

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2022/0025

BETWEEN:

[1] JSN DEVELOPMENT GROUP LIMITED
[2] HBC1 PROPERTIES LIMITED

Appellants

and

[1] GLOBAL BANK OF COMMERCE LIMITED
[2] BRIAN STUART-YOUNG

Respondents

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mr. Trevor M. Ward
The Hon. Mde. Kimberly Cenac-Phulgence

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Andrew O’Kola for the Respondents/Appellants
Dr. David Dorsett for the First Applicant/Respondent
Mr. Jason Tiwari for the Second Applicant/Respondent

2025: February 27;
2026: March 23.

Application to strike out appeal – Company law – Company struck off Register of Companies – Whether a struck-off company retains legal personality or capacity to institute or maintain proceedings – Whether proceedings brought by a struck off company are a nullity – Whether restoration to the register is required before a struck-off company may pursue proceedings- Whether co-appellant had standing to maintain appeal where principal appellant lacked capacity – Abuse of process – Delay in prosecuting appeal – Section 511 and 512 of the Companies Act 1995 of Antigua and Barbuda – Rule 26, 62.8 and 62.12 of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023

JSN Development Group Limited (“JSN”), the 1st respondent and appellant in this appeal, is a company incorporated under the Antigua and Barbuda Companies Act 1995 (the “Act”) and the proprietor of a hotel development at Hodges Bay, Antigua. JSN acquired the

property in 2012 when construction was incomplete and substantial works were required to complete the development.

On 6th December 2016, JSN, together with two other parties, entered into a five-year term loan agreement with Global Bank of Commerce Limited (the “Bank”), the 1st applicant in these proceedings, under which the Bank advanced US\$5,000,000 to fund construction costs. A legal charge was registered over the property on 27th April 2017 (the “Charged Property”). JSN subsequently obtained a further US\$3,000,000 via an overdraft facility. The development was completed in 2018, but JSN ceased interest payments around May 2018. The loan matured on 7th December 2021.

During the loan period, the Bank released five parcels of land, three forming part of the Charged Property and two owned by HBC1 Properties Limited (“HBC1”), the 2nd respondent and appellant, which was not a party to the loan agreement. After the loan matured, the respondents alleged that an oral agreement was reached with Mr. Stuart-Young, the 2nd applicant and then-Chairman of the Bank, to restructure the debt on a three-year, interest-only basis at 3.5% per annum in exchange for a payment of US\$500,000.00. Mr. Stuart-Young later clarified by WhatsApp on 29th January 2022 that the proposal was merely for consideration and not agreed.

The Bank then initiated enforcement proceedings over the Charged Property, advertising a public auction for 6th September 2022. On 31st August 2022, the respondents sought ex-parte injunctive relief to restrain the auction, which was granted on an interim basis with the applicants’ consent. The application was later contested, with the Court primarily concerned with JSN as borrower and chargor, while HBC1 was joined due to the Bank’s prior intention to include its parcels in enforcement.

The respondents challenged the notice of enforcement on the basis that it included parcels released from the charge and improperly incorporated the overdraft facility. The Bank conceded the error regarding the released parcels and undertook to remove them from any future auction. The respondents also challenged the valuation relied upon by the Bank, contending it materially undervalued the Charged Property.

Drysdale J refused the interim injunction on 12th December 2022. The respondents subsequently sought leave to appeal and a stay of execution, which was granted by Thom J on 31st January 2024, to preserve the status quo pending the appeal.

On 21st November 2024, the applicants applied for an “unless order” requiring the respondents to obtain the transcript of proceedings, which was later rendered unnecessary when the transcripts were filed on 27th November 2024. The applicants further applied to strike out JSN as an appellant, asserting that JSN had been struck off the Register on 14th October 2021, rendering it dissolved and incapable of maintaining proceedings. They contended that JSN’s actions constituted an abuse of process, that it had failed to comply with contractual obligations under the loan, and that the appeal had been negligently prosecuted, causing prejudice to the applicants.

The primary issue is whether JSN's striking off rendered the appeal a nullity, such that it ought to be struck out. The matter remains live following directions for supplemental submissions addressing Caribbean Court of Justice authority on corporate dissolution and capacity to sue.

Held: allowing the application to strike out JSN as an appellant; striking out the appeal in its entirety; discharging the stay of execution; and awarding costs to the applicants, that:

1. A company struck off the Register does not retain capacity to prosecute or maintain proceedings in its own name without restoration. Section 512 of the Antigua and Barbuda Companies Act preserves the liability of a struck-off company and its officers so that obligations may continue to be enforced notwithstanding the company's removal from the Register. However, that provision does not confer upon the struck-off company a continuing procedural capacity to invoke the jurisdiction of the court for its own benefit. The section is directed to the protection of creditors and not to enabling a deregistered company to pursue litigation while it remains outside the statutory regime governing corporate compliance.

Section 512 of the **Companies Act of Antigua and Barbuda, 1995** applied.

2. A struck-off company must first be restored to the Register before pursuing proceedings in its own name. The authorities establish that although liabilities may be enforced against a struck-off company, a company wishing to pursue claims or obtain relief must first apply for restoration to the Register. A notice of appeal filed and prosecuted in the name of a company which lacks capacity is therefore a nullity.

Blairmont Rice Investments Inc v Kayman Sankar Co Ltd [2021] CCJ 7 (AJ) GY applied; **Associated Asbestos Services Ltd v Canadian Occidental Petroleum Ltd** [2002] ABQB 898 considered; **Galantis v Alexiou** [2019] UKPC 15 applied.

3. Proceedings instituted by an entity lacking legal capacity are a nullity which cannot be cured by the court's case management powers. Where a party lacks legal personality or competence to litigate, the defect is jurisdictional. The overriding objective and general case management powers under the Civil Procedure Rules cannot be used to validate proceedings brought in the name of an entity which the law does not recognise as having the capacity to sue.

Kimathi v Foreign & Commonwealth Office (No 2) [2016] EWHC 3005 (QB) applied.

4. The appeal could not proceed solely in the name of the co-appellant. The injunction application in the court below had been pursued against the Bank only by JSN. Once JSN's participation was found to be a nullity, the appeal could not be sustained by HBC1 alone, as it had not sought the injunctive relief below and

had no independent basis upon which to challenge the decision refusing that relief.

5. Accordingly, the appeal is struck out in its entirety. JSN is struck out as an appellant on the basis that it lacked capacity to institute or maintain the appeal, and the appeal, as constituted, cannot proceed in the absence of a competent appellant. The stay of execution previously granted must be discharged with costs awarded to the applicants.

JUDGMENT

- [1] **PRICE FINDLAY JA:** Before the Court were two applications brought by Global Bank of Commerce Limited and Mr. Brian Staurt Young (together “the applicants”). The first application, filed on 21st November 2024, sought an unless order requiring JSN Development Group Limited and HBC1 Properties Limited (together “the respondents”) to obtain the transcript from the proceedings below within 21 days, failing which the appeal would be struck out in its entirety. The second application, filed on 11th December 2024, sought an order striking out JSN Development Group Limited (“JSN”), as an appellant in the substantive appeal.

Background

- [2] JSN is a company incorporated under the **Antigua and Barbuda Companies Act 1995**¹ (“the Act”) and the proprietor of a hotel development located at Hodges Bay in Antigua and Barbuda. In 2012, JSN assumed ownership of the property at a time when the hotel was incomplete, and significant construction works were required to bring the development to completion.
- [3] On or around 6th December 2016, JSN, together with two other parties, entered into a five-year term loan agreement with the Bank the second applicant, pursuant to which the Bank advanced a loan of US\$5,000,000.00 for a period of five years as part of the funding for the construction costs associated with Hodges Bay development. On 27th April 2017, a legal charge was registered over the property.

¹ No. 18 of 1995, Laws of Antigua and Barbuda.

Subsequently, the Bank advanced a further sum of US\$3,000,000.00 to JSN by way of an overdraft facility.

- [4] The development was completed in 2018. JSN initially made certain interest payments in respect of the loan but ceased making payments in or about May 2018. The contractual term of the loan expired on 7th December 2021.
- [5] During the subsistence of the loan, the Bank released five (5) parcels of land, namely parcels 203, 470, 479, 480 and 482. Three (3) of those parcels formed part of the Charged Property. The remaining two (2) of these parcels were owned by HBC1, the second respondent, although, HBC1 was not itself a party to the loan facility agreement or a borrower from the Bank.
- [6] Following the expiration of the loan term, the respondents alleged that its director engaged in discussions with Mr. Stuart-Young, who was at the material time the Chairman of the Bank. The respondents contended that an oral agreement was reached pursuant to which JSN would pay the sum of US\$500,000.00 towards accrued interest, in consideration for which the outstanding indebtedness would be refinanced over a three-year period on an interest-only basis at a rate of 3.5% per annum. However, by a WhatsApp message dated 29th January 2022, Mr. Stuart-Young resiled from that position, characterising the proposal as a matter merely for consideration and indicating that a payment of at least US\$500,000.00 would be required before any such consideration could occur.
- [7] Thereafter, the Bank commenced enforcement steps in respect of the Charged Property, including the advertisement of a public auction of the Charged Property scheduled to take place on 6th September 2022.
- [8] On 31st August 2022, the respondents filed an ex parte application seeking interim injunctive relief to restrain the Bank from proceeding with the scheduled auction of the Charged Property. The relief sought included orders restraining the sale or

purported sale of the Charged Property, restraining further advertisement of the auction, and requiring the removal of the online notice of auction.

- [9] An inter partes hearing was immediately convened. At that hearing, the respondents sought an adjournment on the basis that they were in the process of securing financing to discharge the outstanding indebtedness but required a period of ninety days to complete that process. In those circumstances, the applicants agreed not to proceed with the scheduled auction and consented to the grant of an interim injunction pending the adjourned hearing. The Court issued directions for the hearing of the application on 6th December 2022.
- [10] The loan remaining unsatisfied, the application for interim injunctive relief thereafter proceeded on a contested basis. At the hearing, the respondents confirmed that the application was pursued against the Bank only. The Court was principally concerned with JSN as a borrower and chargor of the Charged Property. HCB1 had been joined to the proceedings because the Bank had previously indicated an intention to exercise its power of sale in respect of parcels belonging to it, notwithstanding that HCB1 was not indebted to the Bank.
- [11] The respondents challenged the validity of the notice of enforcement on the basis that it included properties which had previously been released from the charge, and which were not owned by JSN. The respondents further contended that the sum claimed as outstanding impermissibly incorporated the overdraft facility, contrary to the terms of the loan agreement. The Bank conceded that it had no entitlement to enforce against the released parcels and undertook to remove them from any future auction process.
- [12] The respondents also challenged the valuation relied upon by the Bank contending that it was a drive by valuation and that it materially undervalued the Charged Property.

- [13] Having considered the submissions of the parties, Drysdale J refused the application for interim injunctive relief on 12th December 2022. That refusal forms the subject of the present appeal.
- [14] By application filed on 14th December 2022 the respondents sought leave to appeal the decision of Drysdale J dated 12th December 2022, whereby the learned judge refused the respondent's interim application for an injunction restraining the applicants from auctioning the Charged Property parcels of land over which a charge subsisted as security for loans and advances. On the same date, the respondents filed a further application seeking a stay of execution of the decision of Drysdale J pursuant to rule 62.19(a) of the Eastern Caribbean Supreme Court **Civil Procedure Rules 2000**, contending that it was just and convenient that the status quo be preserved pending the determination of the intended appeal. The respondents asserted that if the auction of the Charged Property was permitted to proceed before the appeal was heard and determined, the subject matter of the injunction appeal would be irretrievably lost, the appeal rendered nugatory, and the respondents/appellants deprived of the substantive relief sought on appeal.
- [15] By order dated 31st January 2024, Thom J granted the stay of execution pending the hearing and determination of the appeal. The stay was granted on the basis that the respondents had placed before the Court cogent evidence in support of the stay and that there would be a risk of injustice to the respondents if the stay was not granted.

The Application for an Unless Order

- [16] By application filed on 21st November 2024, the applicants sought an order that the respondents/appellants obtain the transcript of the proceedings in the court below within 21 days, failing which the appeal be struck out in its entirety. The application was brought on the basis that, notwithstanding the urgent nature of the matter and clear obligations imposed by rule 62.12 of the Eastern Caribbean Supreme Court **Civil Procedure Rules (Revised Edition) 2023** ("the CPR"), the

respondents had failed to procure the transcript for more than a year following the filing of the appeal on 14th December 2022. In addition to the unless order, the applicants also sought that, in the event of compliance, the Court give further directions pursuant to CPR 62.8 for the timely progression of the appeal.

[17] The application was premised on three primary grounds. First, it was contended that the delay in obtaining the transcript was inordinate, the appeal having languished since its commencement and the transcript being necessary to advance the matter in accordance with CPR 62.12. Secondly, it was asserted that the delay amounted to an abuse of process. It was emphasised that in the proceedings below the appellants had procured urgent injunctive relief to prevent the exercise of the applicants' contractual enforcement rights in relation to the Charged Property, despite the fact that the loan facility extended by the Bank had matured nearly three years prior with no payment being made towards the satisfaction of the debt over five years. In such circumstances, and with a stay having been granted, the applicants contended that the delay effectively allowed the respondent to continue to avoid repayment while the Bank continued to sustain loss and damage. Thirdly, it was submitted that refusing the order would prejudice the applicants and would not further the overriding objective, whereas the making of the order would assist in the just and cost-effective disposal of the appeal.

[18] On 27th November 2024, the respondents filed the transcripts of the hearings in the court below dated 2nd September 2022, 1st December 2022 and 7th December 2022. The applicants thereafter filed written submissions on 14th February 2025 noting that as the transcripts had been filed, the making of an unless order was no longer necessary.

[19] The application further contended that should the Court accede to the application to strike out JSN as a party to the appeal, the consequence must be that the appeal itself be struck out in its entirety. It was contended that the appeal lies

against the refusal of an injunction that had been sought solely by JSN and that HBC1, having made no such application below, did not have sufficient interest to sustain the appeal and was no more than a 'tag-along appellant' with no independent right to challenge the injunction ruling. Accordingly, the continuation of the appeal would serve no legitimate purpose.

- [20] In the circumstances, I am satisfied that the making of an unless order is no longer required, the respondents, having now filed the transcripts which were the subject of that application. While the delay occasioned remains a matter of some concern, it requires no further determination for present purposes. The next issue which therefore arises for consideration is the application to strike out the appeal. That application engages separate and distinct questions of law and procedure.

The Application to strike out JSN as an Appellant

- [21] By application filed on 11th December 2024, the applicants seek orders that:
- “(i) JSN be struck out as an appellant in the Notice of Appeal filed on 12th December 2022, and subsequently amended by an Amended Notice of Appeal filed on 14th December 2022;
 - (ii) The Applicants be awarded costs, to be summarily assessed in the sum of \$5,000.00 or such other sum as the Court considers appropriate; and
 - (iii) The Court grant such further and/or other relief as it deems fit and just.”
- [22] The grounds upon which the application is advanced are, in summary, that:
- (i) JSN was struck off the Register of Companies on 14th October 2021 and thereby dissolved without legal personality;
 - (ii) any legal proceedings commenced or continued in the name of a dissolved company is a nullity, such a company being wholly impotent and incompetent to bring or maintain legal proceedings;
 - (iii) the purported filing and continuation of an appeal by JSN is an abuse of process of the Court and is liable to be struck out; and

(iv) a non-existent legal entity cannot assert a cause of action and therefore has no reasonable grounds for bringing a claim.

- [23] The applicants further contended that JSN has, in the context of its loan facilities with the Bank, failed to comply with its contractual obligations including the provision of security documentation and maintenance of insurance over the Charged Property, with the result that the Bank is actively harmed by the ongoing litigation and JSN's continued default in its indebtedness, which has remained entirely unpaid despite more than five (5) years having elapsed since maturity.
- [24] The applicants additionally asserted that the appeal has languished, to the continuing prejudice of the applicants. Other than belatedly filing the transcript on 27th November 2024 (more than a year after it became available and apparently only after the applicant's application for an unless order was brought), JSN has taken no meaningful steps to prosecute the appeal.
- [25] The applicants further maintained that the conduct of JSN is deceptive, prejudicial and constitutes a continuation of an abuse of process which the Court has a duty to prevent.

Issues Raised in the Application

- [26] The primary issue arising from the application to strike out JSN as an appellant is whether JSN, having been struck off the Register of Companies ("the Register"), renders the notice of appeal a nullity, such that JSN ought properly to be struck out as an appellant. Should that question be answered affirmatively, it would be dispositive and no further matters would require determination for present purposes.
- [27] The application came on for hearing on 27th February 2025. By order of that same date, the Court directed the filing of supplemental submissions addressing the decision of the Caribbean Court of Justice in **Blairmont Rice Investments Inc v**

Kayman Sankar Co Ltd,² that authority having been raised by this Court with reference to the question of whether a company, upon being struck off the Register, is thereby dissolved and consequently deprived of legal personality or capacity to institute proceedings.

[28] The question therefore remains live before this Court and will be addressed below.

Whether a company, upon being struck off the Register of Companies, is thereby dissolved and consequently deprived of legal personality to institute proceedings

Applicants' Submissions

[29] Dr. Dorsett, counsel for the applicants submitted that JSN, having been struck off the Register under section 511 of the Act, was dissolved by operation of law, and therefore lacked legal personality to institute or maintain the appeal.

[30] He relied on the statutory framework governing removal from the Register. Sections 511 and 512 of the Act provide as follows:

"Removal from Register

Striking off register

511. (1) The Registrar may strike off the Register a company or other body corporate, if

- (a) the company or other body corporate fails to send any return, notice, document or prescribed fee to the Registrar as required pursuant to this Act;
- (b) the company is dissolved;
- (c) the company or other body corporate is amalgamated with one or more other companies or bodies corporate;
- (d) the company does not carry out an undertaking given under subparagraph (i) of paragraph (a) of section 515; or
- (e) the registration of the body corporate is revoked pursuant to this Act.

² [2021] CCJ 7 (AJ) GY, [2021] 5 LRC 433.

(2) Where the Registrar is of the opinion that a company or other body corporate is in default under paragraph (a) of subsection (1), he shall send it a notice advising it of the default and stating that, unless the default is remedied within 30 days after the date of the notice, the company or other body corporate will be struck off the register.

(3) Section 513 applies mutatis mutandis to the notice mentioned in subsection (2).

(4) After the expiration of the time mentioned in the notice, the Registrar may strike the company or other body corporate off the register and publish a notice thereof in the Gazette.

(5) Where a company or other body corporate is struck off the register, the Registrar may, upon receipt of an application in the prescribed form and upon payment of the prescribed fee, restore it to the register and issue a certificate in a form adapted to the circumstances.

Liability continues

512. Where a body corporate is struck off the register, the liability of the body corporate and of every director, officer or shareholder of the body corporate continues and may be enforced as if it had not been struck off the register.”

[31] The applicant further relied on equivalent provisions contained in sections 271 and 272 of The Bahamas **Companies Act 1992**,³ which were considered by the Privy Council in **Galantis v Alexiou**.⁴ Sections 271 and 272 provide as follows:

“Removal of companies from Register

271. (1) The Registrar may remove from the register of companies

- (a) a company that fails to submit any return, notice, document or prescribed fee to the Registrar as required by this Act;
- (b) a company that is dissolved;
- (c) a company that has amalgamated or merged with one or more companies;
- (d) a company that refuses to comply with any request or direction given by the Registrar pursuant to this Act;
- (e) a company whose registration is revoked or cancelled in accordance with this Act; or

³ Cap. 308, Laws of the Bahamas.

⁴ [2019] UKPC 15, [2019] 1 WLR 3636.

(f) a company that has ceased to carry on business.

(2) Where the Registrar is of the opinion that a company is in default with respect to any requirement as to a return, notice, document or prescribed fee, he shall send a notice to that company advising it as to the default and stating that, unless the default is remedied within twenty-one days after receipt of the notice, the company shall be removed from the register of companies.

(3) After the expiration of the time specified in the notice, the Registrar may remove the company from the register and publish a notice of that fact in the Gazette.

(4) Where a company is removed from the register of companies, the Registrar may, upon receipt of an application made within the prescribed period and upon payment of the prescribed fee, restore the company to the register and issue a certificate in the approved form.

Continuation of liability

272. Where a company is removed from the register of companies pursuant to section 271, the liability of the company and of every director, officer or member of the company shall continue and may be enforced as if the company had not been removed from the register.”

[32] These provisions are materially equivalent to sections 511 and 512 of the Act. Counsel for the applicants submitted that, as explained by the Privy Council in **Galantis**, section 272 is concerned with the continuation of liability only. What is preserved are liabilities existing upon the date of removal of the company from the Register, and that section 272 does not create any liability.

[33] Counsel for the applicants submitted that the effect of being struck off the Register is that the company that is struck off is dissolved. That dissolution is involuntary and occurs by operation of law, and the law expressly provides that notwithstanding the involuntary dissolution ‘the liability of the body corporate and of every director, officer or shareholder of the body corporate continues and may be enforced as if it had not been struck off the register’.

- [34] Counsel contended that ordinarily, when a company is dissolved, its legal existence is extinguished and all attendant rights, privileges and liabilities are extinguished. Counsel further contended that this is not the case when a company is dissolved under section 511 of the Act by being struck off the Register, and that by being dissolved it lacks legal personality and hence is wholly impotent and or incompetent to bring legal proceedings, and that any purported legal proceedings brought in the name of a non-existent legal personality is an incurable nullity.
- [35] Counsel for the applicants submitted that proceedings brought in the name of a non-existent entity are a nullity, relying on **Kimathi v Foreign & Commonwealth Office (No 2)**.⁵ He contended that the discretion to apply the overriding objective under the general case management powers contained in CPR 26 does not confer jurisdiction on the Court to cure defects in proceedings which are a nullity. He therefore submitted that, it being a nullity prevents this Court's intervention, and the appeal in the name of 'JSN Development Group Limited' should be struck out for lack of prosecution. He further argued that the continued prosecution of an appeal by a non-existent entity constitutes an abuse of process of the Court, which is designed to adjudicate upon disputes between entities recognised in law as legal persons.
- [36] Apart from prosecuting an appeal when it lacks legal personality, counsel for the applicants also submitted that JSN has prosecuted the appeal in its name in a manner that suggests that it is not really interested in prosecuting the appeal in a timely manner.
- [37] Counsel submitted that an appeal was filed on 12th December 2022 and that the transcript of the hearing in the court below was awaited. The transcript was available from 23rd November 2023 and that, notwithstanding the availability of the transcript, there was no further action by JSN.

⁵ [2016] EWHC 3005 (QB), [2017] 1 WLR 1081.

- [38] He further submitted that on 21st November 2024 the respondents to the appeal filed an application for an Unless Order that unless the transcript be filed within 21 days the appeal be dismissed, and that on 27th November 2024, whilst the Unless Order application was pending, JSN filed the transcript.
- [39] Counsel for the applicants submitted that the behaviour of JSN is that of a litigant starting proceedings with no intention of pursuing them further, and contended that this is a textbook example of behaviour that constitutes an abuse of the process of the court, relying on **St Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/49 Ltd**.⁶ Counsel further relied on the affidavit of Mr. Brian Stuart-Young, which states that JSN is in serious and persistent default of its contractual obligations to the Bank. Counsel contended that the Bank is gravely prejudiced by this default and that the use of legal proceedings to permit ongoing default of contractual obligations is a rank abuse of the process of the court.

Respondents' Submissions

- [40] Mr. O'Kola, counsel for JSN submitted that the context of the application is its appeal against the decision refusing to grant an interlocutory injunction to prevent the Bank from selling the appellants' property by way of enforcement of an alleged, but disputed, debt. He submitted that the applicants' contention that JSN lacked legal personality to maintain the proceedings, and that the appeal should therefore be struck out is misconceived. He further submitted that the alternative argument, namely that the appeal has not been prosecuted with sufficient expedition and thereby constitutes an abuse of process is likewise unfounded.
- [41] Mr. O'Kola contended that the first error is the assertion that JSN has been struck off the register of companies. He pointed out that the Gazette exhibited by the applicants refers to the striking off of 'JSN Development Group Ltd' under section 511 of the Act. He submitted that while the company number mentioned next to

⁶ SKB Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) at paragraph [35].

that name is that of JSN, the Gazette does not state that 'JSN Development Group Ltd' had been struck off. He submitted that this is admittedly a purely technical point, but then, so is the application.

[42] Counsel for JSN submitted secondly, that the application is based on the fallacy that under the law of Antigua and Barbuda the striking off of a company from the register under section 511 deprives it of legal personality and submitted that such is not the case. He relied on sections 511 and 512 of the Act and submitted that section 512 confirms that striking off under section 511 does not end the corporate personality of a company. He submitted that the wording of section 512 only makes sense if the act of striking a body corporate from the register does not cause it to cease to exist as a body corporate.

[43] Counsel relied on the Privy Council decision in **Galantis** and submitted that similar drafting in the company law of The Bahamas was discussed there, including the co-existence of provisions providing for continuation of liability and dissolution. He particularly relied on Lord Lloyd-Jones' observation at paragraph 26 that:

"[T]his is unsatisfactory because there is no obvious means of reconciling the dissolution of the company with the continuation of its liabilities thereunder. Ordinarily, dissolution would terminate the company's legal personality and hence its existence. (Section 271(4) of the 1992 Act does, however, provide for restoration of a dissolved company to the register.) The Board notes that the Saskatchewan Business Corporations Act 1978 [on which the Bahamian legislation was based] contains a provision in materially identical terms; however, under that statute a company is not dissolved when it is struck off the register. It appears that the 1992 Act in its original form did not provide for the dissolution of a company but that section 273 was inserted pursuant to the Companies (Amendment) Act 1993 to make the point clear. In doing so, it may be that Parliament failed to appreciate the resulting clash with section 272."

[44] He also relied on the Saskatchewan legislation to which Lord Lloyd-Jones referred to, which JSN provided which states as follows:

"Striking name of corporation off the register

290(1) The Director may strike the name of a corporation off the register if:

- (a) the Director does not receive any return, notice or other document or fee required by this Act or the regulations to be sent to him;
- (b) the corporation gives notice to the Director that it has ceased to carry on business in Saskatchewan;
- (c) the corporation is not entitled to carry on business under the act of incorporation of the jurisdiction in which it was incorporated;
- (d) the corporation is issued a certificate of discontinuance pursuant to section 182;
- (e) the corporation is dissolved;
- (f) the corporation does not comply with a direction of the Director under section 297;
- (g) the corporation is amalgamated with one or more other corporations;
- (h) the corporation does not carry out an undertaking given under subclause (i) of clause (a) of section 293;
- (i) [repealed]
- (j) the corporation is bankrupt within the meaning of the Bankruptcy and Insolvency Act (Canada), as amended from time to time.

Notice of default

- (2) Where the Director is of opinion that a corporation is in default under clause (a) of subsection (1), he shall send to the corporation a notice advising the corporation of the default and stating that, unless the default is remedied within thirty days after the date of the notice, the name of the corporation will be struck off the register.

[...]

Striking name off register

- (4) After the expiry of the time mentioned in the notice, the Director may strike the name of the corporation off the register and he shall publish notice thereof in the Gazette.

Restoration of name to register

- (5) Where the name of a corporation is struck off the register under this Act or struck off the register under The Companies Act, the Director may, upon receipt of an application in the prescribed form, restore the name of the corporation to the register and may issue a certificate in a form adapted to the circumstances.

Liability of corporation continues

291 Where the name of a corporation is struck off the register, the liability of the corporation and of every director or officer or shareholder of the corporation shall continue and may be enforced as if the name of the corporation had not been struck off the register.”

[45] Counsel submitted that what is relevant is that the legislature in Antigua and Barbuda has not made the error made by its counterpart in The Bahamas, and submitted that the Act does not anywhere provide that a company struck off under section 511 ceases to have legal personality, but on the contrary expressly provides in section 512 for the continuing existence of the body corporate. He submitted that this reading is confirmed by a comparison with section 483(5), which JSN provided which states as follows:

“[...] the Registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved, but – (a) the liability, if any, of every director, managing officer, and member of the company continues and may be enforced as if the company had not been dissolved;”

[46] He submitted that the applicants discuss **Galantis** but wrongly focused on the Board’s discussion of the rule that the liability of directors and others continues and submitted that this is not relevant to the case. It follows that the substratum of the applicant’s application is unsound and contrary to what they assert these are not proceedings brought by a non-existent legal entity but proceedings brought by an existing body corporate that is currently not on the register, although an application for restoration is pending, and that there is accordingly no basis for striking the appeal out.

[47] Counsel for JSN submitted that as to the applicants’ assertion that the appeal is an abuse of process on account of not having been progressed sufficiently rapidly, this is a makeweight and the applicants acknowledge this by calling the issue of striking off the ‘principal’ issue. He acknowledged and regretted that the appeal has not been pursued as rapidly as it ought to have been but submitted that there is no suggestion that a fair hearing is not possible and all that now remains is to schedule the appeal for hearing. He highlighted that the appeal raises important

points of significant financial value, potentially affecting the livelihoods of many people at the Hodges Bay Resort and Spa, and submitted that to strike the appeal out would constitute an unwarranted interference with the appellants' right to a fair hearing.

- [48] He submitted, in summary, that this is an adventitious and unmeritorious application by the applicants who are evidently not keen to have to deal with the appeal on its merits and that the Court should dismiss it with costs.

Party's supplementary submissions on Blairmont

- [49] The parties' submissions were heard on 27th February 2024. On that day, the Court directed the parties to file and serve supplemental submissions addressing the decision in **Blairmont** that had been drawn to the Court's attention. **Blairmont** is a decision of the Caribbean Court of Justice dealing with Guyana's Companies Act and the consequences of a company being struck off the register, including whether such a company retained legal standing to defend legal proceedings.

Applicants' Submissions

- [50] Counsel for the applicants relied on the majority judgment written by Burgess JCCJ, who stated at paragraph [89]:

"In our judgment, in the absence of express statutory provision to the contrary, it is more correct to say that the legal personality of the company is suspended... since a company only loses its legal personality when the company is wound up and dissolved under the provisions of the Companies Act."

- [51] He also relied on Burgess JCCJ's consideration of section 488 of Guyana's Companies Act, equivalent to section 512 of the Act, which provides:

"Where a body corporate is struck off the register, the liability of the body corporate and every director, officer or shareholder of the body corporate shall continue and may be enforced as if it had not been struck off the register."

- [52] Counsel relied further on paragraph [93] of **Blairmont**, where Burgess JCCJ stated that ‘the clear purpose of this section is to ensure that companies, directors, and shareholders cannot escape their liabilities by causing their company to be removed from the register’ and that while liabilities may be enforced against a struck-off company, ‘it is only where a struck off company wishes to pursue enforcement of a liability owed to it that it must first be restored to the register.’
- [53] Counsel for the applicants submitted that this finding reinforced and cemented their position that, because JSN was struck off the Register, it was wholly impotent to prosecute proceedings in the High Court or an appeal in the Court of Appeal and should therefore be struck out from the notice of appeal and the statement of case.
- [54] He relied on paragraph [95] of **Blairmont** and on the dictum of the Privy Council in **Galantis**, where Lord Lloyd-Jones stated at paragraph [44] that ‘This does not necessarily mean that the respondent was without remedy... It would have been open to him to apply to the court for an order... to restore the company to the register.’
- [55] The Canadian case of **Associated Asbestos Services Ltd v Canadian Occidental Petroleum Ltd**⁷ similarly supports the proposition that a struck-off company must first be restored to the register before bringing proceedings.
- [56] Counsel for the applicants submitted that the proposition that a company struck off the Register must first be restored if it is to prosecute a claim or bring an action was wholly supported by **Galantis** and **Blairmont** and that acceptance of that proposition was sufficient for the Court to rule in their favour.

⁷ 2002 ABQB 893.

- [57] He submitted that, notwithstanding the language of ‘suspension’ used in **Blairmont**, the notion that a company’s legal personality is merely ‘suspended’ while struck off was inconsistent with the true position under the Act.
- [58] He relied on section 483 of the Act and submitted that it makes clear that a company struck off under that provision ‘will be dissolved’ by operation of law, while liabilities continue.
- [59] Counsel submitted that JSN was struck off under section 511 of the Act and relied on the amendment introduced by the **Companies (Amendment) Act 2024**,⁸ which now expressly provides that upon publication of notice in the Gazette ‘the company shall be dissolved.’ Section 511(4), as amended, corresponds precisely with section 483(5) and confirms what had always been the case, namely that dissolution follows striking off by operation of law.
- [60] He also relied on the Privy Council decision in **Attorney General of Belize v Belize Telecom Ltd**,⁹ where it was held at paragraph [21] that ‘[t]he question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.’
- [61] Counsel for the applicants submitted that dissolution and winding up are not the same, and that the dicta of Burgess JCCJ in **Blairmont** at paragraph [89] does not sit squarely with Antigua’s statutory framework. He argued that dissolution is a legal consequence arising from a particular state of affairs, whereas the winding up of a company is effected by court order. Relying on section 483(5) of the **Companies Act 1995**, counsel submitted that the legislation makes clear that dissolution and winding up are not one and the same. Accordingly, he contended that the observation in **Blairmont** that ‘a company only loses its legal personality when the company is wound up and dissolved under the provisions of the

⁸ No. 11 of 2024 Revised Laws of Antigua and Barbuda.

⁹ [2009] UKPC 10, [2009] 2 All ER 1127.

Companies Act' is not on all fours with the Companies Act of Antigua and Barbuda.

[62] Counsel relied on the dissenting judgment of Saunders PCCJ in **Blairmont**, who rejected the notion of suspended legal personality and stated at paragraph [171] that the real issue concerns whether a deregistered company can incur liabilities, be sued, or bring proceedings.

[63] Counsel for the applicants relied in particular on paragraphs [175]–[177] of the dissent, where Saunders PCCJ stated that '[t]he norm is that a company loses its capacity to sue or be sued when it is struck off the register' and emphasised that section 488 preserves liabilities, not legal personality, likening a deregistered company to 'a human being in a coma.'

[64] He submitted that, whether legal personality is described as 'suspended' or 'dissolved,' it is common ground that a deregistered company cannot bring a claim without first being restored to the register.

[65] He submitted that the JSN, having been struck off the register, was not capable of bringing or maintaining proceedings in the High Court or the appeal, and should therefore be struck out.

Respondent's Submissions

[66] Counsel for JSN submitted that **Blairmont** amply supports its contention that a mere strike-off from the Register of Companies does not deprive a company of legal personality.

[67] He relied on the majority judgment of Burgess JCCJ in **Blairmont**, who stated at paragraph [89]:

"In our judgment, in the absence of express statutory provision to the contrary, it is more correct to say that the legal personality of the company

is suspended since a company only loses its legal personality when the company is wound up and dissolved under the provisions of the Companies Act.”

- [68] He relied further on the Court’s observation at paragraph [100] of **Blairmont**, where the CCJ noted with disapproval the late stage at which the point concerning strike-off had been taken. He submitted that the same criticism could be made of the present attempt to have the appeal struck out on this ground.
- [69] Counsel accepted that there was one distinction between **Blairmont** and the present case, in that the struck-off company in **Blairmont** was a defendant rather than a claimant. However, he submitted that the point made by the CCJ was merely that ‘a struck-off company cannot in that condition sue to enforce a liability owed to it, but must first be restored to the register,’ as stated at paragraph [93].
- [70] Counsel for JSN submitted that the present case was materially different, as JSN was not suing to enforce a liability owed to it. Rather, he submitted that it was in substance defending the attempt by the Bank to use against it the machinery of the legal charge and its rights of sale under the **Registered Land Act**.¹⁰
- [71] Counsel submitted that the Bank could not be heard to say in the same breath that JSN exists for the purpose of being subjected to enforcement under the legal charge and the Registered Land Act, while simultaneously contending that JSN does not exist for the purpose of advancing reasons why those alleged rights cannot or should not be exercised against it.
- [72] Counsel submitted that, for those reasons, the application to strike out the appeal was misconceived and should be dismissed.

Discussion

¹⁰ Cap. 374 of the Revised Laws of Antigua and Barbuda.

- [73] The primary issue arising for determination is whether JSN, having been struck off the Register on 14th October 2021, retained the legal capacity to institute and maintain these appellate proceedings. That issue goes to the competence of the appellant. If JSN lacked capacity, its participation in the proceedings would be a nullity and the court would have no jurisdiction to entertain an appeal brought in its name.
- [74] A preliminary point was taken by JSN that the Gazette notice relied upon by the applicants referred to 'ISN Development Group Ltd' and not 'JSN Development Group Ltd'. I do not accept that this creates any real doubt as to the identity of the entity struck off. The Gazette notice identified the relevant company number. That company number corresponds to JSN. In the circumstances, I am satisfied that the reference to 'ISN' is a typographical error and that JSN was in fact struck off on 14th October 2021.
- [75] The question therefore becomes one of legal consequence. The applicants contended that strike off under section 511 of the Act deprives the company of legal personality, or at minimum deprives it of capacity to bring or maintain proceedings, with the result that any appeal filed and prosecuted in its name is a nullity. JSN contended that section 512 of the Act preserves corporate personality and therefore preserves capacity to prosecute proceedings while struck off, and that, in any event, these proceedings are in substance defensive and should not be treated as a claim by a struck off company to enforce rights.
- [76] Sections 511 and 512 are central to the analysis. Section 511 provides for the strike off of a company in specified circumstances, including default in filing and the payment of fees. Section 512 provides that, where a body corporate is struck off the register, the liability of the body corporate, and of every director, officer or shareholder continues and may be enforced as if it had not been struck off. Counsel for JSN submitted that the language of section 512 only makes sense if

the company continues to exist as a legal person notwithstanding strike off, because one cannot enforce liability against a non-existent entity.

[77] I am unable to accept JSN's construction. Section 512 is concerned with preserving and enforcing liabilities. It is a savings provision. It prevents those associated with the company from escaping responsibility by reason only of the administrative removal from the Register. It does not follow that the section preserves or confers on the struck off entity a continuing capacity to invoke the jurisdiction of the court to pursue proceedings in its own name. The continuation of liability is directed to the protection of those to whom obligations are owed. It is not directed to enabling the struck off company to prosecute litigation for its benefit while it remains outside the statutory regime of compliance which registration entails.

[78] That construction is supported by the authorities relied on by the parties. Counsel for the applicants relied on the Privy Council decision in **Galantis**, which considered materially similar provisions in the Bahamian Companies Act. There, the Board noted the apparent tension between provisions for removal from the register and a provision preserving liability. The Board treated the continuation of liability provision as preserving liabilities, but not as preserving the struck off company's capacity to sue. The practical consequence was that, while liabilities could be enforced against the removed company and its officers, a person wishing to advance or maintain proceedings in the company's name would first need to be restored to the register. While the statutory language differed in detail, the principle relied on by the applicants is that continuation of liability is not the same as continuation of procedural capacity to bring proceedings.

[79] JSN placed reliance on observations in **Galantis** to the effect that the Bahamian legislation was unsatisfactory and that the Saskatchewan statute on which it was based did not provide for dissolution on strike off. JSN's submission was that the Act resembles the Saskatchewan approach, in that it provides for strike off but

does not, in terms, provide that the company is dissolved by virtue of strike off under section 511. JSN also relied on section 483(5) of the Act, which expressly provides for dissolution on publication of a Gazette notice in that distinct context, arguing that the absence of similar express language in section 511 indicates that strike off under section 511 does not dissolve the company.

- [80] I accept that the court must be careful not to import into section 511 words which are not there. However, the present issue is not resolved by a binary choice between 'dissolution' and 'no dissolution'. The critical question is whether a company which has been struck off can prosecute in its own name without restoration. Even if one accepts, as JSN contended, that strike off does not necessarily amount to dissolution in the strict sense, it does not follow that the struck off company retains legal capacity to sue or to maintain an appeal. Capacity is not determined solely by whether corporate personality is said to be suspended or extinguished. Capacity depends on whether the statute permits a struck off company, while in that status, to invoke the jurisdiction of the court.
- [81] On that question, **Blairmont** is directly germane. It was advanced by counsel for the applicants as supporting the proposition that a struck off company cannot prosecute proceedings without restoration. JSN contended that **Blairmont** supports the opposite conclusion, on the basis of the majority's characterisation of legal personality as 'suspended' rather than lost. Properly understood, **Blairmont** supports the applicants' position.
- [82] In **Blairmont**, Burgess JCCJ stated that, 'in the absence of express statutory provision to the contrary, it is more correct to say that the legal personality of the company is suspended since a company loses its legal personality when wound up and dissolved under the Companies Act.' That statement addresses classification only. It does not, however, confer procedural capacity. Indeed, the majority went on to explain the practical consequences of strike off. Burgess JCCJ observed that a struck off company may have liabilities enforced against it, and

that the clear purpose of the continuation of liability provision is to ensure that companies, directors and shareholders cannot escape liability by removal from the register. Crucially, the majority stated that, while liabilities may be enforced against a struck off company, it is only where a struck off company wishes to pursue enforcement of a liability owed to it that it must first be restored to the register.

[83] Counsel for the applicants relied on that aspect of **Blairmont** and submitted that the present appeal is an instance of a struck off company seeking to invoke the court's process affirmatively and therefore requires restoration as a precondition. I agree with that contention. Whatever label is adopted, suspension or dissolution, **Blairmont** confirms that a struck off company is not at liberty to prosecute proceedings as claimant without restoration. The court's emphasis was practical: restoration is required before the struck off company may pursue claims for its own benefit.

[84] Mr. O'Kola sought to distinguish **Blairmont** on the basis that the struck off company there was defending proceedings, and the point was raised late. He also submitted that its position here is essentially defensive, in that it is resisting enforcement under a legal charge and the Registered Land Act. I am not persuaded by this attempted distinction. This appeal challenges the refusal of interlocutory injunctive relief. It seeks from this Court an order which would restrain the Bank from exercising enforcement rights. That is not a passive defence in existing enforcement proceedings brought by the Bank. It is the institution and prosecution of appellate proceedings for the purpose of obtaining substantive relief. It falls squarely within the category described in **Blairmont** as requiring restoration if the company is to invoke the court's jurisdiction affirmatively.

[85] Counsel for the applicants also relied on the dissenting judgment of Saunders PCCJ in **Blairmont**, which, while differing from the majority's language, reinforces the same practical outcome. Saunders PCCJ rejected that section 488, equivalent to section 512, preserves legal personality in a way that allows a struck off

company to litigate as though it remains in good standing. He emphasised that the norm is that a company loses capacity to sue or be sued when struck off, and he likened the position to that of an entity incapable of independent action absent restoration. Although expressed differently, the dissent underscores that a continuation of liability provision does not, without more, preserve a general capacity to bring proceedings while struck off.

[86] The applicants also relied on **Kimanthi** for the proposition that proceedings brought by a non-existent legal person are a nullity, and that the overriding objective and case management powers cannot be used to cure a nullity. The point is well taken in its essence. If a party lacks legal capacity to litigate, the defect is not one of form but one of jurisdictional competence. A court may manage proceedings between proper parties. It cannot validate proceedings in the name of an entity which the law does not permit to sue.

[87] Counsel for the applicants further relied on **St. Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/49 Ltd** to characterise the prosecution of the appeal as abusive, given the delay and effect of the stay. While delay is relevant to case management and to the court's control of its process, the nullity point is anterior. If JSN lacked capacity to bring and maintain the appeal in the first place, the question of delay does not supply jurisdiction.

[88] The statutory provisions and the authorities lead me to the following conclusion. Strike off under section 511 removes the company from the Register. Section 512 ensures that liabilities may continue to be enforced notwithstanding strike off. Neither section confers a right on the struck off company to invoke the court's jurisdiction affirmatively. **Blairmont** confirms that where a struck off company wishes to pursue proceedings for its benefit, it must first be restored to the register. **Galantis** supports the same practical proposition, that restoration is the appropriate route if a struck off company is to sue. JSN has not been restored. It follows that JSN was not competent to institute or maintain this appeal in its name.

- [89] I reject Mr. O’Kola’s submission that the Bank cannot in the same breadth enforce against JSN and deny it standing. The continuation of liability provision permits enforcement against the struck off company precisely to prevent evasion of liabilities. It does not create reciprocal procedural capacity in favour of the struck off company. The statute is directed to creditor protection. It does not entitle the struck off company to litigate as if it remained duly registered.
- [90] In the circumstances, I am satisfied that the notice of appeal, insofar as it is brought and maintained by JSN, is a nullity. The defect is not one which may be cured by subsequent steps taken in the proceedings. It is a fundamental incapacity going to the existence of a competent appellant before the court.
- [91] Counsel for the applicants submitted that, if JSN is struck out as an appellant, the appeal must be struck out in its entirety, because the injunction below was pursued against the Bank only by JSN, and HBC1 is, as they put it, a tag along appellant with no independent interest to sustain the appeal. In light of my conclusion at paragraph [92], it becomes necessary to consider the viability of the appeal absent JSN.
- [92] The application for interim injunctive relief proceeded below as between JSN and the Bank, and the refusal of that relief is the decision challenged. An appeal is not an abstract exercise. It must be prosecuted by a party with standing in relation to the decision appealed. Where the party who sought the relief and against whom the decision was made is incapable of prosecuting the appeal, the appeal cannot ordinarily continue simply because another entity is named as appellant, absent a demonstrated and proper basis on which that other entity is entitled to challenge the decision.
- [93] On the material placed before this Court, HBC1 did not seek the injunctive relief below and the proceedings proceeded on the basis that the application was

pursued against the Bank only by JSN. In those circumstances, I am satisfied that once JSN's participation is found to be a nullity, the appeal, as presently constituted, cannot properly proceed.

[94] It follows that the applicants' application succeeds. JSN is to be struck out as an appellant on the basis that its participation in the appeal is a nullity, and the appeal is to be struck out accordingly.

[95] In light of this conclusion, it is unnecessary to determine the alternative ground advanced by the applicants based on abuse of process and delay. The matter is disposed of on the anterior issue of capacity and nullity.

Order

[96] For the reasons set out above, this Court orders as follows:

- (1) JSN Development Group Limited is struck out as an appellant in the notice of appeal filed on 12th December 2022 and the amended notice of appeal filed on 14th December 2022.
- (2) The appeal is struck out in its entirety as a nullity.
- (3) The stay of execution granted by the order of Thom J dated 31st January 2024 is hereby discharged.
- (4) The applicants are awarded their costs of the applications, such costs to be assessed by a Judge of the High Court if not agreed within 21 days of the date of this judgement.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Kimberly Cenac-Phulgence
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar