made. The action before the Court was not in existence at the time was made and so it does not meet the requirements of the subsection, as the subsection does not apply".

[45] The applicant submitted that:

(1) While Section 62 (4) contains no express reference on whether leave was required for new actions the said subsection has to be interpreted purposively to include new actions in order to avoid absurdity, repugnancy or injustice which Parliament could not have intended.

(2) The literal meaning of the subsection (and as advocated by CLICO is) suggests that only matters existing at the time the judicial manager is appointed will be stayed and require leave to proceed. This means that new actions could therefore commence and proceed without leave. This literal interpretation creates the absurdity that existing litigants against CLICO need leave to proceed with their actions, but a new litigant can file an action and have it adjudicated without leave. Such an interpretation amounts at the very least to an injustice to existing litigants and the estate because this interpretation removes the required protection of leave.

[46] The learned trial judge stated:[13]

"In its plain reading section 62(4) of the Act appears to apply solely to matters in train prior to the advent of the judicial manager. In this way since there is no prohibition against application subsequent to the appointment of the judicial manager and as such the matter of leave cannot arise. Herein arises the real distinction between the parties before the court…

[13] ibid at paragraphs 34 and 45-47

Mention has already been made of the dictum of Madam Justice Hariprashad-Charles to the effect that the court would look at rules of statutory interpretation if there arises an absurdity or injustice. On the other hand in **Pepper v Hart** Lord Griffiths speaking on the issue in the House of Lords said this: "The days have long passed when the courts adopted a strict constructionist view of interpretations which required them to adopt the literal meaning of language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation...".

There can be no doubt that the true purpose of the legislation is to regulate insurance companies and for related matters. This is stated in the long title. And in relation to section 62(4) of the said Act the court cannot accept the anomaly or injustice advanced by the respondent that only existing actions require leave of the court proceed. On the contrary, as submitted by the applicant the section is part of the regulatory power given to the court to protect insurance companies against claims that would impeded the purpose for which the administrative order for judicial management was made. Indeed, the filing of unrestricted actions has the potential to defeat the whole purpose of an insurance company being in administration or judicial management. It is considered that Parliament could not have intended such a result.

It is therefore the conclusion of the court that section 62(4) of the Act must be interpreted purposively to mean that for actions in existence prior to the appointment of the judicial manager leave of the court is required and such leave is also required with respect to purposed [sic} actions as to say otherwise would be repugnant to the comprehensive scheme of the legislation to regulate insurance companies of all types or categories and all persons connected therewith, at all times. "

[47] The first difference that arises is that unlike the view of the court in **Social Security** with respect to the literal meaning of Section 62(4) I am not of the view that the literal meaning

of the words used in Section 143 (c) is that it applies solely to matters in existence or "in train" at the time of the appointment of the receiver. Based on that court's view of the literal meaning of Section 62 (4) it was determined that the literal meaning would result in an absurdity in that only existing legal proceedings would be stayed while subsequently filed proceedings would not be subject to a stay and could proceed. The court therefore adopted the purposive approach.

[48] In this case it is my view that the literal meaning of Section 143 (c) is that all legal proceedings, whether filed before or after the appointment of the receiver, are stayed. This would not create a situation like in **Social Security** where there would be a difference between proceedings filed before and those filed after the appointment of the receiver. Both proceedings would be subject to the stay.

[49] The general rationale for staying legal proceeding when a company is being wound up does not in my view differ because the company is a financial institution. These provisions staying proceedings are " *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 or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase costs against the company and diminish the assets which ought to be divided among the creditors."*[14] It is contemplated that the court "*shall be seized of all these matters and shall see that the affairs are wound up in a dignified and orderly way."* [15]

[50] The purpose of provisions of this nature therefore includes preventing a company in liquidation (including a financial institution) from being subjected to a multiplicity of actions which would be expensive, time-consuming, in some cases unnecessary and which would take the liquidator's attention and available funds away from the orderly winding up of the company. The court, as described by Mr. Gonsalves Q.C, is the "gatekeeper".

[14] James L.J in Re: David Lloyd & Co. Lloyd v David Lloyd & Co (1877) 6 Ch. D 339 at

[15] Widgery L.J in Langley Construction (Brixton) Ltd. v Wells [1969} 1 WLR 503 at 509

[51] The above-described purpose of provisions of this nature is in no way defeated by applying the literal meaning of Section 143 (c). All legal proceedings whether filed before or after the appointment of the receiver will be stayed and will require a lifting of the stay by the court to allow the proceedings to proceed. The company in receivership will not be required to defend a claim unless the stay is lifted by the court.

[52] The fact that a claim would be subject to a stay once filed does not of itself result in an absurdity or entail some repugnancy or injustice.

[53] Section 143 (c), as worded , does not in my view make it mandatory to seek leave to initiate proceedings. If the intention of the legislature was to prevent the initiation/commencement of legal proceedings then it could or should have stated so expressly. I note that in Section 143 (d) it is expressly stated that a person falling within that section may not "***initiate*** *or continue legal proceedings."*

[54] There may be legitimate reasons why legal proceedings are commenced before leave is sought such as in the case of preventing the running of a limitation period. Consequently, there may be legitimate reasons why the legislature did not see it fit to state in Section 143 (c) that legal proceedings may not be *initiated/commenced* without leave of the court.

[55] In any event, while it appears to me that it may have been more prudent and in keeping with current practice [16] to expressly prevent the initiation/commencement of legal proceedings I remind myself that a statute is not to be construed on the court's "*perception of its wisdom or propriety or a view of what Parliament ought to have done."* The words are

[16] Section 130 of the UK Insolvency Act 1986 states "*When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose*." *(emphasis mine) ;* The liquidation orders made by the court in cases such as Igors Kippers v Stanford International Bank ANUHCVAP2010/0025 and Stanley DeFreitas v Transglobal Inc (In Liquidation) SVGHCV2011/101 and 102 expressly prevented the bringing or continuation of claims.

to be given their ordinary grammatical meaning unless they result in some absurdity, repugnancy, or injustice.

[56] I am therefore unable to agree with the submissions of the defendants that in the context of Section 143 (c) a claim form is a "legal proceeding" even before it is filed. I find that the literal meaning of the Section 143 (c) is that all legal proceedings, whether filed before or after the appointment of the receiver, are stayed unless the court directs otherwise.

[57] I do not find that applying the literal meaning entails some absurdity, repugnancy or injustice and thus the words must be given their ordinary and natural meaning.

[58] I therefore do not find that Section 143 (c) requires a claimant to obtain leave of the court to initiate/commence legal proceedings although it is my view that it would generally be more prudent to do so.

ISSUE 2 – SHOULD THE STAY BE LIFTED / THE CLAIMANTS GRANTED LEAVE TO CONTINUE PROCEEDINGS

[59] The application states that it is seeking leave to "bring" proceedings. Mr. Scipio Q.C sought to address this by submitting that:

(1) The choice of words "bring" in the application is deliberate.

(2) The claimants are seeking to make a distinction between two (2) processes. The proceedings having been filed i.e. commenced but not yet served by that meaning "brought".

(3) The fact that the precise wording of **the Act** is not used does not prevent the matter being considered. In lifting the stay leave will automatically to given. There is no ambiguity as to what is being sought so as to prejudice the defendants. The wording of

Section 143 (c) is clear in relation to the stay and the application has referred to that section.

[60] Mr. Scipio Q.C provided no authority for the submission that there is a difference between "filing/commencing" proceedings and "bringing proceedings" which occurs when the proceedings are served.

[61] Proceedings, whether by way of a claim form or an application, are commenced when they are filed.[17] The claimants have provided no authority which states that the filing /commencing of a claim does not amount to *bringing proceedings* until service is effected. For my part I can see no real distinction between commencing and bringing proceedings. It does not appear to me to be correct to say that proceedings have not been "brought" because they have not been served. Even without being served on a defendant the proceedings have been brought.

[62] I am unable to accept the claimants' explanation for the reason the application seeks leave to *bring proceedings*. By on the one hand seeking leave to "bring" proceedings" and referring to "intended" parties in the application[18] and submissions[19] and on the other hand submitting that no leave is required to bring proceedings, suggests to me that the claimants are/were themselves unsure or undecided on whether or not leave was required prior to commencing the claim.

[63] Notwithstanding these inconsistencies, in my view it is clear from the application what the claimants are seeking. The application refers to section 143 (c) of **the Act** which stays proceedings. It is evident that they wish to pursue a claim against the defendants but to do so the stay imposed by Section 143 (c) must be lifted. There does not appear to me to be any ambiguity in the substance of what the claimants are seeking. More importantly, there is no evidence that the defendants were unsure or misled about the substance of the

[17] Quorum Island (BVI) Limited and AG v Virgin Island Environmental Council BVIHCVAP2008/0004

[18] Paragraph 2, line 4 of the affidavit of Willian Tacon filed on 6th May 2016 refers to " The intended First and Second Defendants"

[19] Paragraphs 1 of the claimants' written submission refers to "The Intended Claimants/Applicant" and the "Intended First and Second Defendants"

application or that they suffered any prejudice. Indeed the defendants have addressed all relevant issues in relation to whether the stay should be lifted.

[64] In the circumstance I do not find that the result of the inconsistencies or failing to specifically state that a lifting of the stay is being sought means that the court should not consider what is the essence of the application *vis* whether the stay should be lifted. I therefore proceed to consider whether the court should lift the stay.

Should the Stay Be Lifted?

[65] The use of the words *"unless the court directs otherwise*" in Section 143 (c) gives the court a discretion to lift the stay and allow a claim to proceed.

[66] In the absence of any express criteria in **the Act** or procedural rules made under **the Act** and the non-applicability of the **CPR** and any law relating to company insolvency or liquidation - to what matters should the court have regard in determining whether to lift the stay and permit the claimants to proceed with the claim?

[67] **The Act** is relatively new and there is an absence of any reported judicial guidance on how the court should exercise its discretion in relation to Section 143 (c) of **the Act**.

[68] The defendants cited the case of **Re: Atlantic Computer Systems**[20] where the Court of Appeal, with some reluctance,[21] gave guidance on the principles to be applied on applications for the grant of leave in relation to a company *in administration*. I note and bear in mind that the Court in that case stated that while in certain cases similar considerations may apply when considering the grant of leave in relation to a company in administration as opposed to a company in liquidation there were important differences. The Court stated: [22]

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[20] [1992] 1 All ER 476
[21] ibid Nicholls LJ at page 500
[22] Nicholls LJ at 488-489

"the objectives of winding-up orders and administration orders are different and, hence, the approach that should be adopted by the court when exercising its discretion under the two regimes is different. In the case of winding up the company has reached the end of its life. The basic object of the winding-up process, in the case of an insolvent company, is to achieve an equal distribution of the company's assets among the unsecured creditors…

In contrast, an administration is intended to be only an interim and temporary regime. There is to be a breathing space while the company, under new management in the person of the administrator, seeks to achieve one or more of the purposes set out in s 8(3). There is a moratorium on the enforcement of debts and rights, proprietary and otherwise, against the company, so as to give the administrator time to formulate proposals and lay them before the creditors, and then implement any proposals approved by the creditors. In some cases winding up will follow, in others it will not. Whether those whose land or goods are being used by the company during this interim period should be given leave to enforce their proprietary rights forthwith or should be paid ahead of everyone else must depend on all the circumstances, which will vary widely from one case to the next."

[69] While there is an absence of express criteria for the lifting of a stay under Section 143 (c) there is no doubt that the discretion "*cannot be exercised in a vacuum or a whim'* [23]. Further, notwithstanding that all the considerations which apply to granting leave in relation to a company in administration may not apply to a company in liquidation and the fact that **the Act** bars the application of any law in relation to company bankruptcy or reorganization does not in my view mean that the court cannot have general regard to some of the factors which courts have taken into consideration in determining whether to grant leave in relation to companies in administration or liquidation.

[23] Pereira J.A in C.O Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd SLUHCVAP2011/0017

[70] In **Cassegrain v Gerard Cassegrain & Co Pty Ltd (in liquidation)** [24] the NSW Court of Appeal adopted the commentary in *Austin and Black's Annotations to the Corporations Act* paragraph 5.4718, which states:

> "*The relevant factors to be taken into consideration include the amount and seriousness of the claims; the degree and complexity of the legal and factual matters involved; the stage to which the proceedings, if commenced, have progressed; the risk that the same issues would be relitigated if the claims were to be the subject of a proof of debt; whether the claim has arguable merit; whether proceedings are already in motion at the time of liquidation; whether the proceedings will result in prejudice to creditors; whether the claim is in the nature of a test case for the interest of a large class of potential claimants; whether the grant of leave will unleash an avalanche of litigation; whether the cost of the hearing will be disproportionate to the company's resources; delay and whether pre-trial procedures such as discovery and interrogatories are likely to be required or beneficial."*

[71] Further, the courts have granted leave to bring claims which could not be proved in the winding up process such a claim for a proprietary remedy. **In the matter of Bigdeal Artist Management Pty Ltd (in liquidation)** [25] an order was sought for leave to proceed with a claim of a proprietary nature under the relevant Corporation Act against a company in liquidation. The claimant was seeking to establish that monies paid to the company in liquidation by a third party were monies held by the third party on trust for the claimant and as such the monies were held by the company subject to the trust in favour of the claimant. In granting leave to proceed with the claim against the company the court found that the claim had a solid foundation and further that where a proof of debt procedure does not permit proprietary claims to be adequately advanced or adjudicated, granting leave to proceed was appropriate.

[24] (2012) NSWCA 435
[25] (2015) NSWSC 936

[72] In exercising my discretion I must seek to give effect to the purpose of **the Act** having regard to the legitimate interests of both parties and all the circumstances of the case**. H**aving regard to all the circumstance requires the court to also take into consideration Sections 184 (1) and (2) of **the Act** which state that:

> **" (1) In any court proceedings under this Act, the Court shall take into consideration the public interest.**
>
> **(2) In considering the public interest, the Court shall have regard to—**
>
> **(a) the critical importance of financial stability to the public interest;**
>
> **(b) the importance of permitting the Central Bank to discharge its functions in an expeditious and efficient manner in the interest of maintaining financial stability.**

[73] In determining whether to lift the stay the matters to which I propose to consider are:

(1) The purpose of the receivership;
(2) The nature of the claim and whether the claim can be dealt with in the winding up process;
(3) The effect which refusing to lift the stay or lifting the stay would have on the parties;
(4) The public Interest as mandated by Section 184 of **the Act**; and
(5) The merits of the claim;

The Purpose of the Receivership

[74] The evidence for the claimants was contained in affidavits filed by Mr. William Tacon, the court appointed Administrator of the claimants.

[75] Mr. Tacon states :[26]

[26] Affidavit filed on 6th May 2016.

" 8. The House of Assembly for Anguilla in December 2015 passed the third reading of the proposed new banking legislation with the intention of facilitating a receivership and resolution plan by the ECCB of First and Second Defendants. On 18 April, 2016 the Governor of Anguilla assented to the Banking Act 2015, the Eastern Caribbean Asset Management Corporation Agreement (Amendment) Act, 2016, and the Bank Resolution Obligations Act 2016 which was the final stage in the legislation process in order for the ECCB to facilitate the receivership by the ECCB for the First and Second Defendants…

10. On 22nd April 2016 at 4:00 pm the First and Second Defendants ceased to be under the control of the ECCB and were placed in receivership by ECCB pursuant to section 137(a) of the Banking Act 2015. A copy of the Anguilla gazette verifying that the First and Second defendants have been placed in receivership is now shown to me and exhibited as "**WT2**"

11. Mr. Gary Moving has been appointed as the Receiver of the First and Second Defendants by the ECCB."

[76] This evidence has been admitted by the defendants.[27]

[77] Further, Section 137 (1) (a) of **the Act** states that *"The Central Bank may appoint a receiver for a licensed financial institution …where it is insolvent."*

[78] Section 137 (2) of **the Act** states:

" A receiver appointed under this Part shall liquidate the licensed financial institution or licensed financial holding company for which it has been appointed receiver and wind up its affairs in an orderly manner that minimises any risk to financial stability, minimises disruption to depositors, and, consistent with the preceding goals,

[27] Paragraph 5 of the affidavit of Gary Moving filed on 16th June 2016.

maximizes the value of the assets of the licensed financial institution or licensed financial holding company."

[79] The statutory purpose of the receivership is therefore to wind up the affairs of the licensed financial institution in an orderly manner which: (a) minimises any risk to financial stability; (b) minimizes disruption to depositors and ; (c) maximizes the value of the assets of the licensed financial institution.

The Nature of the Claim and Whether The Claim can be Dealt With In the Winding Up Process

[80] The statement of claim avers that:

(1) The claimants **(" PBT**" and "**CCI**") are both banks licensed and regulated by the Anguilla Financial Services Commission to carry on offshore banking business in or from within Anguilla.

(2) On 22nd February 2016 Mr. William Tacon was appointed by the court as administrator of both claimants pursuant to Section 31 of the Financial Services Commission Act on and subject to the terms of the order of court.

(3) The First Defendant ("**NBA**") and the Second Defendant ("**CCB**") are companies incorporated pursuant to the laws of Anguilla. At all material times, NBA was the sole shareholder in PBT and CCB was the sole shareholder in CCI and, for the purpose of the Banking Act, RSA c B11, NBA and CCB were banks licensed by the Minister of Finance of Anguilla and regulated by the Eastern Caribbean Central Bank ("**ECCB**") to carry on banking business in or from within Anguilla.

(4) Between 12 August 2013 and 22 April 2016, pursuant to powers conferred on the ECCB by the Eastern Caribbean Central Bank Agreement Act, the affairs of NBA and CCB were subject to the control of the ECCB through a process of conservatorship.

(5) On 22 April 2016, the ECCB appointed a receiver over NBA and CCB under Section 137 of the Banking Act, N 6 of 2015.

(6) On 22 April 2016 at 4:00pm, NBA and CCB ceased carrying out banking business in Anguilla. According to a press release dated 22 April 2016 issued by the ECCB, the banking operations of NBA and CCB were transferred on 22 April 2016 to a newly established bank, the National Commercial Bank of Anguilla Ltd ("NCBA"). NCBA is wholly owned by the Government of Anguilla. As at the time of drafting this Statement of Claim, the terms upon which any such transfer purported to operate, and the terms of any wider plan of resolution which is to be implemented in respect of NBA and CCB are unknown to the claimants and Administrator.

CONTROL OF PBT AND CCI

(7) Between 12 August 2013 and 24 March 2016 (the "Relevant Period"), the affairs of PBT and CCI were conducted in accordance with instructions given by, and under the management control of, individuals appointed by the ECCB as conservators in respect of NBA and CCB from time to time (being Mr. Martin Dinning, Mr. Hudson Carr and Mr. Shawn Williams - collectively, the "Conservator Directors"). In particular:

(a) On or around 15 August 2013, the ECCB and/or conservator acting on behalf of NBA and CCB at that time, Mr. Martin Dinning, dismissed the appointed directors of P B T and CCI . Despite requests made by the Administrator, the ECCB (through its Deputy Governor Mr. Trevor Braithwaite) and Mr. Williams, the then conservator, have refused to clarify the basis upon which such action was taken or the rationale for the dismissal;

(b) In the period 15 August 2013 until 22 February 2016, PBT had no *de jure* directors and therefore acted solely in accordance with the instructions of, and under the management control of, the NBA conservator acting from time to time;

(c) In the period 15 August 2013 until 15 January 2015, CCI had no *de jure* directors and therefore acted solely in accordance with the instructions of, and under the management control of, the CCB conservator acting from time to time.

(d) In the period 15 January 2015 until 22 February 2016, Mr. Hudson Carr (the ECCB appointed conservator of CCB) was the sole *de jure* director of CCI , which acted solely in accordance with his instructions, and under his management control;

(e) In the period 22 February 2016 until 24 March 2016, and insofar as relevant for the purpose of this claim, the Administrator (in accordance with the terms of his appointment) sub-contracted the management of the day-to- day operations of PBT and CCI to Mr. Williams as conservator of NBA and CCB. As a consequence, the day- to-day banking business of PBT and CCI (including deposit- taking) continued to be conducted solely in accordance with the instructions of, and under the management control of, the then conservator Mr. Williams.

(8) In the premises, the Conservator Directors acted as *de facto* directors of PBT and CCI (save that Mr. Hudson Carr acted as a *de jure* director of CCI for the period 15 January 2015 until 22 February 2016) by reason of the fact that, *inter alia:*

(a) During the Relevant Period, management, trading and administrative decisions of PBT and CCI were made by, or subject to the control of, the Conservator Directors. Personnel within PBT and CCI took instructions and directions from the Conservator Directors, who established the policy to be adopted by PBT and CCI during the Relevant Period for making deposits and permitting withdrawals;

(b) The Conservator Directors assumed to act as directors of PBT and CCI and as part of the corporate governing structure, and were the sole persons exercising the powers of, and discharging the functions of directors of, PBT and CCI, when causing PBT and CCI to continue conducting banking business; and

(c) The Conservator Directors undertook functions which could only be discharged by a director of PBT or CCI.

Prior to discovery, the above particulars are the best particulars that the Claimants are able to provide of the Conservator Directors' involvement in the corporate governing structure of PBT and CCI during the Relevant Period. The above particulars are provided without prejudice to whether any other persons were acting as *de facto* or shadow directors of PBT and CCI , including the ECCB itself.

<u>DUTIES OWED TO PBT AND CCI</u>

(9) By reason of acting as *de facto* or *de jure* directors of PBT and CCI, alternatively and in any event by reason of the role assumed by the Conservator Directors in relation to the affairs of PBT and CCI during the Relevant Period, the Conservator Directors owed the following fiduciary duties to each of PBT and CCI:

(a) To act in good faith in the interests of, respectively, PBT or CCI;

(b) To exercise their powers, and apply PBT and CCI's assets, only for the proper purposes of, respectively, PBT and CCI; and

(c) Not, without the informed consent of principals, to put themselves in a position where there was or would be a conflict between their duties to PBT and CCI, and any other interests or duties which they owed to NBA, CCB or the ECCB respectively or any other person.

BREACH OF DUTY

(10) Throughout the Relevant Period, NBA and CCB were insolvent and unable to pay their debts. It is to be inferred from their office and appointment by the ECCB in respect of NBA and CCB that the Conservator Directors were at all times aware that NBA and CCB were insolvent and unable to pay their debts.

(11) Notwithstanding the insolvency of NBA and CCB , during the Relevant Period, the Conservator Directors (acting on behalf of PBT and CCI) procured or permitted the payment to, respectively, NBA and CCB of all monies received by PBT and CCI from depositors, and the proceeds of all assets of P B T and CCI realised or collected during the Relevant Period (the "Funds").

(12) The terms upon which the Conservator Directors procured (i) the making of further deposits by creditors with PBT and CCI ;and (ii) the payment over of the Funds to, respectively, NBA and CCB, are the subject of further investigation by the Administrator, and this claim is made without prejudice to any rights of PBT and CCI (or the rights of depositors) which may arise from the terms upon which such deposits were made.

(13) The total amount of the Funds paid to or collected by, respectively, NBA and CCB during the Relevant Period amounted to US$174,959,675.75 and US$26,983,662.05 as set out in Schedules 1 and 2. Due to the volume of data, and by way of voluntary particulars, details of the transactions making up these totals are provided to the Defendants under separate cover in electronic format.

(14) In causing the Funds to be paid to NBA and CCB, the Conservator Directors acted in breach of the fiduciary duties owed to PBT and CCI, as set out in paragraph (9) above.

PARTICULARS OF BREACH

(a) The Conservator Directors caused or permitted the Funds to be paid to the known insolvent entities NBA and CCB rather than an alternative solvent third party bank;

(b) The Conservator Directors failed to put in place any, or any sufficient, security arrangements providing for repayment of the Funds;

(c) The Conservator Directors failed to consider whether, and if so why, payment of the Funds to NBA and CCB was in the interests of, respectively, PBT and CCI, alternatively failed to take into account all matters relevant to that decision such as NBA and CCB's insolvency, and the lack of any or any sufficient security arrangements to ensure repayment. Payment of the Funds to NBA and CCB was, in the circumstances of NBA and CCB's known insolvency, a transaction that no intelligent and honest man in the position of a director of PBT or CCI could have reasonably believed was for the benefit of PBT or CCI absent sufficient security arrangements to ensure repayment ; and

(d) If and to the extent that the Conservator Directors did consider whether payment of the Funds to NBA and CCB was in the interests of, respectively, PBT and CCI, and did take into account all matters relevant to that decision, they wrongly gave precedence to NBA and CCB's need for liquidity, acted in conflict of their duties owed to PBT and CCI, and gave insufficient thought to the consequences of NBA and CCB's insolvency. The Conservator Directors could not in good faith have believed that permitting payment of the Funds to NBA and CCB was, in all the circumstances, in the interests of PBT and CCI.

Prior to discovery, the above particulars are the best particulars that the Claimants are able to provide of the Conservator Directors breach of duty.

CONSEQUENCES OF BREACH - PROPRIETARY CLAIMS

(15) The payment of the Funds to NBA and CCB in breach of fiduciary duty amounted to a breach of trust by the Conservator Directors, such that the Funds were received and held by NBA and CCB on trust for PBT and CCI.

(16) NBA and CCB did not receive the Funds as *bona fide* purchasers for value without notice of the interest of PBT and CCI. No value was provided to PBT and CCI in return for the payment to NBA and CCB of the Funds. Further, or in the alternative, the Conservator Directors in their capacity as conservators of NBA and CCB controlled NBA and CCB throughout the Relevant Period, and their knowledge of the circumstances in which the Funds were being paid to NBA and CCB is to be attributed to NBA and CCB such that the funds were received by them with notice of PBT and CCI's interest and/or with notice that the Funds were being paid over in breach of duty.

(17) In the premises, the Funds which were received by NBA and CCB remained the assets of, and were held on trust for, PBT and CCI. PBT and CCI are entitled to the return of the Funds and/or their traceable proceeds, and seek an account of NBA and CCB's dealings with the Funds for the purpose of identifying such part of the Funds and/or their traceable proceeds as remain in the possession or control of NBA and CCB.

(18) If and to the extent that the Funds or their traceable proceeds have been transferred by NBA or CCB to NCBA, NCBA received the Funds or their traceable proceeds with notice of P B T and CCI's claim to the same by reason of a letter dated 19 April 2016 from the Administrator's Counsel setting out the basis of P B T and CCI's claim, the contents of which NCBA had notice of prior to the implementation of the Plan of Resolution relating to NBA and CCB. In the premises, any part of the Funds and/or their traceable proceeds which were received by NCBA remained the assets of, and were held on trust for, PBT and CCI. PBT and CCI are entitled to return of the Funds and/or their traceable proceeds, and seek an account of NCBA's dealings with the

Funds for the purpose of identifying such part of the Funds and/or their traceable proceeds as remain in the possession or control of NCBA.

(19) For the purpose of taking any account as described above, the Court is asked to conduct the account on a willful default basis, alternatively common account basis. PBT and CCI will give credit for such part of the Funds or their traceable proceeds as have been repaid to PBT and/or CCI. The Court is asked to give such further or other directions as are necessary in light of any defence served in order to take the account and establish the extent of the Funds and their traceable proceeds to which PBT and CCI are entitled.

(20) This proprietary claim is asserted by the Claimants without prejudice to any other claims that may be available to the Claimants against the Defendants, the ECCB or any other persons, including claims for personal liability arising by reason of breach of duty, knowing receipt or assisting in breach of trust.

AND THE CLAIMANTS CLAIM:

(1) A declaration that, in procuring or permitting the Funds to be paid to the NBA and CCB, the Conservator Directors acted in breach of fiduciary duties owed to PBT and CCI respectively;

(2) A declaration that such part of the Funds and/or their traceable proceeds as are held by NBA, CCB and NCBA are held on trust for, respectively, PBT and CCI;

(3) The taking of an account on a willful default basis, alternatively common account basis, and an inquiry for the purpose of identifying such part of the Funds and/or their traceable proceeds as remain in the possession or control of NBA, CCB and NCBA, or such other purpose as the Court considers appropriate;

(4) All further proper accounts, inquiries and directions, including such directions as are necessary in light of any defence served in order to take the account, and

establish the extent of, the Funds and their traceable proceeds to which PBT and CCI are entitled;

(5) An order that NBA, CCB and NCBA do transfer to PBT and CCI such part of the Funds and/or their traceable proceeds as remain in their possession and/or control, or otherwise transfer and pay to the Claimants any of their property as is identified as part of the account and inquiry;

(6) Interest on the Funds as from the date of their misapplication or such other date as the Court considers appropriate, payable at the rate of one percent above ECCB base rate and compounded at half yearly intervals, alternatively at such rate and for such period as the Court considers appropriate;

(7) Costs; and

(8) Such further or other relief as the Court considers fit.

[81] The claimants are therefore asserting that they have a proprietary claim. This proprietary claim is being asserted on the basis that the monies paid to the defendants by the conservators of the defendants were monies belonging to the claimants and were transferred by the conservators in breach of fiduciary duties owed by the conservators to the claimants.

[82] In **Re: David Lloyd & Co. Lloyd v David Lloyd & Co**.[28] James L.J stated:

"These sections in the Companies Act, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, 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 or bankrupt in the best way for distribution among all the persons who have claims upon them. There being only a

[28] (1877) 6 Ch. D 339

small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors. ***But that has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property. The position of a mortgagee under such circumstances is, to my mind, exactly similar to that of a man who said, "You the company have got property which you have taken from me; you are in possession of my property by way of trespass, and I want to get it back again." A landlord might say, "You have property under lease from me; you have broken the covenants of the lease, and I have a right of re-entry in consequence of that breach." The company ought not, because it has become insolvent or has been minded to wind up its affairs, to be placed in a better position than any other lessee with regard to his lessor. (emphasis mine)***

[83] The claimants are not seeking to assert a claim against the assets of the defendants. They are seeking the return of property which they allege belongs to them. As stated previously, these funds, if found to be held on trust as asserted, do not form part of the insolvency estate and are excluded whether the trust is express, implied or constructive.[29]

[84] The alleged proprietary claim cannot in my view be properly determined in the winding up process and the defendants have provided no evidence to suggest otherwise. Further it appears to me that a determination of a claim of this nature would be beneficial for the receiver and creditors of the 1st and 2nd defendants as it would help to determine what assets are available for distribution. Equally it would be beneficial for the Administrator and creditors of the claimants as the status of the funds transferred to the defendants would be clearly determined.

[29] Paragraph 26 above.

The Effect Which Refusing To Lift The Stay Or Lifting The Stay Would Have On The Parties.

[85] The evidence of Mr. Tacon does not directly address the effect which a refusal to lift or lifting the stay would have on the claimants. He states that the Government of Anguilla and/or the ECCB implemented some form of Plan of Resolution in a manner which seeks to leave the claimants without full and proper recourse for the monies paid to the defendants.[30] It is evident that a refusal to lift the stay would result in the claimants being unable to pursue their alleged proprietary claim against the defendants.

[86] The only evidence by the defendants is contained in the affidavit of Mr. Moving, the receiver of the defendants. Mr. Moving's affidavit is surprisingly quite bare given the nature of this matter. There is no evidence of the status of the receivership and the effect, if any, which a lifting of the stay would have on the defendants or the winding up process. The only evident effect of lifting the stay is that the defendants would have to defend the claim.

[87] In the absence of any other evidence, apart from the effects which are evident, I am unable to determine what effect, if any, lifting the stay and allowing this claim to proceed would have on the defendants or the winding up process.

The Public Interest

[88] Section 184 of **the Act** mandates that the court should have regard to the public interest which includes having regard to the critical importance of financial stability to the public interest and the importance of permitting the Central Bank to discharge its functions in an expeditious and efficient manner in the interest of maintaining financial stability.

[89] In this regard, the claimants' evidence is that given "*the nature and extent of the claim, and its potential interplay with the Plans of Resolutions (and the viability of those plans) now advanced in respect of the First and Second Defendants, is such that it is likely to be in the*

[30] Paragraphs 17 of the affidavit of Mr. Tacon filed on 23rd June 2016.

interests of the parties and in the public interest that the claims against the First and Second Defendants are resolved by the court."

[90] The claimants have not stated how it would be in the public interest to lift the stay or whether the lifting of the stay is likely to have any impact on financial stability and the ability of the Central Bank to discharge its functions.

[91] The defendants have equally failed to address any of the matters in Section 184 even though in my view this information would more be in their purview and is an important factor in considering whether to lift a stay.

[92] In the absence of evidence I am unable to determine how lifting the stay would impact the matters set out in Section 184 of **the Act.**

The Merits of the Claim

[93] The claim in my view raises serious questions about the source of the powers under which the conservators of the defendants (appointed by the ECCB) sought to exercise the powers they are alleged to have exercised over the claimants who are offshore banks regulated by the Anguilla Financial Services Commission rather than the ECCB. I note that the affidavit of Mr. Moving is notably silent in response to these matters which were raised by the affidavit of Mr. Mr. Tacon by way of reference to the statement of claim.

[94] The claimants assert that the conservators, in acting as the *de facto* or *de jure* directors of the claimants, owed a fiduciary duty to the claimants. They assert that this duty was breached when the conservators, *inter alia*, procured or permitted the payment to the 1st and 2nd defendants of funds received by the claimants from depositors and the proceeds of all assets of the claimants realized or collected during the relevant period.

[95] However, I note that notwithstanding alleging the existence of a fiduciary duty by the conservators to the claimants, the breach of it and seeking a remedy against the conservators the claimants have not named the conservators as parties.

[96] In oral submissions Queen's Counsel for the claimants submitted that it would only be necessary to add the conservators as parties if a remedy was being sought against them and no remedy was being sought against them.

[97] Queen's Counsel for the defendants responded by pointing out that: (a) the first remedy being sought in the statement of claim is a declaration that in procuring or permitting the funds to be paid to the 1st and 2nd defendants , the conservators acted in breach of fiduciary duties owed to the claimants ; (b) a declaration is a remedy ; and (c) consequently, even by the submission of Queen's Counsel for the claimants the conservators should be named as parties. More significantly, the claim against the named defendants requires that it be first established that there was in fact a duty owed by the conservators and that there was a breach of that duty. The conservators must therefore be named as parties.

[98] In response, Queen's Counsel for the claimants did not dispute that the breach of duty by the conservators must be established before the claimants could pursue the remedies sought against the defendants but submitted that the conservators can be called as witnesses to establish the existence and breach of duty by them.

[99] I am unable to agree with Queen's Counsel for the claimants that the conservators are not necessary parties to this action for the following reasons:

(1) Queen's Counsel for the claimants submitted that it is necessary to name a party if a remedy is sought against that party. A declaration is a remedy. The claimants have sought a declaration against the conservators and they should therefore be named as parties.

(2) The claimants are seeking a remedy against the conservators. Unless named as parties, how are the conservators to respond to the allegations made against them in the claim? Queen's Counsel for the claimants submitted that the conservators can respond by being summoned to give evidence. There is no doubt that the court has the power to compel a person to attend court and give evidence or produce documents but surely this process is not a substitute for naming the persons against whom specific allegations are made and a specific remedy sought as parties.

(3) In my view, the proper place to respond to allegations raised in pleadings is by way of pleadings. Witness statements provide evidence of the matters contained in pleadings and cannot raise matters not set out or foreshadowed in pleadings. I am therefore unable to agree that the conservators' right to respond to the allegations made against them in the statement of claim can be addressed solely by leaving it open for some party to summon them as witnesses.

(4) More importantly, the claimants assert that they have a proprietary claim. They assert that the conservators, in acting as *de facto* or *de jure* directors of the claimants, owed and breached their fiduciary duty to the claimants. A breach of a fiduciary duty is treated as a breach of trust.[31] A third party recipient of property paid in breach of a fiduciary duty who is not a bona fide purchaser for value will hold that property on trust for the company.[32]

(5) Based on the pleaded case, the claimants must first establish the existence and breach of a fiduciary duty (breach of trust) by the conservators before seeking to pursue property allegedly transferred and held by the defendants in breach of this alleged trust. In the absence of the conservators being named as parties it does not appear to me that the claimants can rightfully seek or obtain a declaration against them that they acted in breach of the fiduciary duty allegedly owed to the claimants.

[31] Page 7, paragraph 15 (f) of the claimants' skeleton arguments filed on 23rd June 2016 citing JJ Harrison (Properties) Limited v Harrison {2002] at paragraphs 25 and 26.

[32] Page 7 paragraphs 15 ((g) of the claimants' skeleton arguments filed on 23rd June 2016.

(6) In the circumstance, I find that without the conservators being made parties the claim has very poor prospects of success. In fact I would venture further to say that I cannot see how the claim against the defendants can succeed without it being initially established that there was a fiduciary duty and a breach of same by the conservators. In my view such a finding cannot be properly made unless the parties against whom the allegations are made and relief sought are made parties and given an opportunity to respond.

[100] The defendants submit that in any event Article 5F of the **Eastern Caribbean Central Bank Agreement Act R.S.A E5 (Anguilla)** ("**the ECCB Act**") blocks any claim against the conservators done in good faith. Article 5F states that:

> "*The Council, or the Minister or the Bank, its directors and officers and any person appointed by the Bank under Article 5B are not subject to any action …in respect of anything done or omitted to be done in good faith and without negligence in the performance or in connection with the performance of functions conferred on the Bank under this Part."*

[101] I note that Article 5F only provides immunity for anything done or omitted to be done by the conservator *in good faith and without negligence*. It follows that the immunity would not cover the acts or omission of a conservator which were done without good faith and negligently.

[102] The defendants submit further that the conservators are employees of the ECCB and are therefore immune from suit based on Article 50 (7) (1) of **the ECCB Act** which states that:

> *"The Governor , the Deputy Governor, the appointed Directors, officers and employees of the bank shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity.*

[103] The defendants cite the case of **Capital Bank International Limited v Eastern Caribbean Central Bank and Sir Dwight Venner** [33] in relation to the application of Article 50.

[104] In **Capital Bank** Byron CJ, delivering the judgment of the Court, noted that the immunities granted by Article 50 ("the immunity provision") are not absolute because of the effect of the constitutionally guaranteed right to the protection of law prescribed in section 8(8) of the Constitution of that jurisdiction.[34] While the Court accepted that the immunity provision had legitimate objectives the Court still had to consider whether it offended the constitutional concept of proportionality.[35] The ECCB (respondents) [36] contended that the appellant had to show that a genuine and serious dispute exists concerning the determination and/or the existence of one of its civil rights or obligations. The Court examined the reliefs being sought to determine whether there was a civil right in dispute and found that some of the reliefs sought were covered by the immunity granted under Article 50 while others were not. The claim was therefore allowed to proceed against the ECCB with respect to the reliefs the court found were not covered by the blanket immunity.

[105] In the circumstance it appears to me that the issues of: (a) whether the conservators are covered by the immunity under Article 50 (7) (1) ; and (b) whether the reliefs being sought fall outside that section on the basis that it constitutes a civil right are both issues which would have to be determined.

[106] I considered whether the court, having determined that the conservators are necessary and proper parties, could use its inherent power to join the conservators as parties. I am of the view that generally the court has such a power but I am not satisfied that such a power can or should be exercised in this case for the following reasons;

[33] GDAHCVAP2002/13 and 14
[34] ibid paragraph 8
[35] paragraphs 14 and 15
[36] paragraph 17

(1) Section 5F of **the ECCB Act** provides persons appointed by the ECCB with immunity from suit unless the actions are done in bad faith and negligently. Bad faith must be specifically pleaded by the party alleging it.[37] There are no averments of this nature or of negligence in the statement of claim.

(2) The issues which must be considered in determining whether the conservators are covered by the immunity contained in Article 50 (7) (1) of **the ECCB Act** do not lend themselves to the court exercising its power without giving the parties an opportunity to be heard and further detailed analysis.

[107] Having considered the matters above I find that:

(1) The claim is alleged to be a proprietary claim. On the premise that it is such a claim it is not one which can properly be dealt with in the winding up process since the proof of debt procedure does not permit proprietary claims to be adequately advanced or adjudicated.

(2) Generally, a claim of this nature (a proprietary claim) should be adjudicated upon in a timely manner in the interests of all parties since it would determine whether the funds in issue form part of the defendants' insolvency estate and would also provide clarity to the Administrator of the claimants with respect to the status of the funds and aid in the proper discharge of his functions.

(3) There is no evidence of how the lifting of the stay would have any impact, if any, on the winding up process. Specifically there is no evidence that lifting the stay would adversely affect the winding up process.

(4) There is no evidence of how the lifting of the stay would affect financial stability or the discharge of the functions of the Central Bank. Specifically, there is no evidence that

[37] Halsbury's Laws of England, Volume 61 (2010) paragraph 621 citing Demetriades v Glasgow Corpn [1951] 1 All ER 457 at 460–461, HL, per Lord MacDermot and at 463 per Lord Reid; Cannock Chase District Council v Kelly [1978] 1 All ER 152, [1978] 1 WLR 1, CA, per Megaw LJ;

the lifting of the stay would adversely affect financial stability or prevent the Central Bank from discharging its functions in an expeditious and efficient manner.

(5) The claim, in substance, raises serious issues regarding the source of the power exercised by the conservators over the claimants and the manner in which the power was exercised. However, the claim as formulated has no real prospect of success since the claim against the conservators for breach of trust must be established before liability can be established against the defendants for the return of the funds allegedly held on trust as a result of the alleged breach of trust. To put it another way, the conservators, against whom primary liability must first be established before secondary liability against the defendants can be established, must be but are not named as parties to the claim.

(6) Thus while a claim of this nature might otherwise merit the lifting of the stay in the absence of evidence that the lifting of the stay is likely to impede the purpose of the receivership and negatively impact the winding up process or the matters set out in Section 184 of **the Act**, I am not satisfied that the court should exercise its discretion in favour of lifting the stay to allow a claim that has no real prospect of success in its present formulation to proceed. To do so would in my view cause valuable resources (time and money) of both the claimants and the defendants to be put to prosecuting and defending such a claim. It would also not be an efficient use of the court's limited resources.

[108] The application for the stay to be lifted to permit the claimants to proceed with their claim against the defendants is therefore refused.

Costs

[109] The claimants shall pay costs to the 1st and 2nd defendants. If the parties are unable to agree on costs within 21 days the parties shall make written representations with respect

to the quantum of costs that should be awarded to the 1st and 2nd defendants.

Fidela Corbin Lincoln
Master