

ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

HCVAP 2010/051

BETWEEN:

THE LIQUIDATORS OF EUROFED BANK LIMITED (IN LIQUIDATION)

Appellant

and

THE SUPERVISORY AUTHORITY
(Under the Money Laundering (Prevention) Act 1966)

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins
The Hon. Mde. Janice Pereira
The Hon. Mr. Davidson Kelvin Baptiste

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Anthony Astaphan SC, with him Mr. Nicholas Fuller for the Appellant
Mr. Justin Simon QC, Attorney General, for the Respondent

2011: May 19,
November 21.

Registration of foreign restraint order – order obtained further to conviction for a money laundering offence - restraint order seeks to freeze funds held in bank in liquidation in Antigua and Barbuda which are in the control of or held for the convicted person – order also seeks to freeze any interest accruing to the funds – whether the restraint order accordingly rendered non-registerable – whether local court erred in ordering the registration of the order – ss. 289 and 304 of the International Business Corporations Act, Cap. 222 – ss. 2(1), 19 and 20 of the Money Laundering (Prevention) Act, 1996 - the Mutual Assistance in Criminal Matters Act 1993 – Article 1 section 2(g)&(h) of the Mutual Legal Assistance in Criminal Matters (The Government of Antigua and Barbuda, and the Government of the United States of America) Ratification Act 2000.

Eurofed Bank is in liquidation under a winding up order made on 3rd December 1999 by the High Court in Antigua and Barbuda. The Bank is insolvent and was in receivership prior to the winding up order. In October 1999, while the Bank was in receivership and under the control of Receiver-Managers, a judge of the High Court in Antigua and Barbuda issued a restraint order against Pavlo Lazarenko and his associated entities prohibiting them from removing any of their assets from

Antigua and Barbuda or from disposing of any of their assets there, including the funds which they held in Eurofed Bank. The funds or assets are allegedly the proceeds of criminal activity. Pavlo Lazarenko was convicted in the United States on 3rd June 2005 on indictment on 29 counts including conspiracy to launder the proceeds of foreign extortion. After the order of October 1999, other orders were made by the High Court further restraining the removal and disposal of the funds which Pavlo Lazarenko and his associated entities held in Eurofed Bank. On 8th July 2005 a judge in the US District Court for the District of Columbia issued a restraint order in aid of forfeiture proceedings which resulted from the conviction of Lazarenko and others for financial criminal activity. The respondent Supervisory Authority applied to register the order in Antigua and Barbuda pursuant to Mutual Legal Assistance legislation and Treaty between the Governments of Antigua and Barbuda and the United States of America. The appellant liquidators objected to the registration of the order, and, in particular, that aspect of it which provides for the continuation of the credit of interests to the said fund, on the ground that interests do not accrue to funds in a liquidation after winding up commences. A judge of the High Court in Antigua and Barbuda ordered the registration of the order. The liquidators appealed.

Held: dismissing the appeal and affirming the decision of the trial judge, with no order as to costs either in the High Court or in this Court:

The trial judge did not err when he ordered the registration of the US restraint order issued by the District Court of Washington DC in Antigua and Barbuda without severing the interest element in the order, notwithstanding that he accepted the submissions on behalf of the liquidators that, generally, interest payments do not accrue to funds invested in an insolvent company after the commencement of the liquidation of that company. Where, as in the present case, funds that are allegedly the proceeds of crime invested in a company which is subsequently put into liquidation, the principal as well as any interest thereon could be the proceeds of crime. The interest element cannot be alienated from the principal to make the interest a part of funds available to liquidators because the interest is as much a part of the alleged proceeds of crime as the principal sum. They are all subject to tracing, and such principal and interests thereon that are proved, at the enforcement stage, to be the proceeds of criminal activity, are subject to be forfeited. Additionally, as a matter of public policy, permitting an entity or creditors therein to benefit from interest on proceeds of criminal activity is contrary to the object and purpose of combating money laundering. The restraint order thus takes precedent over the winding up order and the principal as well as the interest remains frozen together pending the outcome of forfeiture proceedings. Accordingly, the judge did not err when he ordered the registration of the US restraint order, including the interest element therein, nor when he held, further, that, ultimately, at the forfeiture proceedings, all issues, including the legal status of the accrued interest can be ventilated and resolved according to law.

JUDGMENT

- [1] **RAWLINS, C.J.:** Stated briefly, the issue in this appeal is whether a foreign restraint order freezing funds which are allegedly the proceeds of crime, is rendered non-registrable in Antigua and Barbuda because it contains provisions which would freeze and attach not

only the principal sums in those funds in a local bank that is in liquidation, but, more particularly, would also freeze and attach to interest accruing on those funds.

- [2] The restraint order was made on 8th July 2005 by a judge in the US District Court for the District of Columbia. It was made, inter alia, against assets held in Eurofed Bank (In Liquidation) in Antigua and Barbuda. The funds were the subject of US forfeiture proceedings. They were described by prosecutors in the US proceedings to be the proceeds of money laundering offences committed by Pavlo Lazarenko, a former Ukrainian Prime Minister. The appellants in the present appeal, the liquidators of Eurofed Bank, are the controllers of funds on deposit in that Bank, which funds are either owned or controlled by or on behalf of Pavlo Lazarenko, as well as funds of one Alexander Milchenko, deceased.
- [3] Pavlo Lazarenko was convicted in the United States on 3rd June 2005 on indictment on 29 counts including conspiracy to launder proceeds of foreign extortion.
- [4] It is common ground that the bank is insolvent. Due to its insolvency, the liquidators have only been able to pay a dividend of approximately 81% to creditors who proved their claims within the stipulated time frame prescribed by the liquidators.

Proceedings in the US Court

- [5] The US restraint order of 8th July 2005 was issued in aid of forfeiture proceedings which resulted from the conviction of Lazarenko and others for financial criminal activity. The Supervisory Authority for such offences under the laws of Antigua and Barbuda applied to register the order in the Antigua and Barbuda High Court. Provision is made for the registration of such foreign judgments and orders under the Mutual Assistance in Criminal Matters Act 1993 and pursuant to the Mutual Legal Assistance in Criminal Matters (The Government of Antigua and Barbuda, and the Government of the United States of America) Ratification Act 2000. The applicable provisions are Article 1 sections 1 and 2(h) of this latter Act.

- [6] Article 1 sections 1 and 2 state:
1. The Contracting Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigation, prosecution, and prevention of criminal offenses, and in proceedings related to criminal matters.
 2. Assistance shall include:
 - (a) taking the testimony or statements of persons;
 - (b) providing documents, records, and articles of evidence;
 - (c) locating or identifying persons;
 - (d) serving documents;
 - (e) transferring persons in custody for testimony or other purposes;
 - (f) executing requests for searches and seizures;
 - (g) **assisting in proceedings related to immobilization and forfeiture of assets; restitution; collection of fines;** and
 - (h) **any other form of assistance not prohibited by the laws of the Requested State.** [Emphasis added]

[7] It is seen that Article 1 section 1 speaks to the scope of mutual assistance which the contracting parties can provide in connection with the investigation, prosecution and prevention of criminal offenses and in proceedings related to criminal matters. Section 2 lists the type of assistance which can be provided and subsections (g) & (h) provide for any form of assistance not prohibited by the laws of the Requested State.

[8] The effect of the registration and subsequent enforcement of the US order would freeze the subject funds in the liquidation in Antigua and Barbuda, whether they constitute principal or “any interest accrued” thereon.

Background to the Antigua proceedings

[9] Litigation affecting Euro Bank (in liquidation) has been ongoing for some time in the court of Antigua and Barbuda.

[10] On 28th October 1999, while the Bank was in receivership and under the control of Receiver-Managers, Henry Moe J issued a restraint order against Pavlo Lazarenko and his

associated entities prohibiting them from removing any of their assets from Antigua and Barbuda or from disposing of any of their assets there. The prohibition specifically included any accounts that they held in Eurofed Bank. This order was made on an application by the Supervisory Authority, the Office of National Drug and Money Laundering Control Policy, pursuant to the Money Laundering (Prevention) Act 1996 as amended.¹ On 3rd December 1999, the said court made the order winding up the Bank on the application of the Receiver-Managers.

[11] On 14th July 2000, Satrohan Singh JA granted a stay of execution against the Supervisory Authority pending an appeal by Pavlo Lazarenko and the other defendants to the restraint proceedings pending the determination of the appeal. He ordered that the funds that were the subject of that order were to be paid into an interest bearing account at the Bank of Nova Scotia in St. John's until the determination of the appeal and that the restraint order be maintained until further order. He further ordered that the order transferring the funds to the Bank of Nova Scotia in the name of the Registrar of the High Court was to be complied with by 18th July 2000.

[12] On 5th November 2003, on an application by the joint liquidators, Donald Ward and Charles Walwyn, Mitchell J made an order to divide the funds in Antigua and Barbuda which were subject to the liquidation. The order stipulated that US\$19,954,229 be transferred to the liquidator's account for distribution to the creditors while the balance of US\$68 million be kept frozen at the Bank of Nova Scotia in the name of the Registrar of the High Court. The frozen funds were those of Pavlo Lazarenko and his associated entities which were allegedly the proceeds of crime. The effect of that order was that those funds were taken out of the hands of the liquidators and could not be disposed of by them.

[13] On 27th May 2004, Olivetti J granted an application by the Supervisory Authority pursuant to the Money Laundering (Prevention) Act 1996, to freeze all rights and interests of Pavlo Lazarenko in the Bank of Nova Scotia account and any account maintained by the liquidators.

¹ By the Money Laundering (Prevention) (Amendment) Act, 1999.

[14] The restraint order that the US Court made on 8th July 2005 against Pavlo Lazarenko and his associated entities was an order in rem directed against their property rather than against them personally. The order prohibited any withdrawals, transfers, assignments etc as being subject to forfeiture. This restraint order was made against all assets in the name of Pavlo Lazarenko and his associate entities and included a sum of US\$85.5 million held at the Bank of Nova Scotia in Antigua and Barbuda, which was previously on deposit in accounts at Eurofed Bank. The restraint also included a sum of US\$1.6 million similarly held for the benefit of Alexander Milchenko.

[15] On 13th February 2009 Harris J granted an ex parte application by the liquidators to transfer the funds which were frozen in the Bank of Nova Scotia in the name of the Registrar of the High Court back to the account of the liquidators, but to remain subject to the freeze order of May 2004.

The registration hearing

[16] The Supervisory Authority's application to register the US restraint order then came on for hearing on 21st September 2010 before Harris J. On that day the judge granted the application made by the Supervisory Authority pursuant to section 27 the Mutual Legal Assistance in Criminal Matters (the Government of Antigua and Barbuda, and the Government of the United States of America) Ratification Act 2000 to register the foreign restraining order in the High Court in Antigua and Barbuda. The judge delivered the written judgment on 12th October 2010.

The judge's findings and order

[17] In the judgment, Harris J found that the US order fell within the ambit of the Mutual Assistance in Criminal Matters Act.² He held that there was no breach of natural justice because the Liquidators were not precluded from contesting any aspect of the proceedings.³ This decision was not appealed. He accepted the submissions on behalf of

² See paragraph 34 of the judgment.

³ See paragraph 35 of the judgment.

the Liquidators on the law that governs the status of the accrued interest in the fund after the commencement of the liquidation.⁴ However, he held that this did not prevent the court from issuing a restraining order to conserve the subject assets, since, ultimately, at the forfeiture proceedings, all issues, including the legal status of the accrued interest can be ventilated and resolved according to law.⁵ The judge further held that the US order could not be severed in the manner suggested by counsel for the Supervisory Authority because there is no statutory authority for doing so and there was no evidential basis for it. He held, however, that this did not preclude the court from enforcing only against that part of the funds on which enforcement is permissible at the enforcement stage.⁶

[18] It is noteworthy that the US restraint order describes the funds or assets in Antigua and Barbuda, which were subject to restraint, in paragraphs (e) and (f) of the 3rd recital to the restraint order as follow:

“d. Approximately \$85.5 million held at Bank of Nova Scotia (Antigua) in the name of the Registrar of the High Court of Antigua & Barbuda, formerly on deposit in accounts held for the benefit of Pavlo Ivanovich Lazarenko at Eurofed Bank Limited of Antigua & Barbuda (herein after “Eurofed”). Eurofed is now in liquidation under the supervision, management, and/or control of the receivers Charles Walwyn and Robert Wilkinson of PricewaterhouseCoopers, and these defendant assets, together with additional monies, were placed into certificates of deposit in the name of the Registrar of the High Court of Antigua & Barbuda. As of the date of receivership in November 1999, these defendant assets were valued at approximately \$85,502,589.95 in United States dollars. These defendant assets include, but are not limited to, all assets derived from deposits at:

- (i) Account Number 137978, in the name of Pavlo I. Lazarenko;
- (ii) Account Number 132907, in the name of Lady Lake Investments Corporation;
- (iii) Account Number 134936, in the name of Fairmont Group, Ltd.;
- (iv) Security deposits held for Lady Lake Investments Corporation and Fairmont Group, Ltd.;
- (v) Account Number 119648 in the name of Guardian Investments Group, Ltd.;
- (vi) Account Number 133923, in the name of Firstar Securities, Ltd.;

⁴ See paragraph 36 of the judgment.

⁵ See paragraphs 36-38 of the judgment.

⁶ See paragraphs 39 and 40 of the judgment.

- (vii) Account Number 196317, in the name of Nemuro Industrial Group;
- (viii) Accounts in the name of Orby International, Ltd.;

“e. Approximately \$1.6 million in United States dollars held at Bank of Nova Scotia (Antigua) in the name of the Registrar of the High Court of Antigua & Barbuda, formerly on deposit in account 120512 held for the benefit of Alexander Milchenko (deceased) at Eurofed Bank Limited of Antigua & Barbuda (herein after “Eurofed”). Eurofed is now in liquidation under the supervision, management, and/or control of the receivers Charles Walwyn and Robert Wilkinson of PricewaterhouseCoopers, and these defendant assets, together with additional monies, were placed into certificates of deposit in the name of the Registrar of the High Court of Antigua & Barbuda. As of the date of receivership in November 1999, these defendant assets were valued at approximately \$1,616,632.99 in United States dollars;”.

[19] The US court further ordered as follows:

“IT IS FURTHER ORDERED THAT any financial institutions holding any assets subject to this order are hereby directed to maintain such assets so as to continue to preserve their value and, for such purposes, are authorized to invest them for purposes of capital appreciation and accrual of interest in the normal course of business and in accordance with generally accepted practices for the management of such assets. Such financial institutions shall take no offsets against assets subject to this order. **They shall continue to credit to the accounts in which the Defendants *In Rem* may be found any deposits, interest, dividends, or other credits in the normal course of business and such deposits, interests, dividends and other credits shall be subject to this Order...**” [Emphasis added]

The order further directed the Attorney General of the United States to request that the appropriate authority in Antigua and Barbuda, among others, serve the order on subject persons/institutions within the country, and to take the necessary measures to enforce the terms of the order. The respondent Supervisory Authority is the appropriate authority in Antigua and Barbuda.

[20] The judge’s registration order of 21st September 2010 in the High Court of Antigua and Barbuda identifies the Antigua and Barbuda entities set out in the US order as the subjects of the Antigua and Barbuda order. Additionally, in paragraph 2(4), the Antigua and Barbuda order specifically identifies:

“ ... all funds traceable to Pavlo Lazarenko, Alexander Milchenko and their accounts, or to the abovementioned accounts, including but not limited to, any interest accrued;”

The Antigua and Barbuda order then prohibits Scotiabank, as well as the liquidators of Eurofed Bank, their officers, servants or agents from dealing with the restrained assets. It orders them to preserve the value of the assets, and, for that purpose, authorizes them to invest the assets for capital appreciation and accrual of interest in the normal course of business in accordance with generally accepted practices for their management. The order also authorizes them to continue to credit any deposits, interest, dividends or any credits in the normal course of business, such deposits, interest, dividends or credits to be subject to the restraining order.⁷

The appeal

- [21] Neither of the parties complain about the format of the registration order made in the Antigua and Barbuda Court on 21st September 2010. However, the liquidators seek, in this appeal, to impeach those aspects of the order which attach the restraint to interest. Their main contention is that the interest accruing from the frozen funds should not be a part of the US restraining order as registered in Antigua and Barbuda. The appellant liquidators argue that the interest should be released to them so that it can be used to complete the liquidation as failure to do so will suffocate the liquidation to death. In the course of the liquidation, the liquidators used interest which accrued during the liquidation to meet these expenses.

The critical question

- [22] To some extent, the focus seemed to be on resolving the question whether interest accrues to funds in an insolvent liquidation, and, if so, at what stage. It is trite principle, established in **Humber Ironworks Co v Warrant Finance Co**.⁸ and kindred cases that when a company is in insolvent liquidation, creditors are not entitled to claim or prove interest accruing after the commencement of winding up. Thus, Sir C.J. Selwyn L.J stated:

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⁷ See paragraph 3 of the order.

⁸ (1869) 4 Ch. App. 643.

⁹ Ibid at page 646.

“...in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding up. I therefore, think that nothing should be allowed for interest after that date.”

This in turn is in keeping with the rationale, as pointed out by Mr. Astaphan for the appellants, that the principle established in **Humber Ironworks Co.** provides the fairest method by which to distribute the assets of an insolvent company as it would ensure that all proven claimants are treated equally. They rely on the following statement by Sir G.M. Giffard:

“For these reasons I am of the opinion that dividends ought to be paid on the debts as they stand at the date of the winding-up; for when the estate is insolvent this rule distributes the assets in the fairest way.”¹⁰

[23] It follows, in my view, that Mr. Astaphan, SC, is correct when he submitted that, generally, any interest which may accrue in this case is for the benefit of and use in liquidation proceedings as a whole and cannot be credited to a specific creditor or depositor, especially not before the liquidation is finalized. The learned Attorney General accepted this when he stated that the common law makes it clear that, generally, contractual rights of creditors in interest ceases when a winding up order commences, so that any interest which thereafter accrues to the liquidation corpus would be utilized and/or distributed in accordance with section 289 of the International Business Corporations Act.

[24] It is my view, however, that the question whether interest accrues to funds in an insolvent liquidation is merely an hypothetical question given the circumstances of the present case. The order which the Supervisory Authority sought to register is not intended to freeze all of the funds in the liquidation and it does not direct the freezing of all of the funds in the liquidation and the interest on all of the liquidation funds. Rather, it is directed against specific funds, and, in particular, those funds in accounts under the control of or held on behalf of Pavlo Lazarenko and Alexander Milchenko. The restraining order is for the purpose of the eventual forfeiture of those funds on the grounds that they are the proceeds of money laundering for which offence Pavlo Lazarenko was convicted.

¹⁰ Ibid at page 647.

[25] It is in the foregoing premises that I am confirmed in the view that the critical question in this appeal is whether, notwithstanding that interest does not accrue to the account of a creditor after the commencement of insolvent liquidation, the laws of Antigua and Barbuda permits the accrual of interest to such an account where the funds in the account are the proceeds of criminal activity, which might be subject to forfeiture. It is the answer to this question that would determine whether the order of the US court directing that interest on the subject accounts be also subject to the restraint order, is unlawful so that the order, or possibly that aspect of it, cannot be lawfully registered in Antigua and Barbuda.

Submissions on behalf of the liquidators

[26] Mr. Astaphan, SC, argued, on behalf of the liquidators, that given the principle that a creditor is not entitled to claim interest which has accrued after the commencement of the winding up of an insolvent company, it would be illegal and improper for such creditor accounts, as are the subject of the restraint order, to be credited with interest as the US restraint order seeks to require the liquidators to do. Learned counsel submitted that this is not affected by the allegation that the funds are the proceeds of crime. This, he said, is because on liquidation the creditor is not the beneficiary of the accrued interest. Mr. Astaphan insisted that the act of freezing a creditor's account even on the suspicion that the funds therein are the proceeds of crime ends any entitlement to interest which the creditor may have during liquidation. He submitted, further, that even if the creditor is acquitted, his entitlement would be restricted only to the net and available assets of the company at the completion of the liquidation and not to interest on or during liquidation. Therefore, counsel asserted, a freezing order on interest prior to the completion of liquidation is contrary to the common law, and, additionally, hinders the proper functioning of the liquidation.

[27] Mr. Astaphan further contended that it would be inequitable to permit interest to accrue to the accounts that are the subject of the restraint order. This, he said, would result if the order to register it is not set aside because the beneficiaries of the order will be allowed to accrue interest while other creditors and depositors of the bank will not be able to do the same, placing them at a significant disadvantage. Counsel insisted that this result would

be contrary to law and goes against the principle stated in **Humber Ironworks Co.** and kindred cases, which aims to ensure the distribution of assets in the fairest way. Counsel also relied on **Re Amalgamated Investment & Property Co. Ltd**¹¹, **Re Agricultural Wholesale Society**¹² and **Re Parent Trust & Finance Co. Ltd**¹³

[28] Mr. Astaphan contended, additionally, that the restraint order is also contrary to statute, to wit, the International Business Corporations Act,¹⁴ under which the bank was incorporated and is being liquidated. He noted that section 289(1)(a)-(f) of this Act details the priority of payments on winding up. It states:

- “1. In a winding up of a corporation under this Act, the following claims have, against the general assets of the corporation, priority over all the other debts of the corporation –
 - (a) firstly, the necessary and reasonable expenses incurred in carrying out the winding-up;
 - (b) secondly, the wages and salaries of the offices and employees of the corporation that accrued during the three months immediately preceding the seizure of the administration and control of the corporation;
 - (c) thirdly, all parochial or other local rates due from the corporation and all taxes and other debts due from the corporation to the Crown, or held in trust for the Crown, at the time of the seizure of the administration and control of the corporation or at the time a voluntary liquidation is proposed;
 - (d) fourthly, the fees and assessments owing to the appropriate officer;
 - (e) fifthly, if the case requires, the savings and time deposits or trust accounts in amounts not exceeding twenty thousand dollars respectively; and
 - (f) sixthly, if the case requires, all the other deposits, trust accounts and policy claims, and all other claims filed within the time limited therefor pursuant to this Act.”

[29] Mr. Astaphan, SC, also asked the court to note section 289(2) of the International Business Corporations Act, which states as follows:

- “2. After payment of all other claims against the corporation, and, notwithstanding any other law, with interest at such rate as the court

¹¹ [1985]Ch. D. 349

¹² [1929] 2 Ch. 261

¹³ [1936] 1 All ER 641

¹⁴Cap 222 Revised Laws of Antigua and Barbuda

determines, all remaining claims against the corporation that were not filed within the time limited therefore pursuant to this Part may then be paid.”

Learned counsel submitted that this subsection is significant in 2 regards. The first is that it stipulates that interest can only be paid on the completion of the liquidation after the payment of all other claims against the company. The second is that where payments are to be made with interest, the interest is to be at such rate as the court determines.

[30] The inference which learned counsel asked the court to draw is that there is no other legal basis for the payment of interest in a liquidation under the laws of Antigua and Barbuda. Accordingly, learned counsel submitted that the effect of sections 289(1)(a)-(f) and 289(2) foregoing is to negate the payment to and/or the freezing of interest prior to the completion of the liquidation, and, by extension, to prohibit any payment to or freezing of interest during or prior to the completion of the liquidation. Counsel asserted that it was the intention of the legislature that liquidators should use interests which accrue during liquidation to meet the expenses of the liquidation and that interest would be paid only at the end of the liquidation. Counsel therefore submitted, in conclusion, that the US restraint order is in direct conflict with sections 289(1) and (2) of the Act. He insisted that, accordingly, the judge should have refused the application to register the order.

[31] As the trial judge did, I also accept the foregoing submissions by Mr. Astaphan, SC, and agree that this would be the effect of the general or normal operation of sections 289(1)(a)-(f) and 289(2) the International Business Corporations Act. It is not clear to me, however, that these provisions are applicable where in an insolvent liquidation funds are restrained as the proceeds of crime which are subject to forfeiture. From this perspective there seems to be some force in the contention by the learned Attorney General that section 289(2) of the International Business Corporations Act is not applicable for the resolution of the critical issue in the present appeal because it speaks to the payment of all remaining claims which were not filed within the time limit pursuant to this Part of the Act. Accordingly, it seems to me that his submission that section 289(2) only arises after all claims against the corporation have been satisfied is correct. I also agree with his further submission that, in any event, the interest referred to is in addition to payment by the liquidator of all remaining claims and is to be determined by the court.

Submissions on behalf of the supervisory authority

[32] The Honourable Attorney General sought to distinguish the circumstances in **Re Amalgamated Investment & Property Co. Ltd.** from the present case. He submitted, correctly, that in **Re Amalgamated Investment**, the issue was whether a creditor who had a contract with a company that provided for payment of the capital sum and interest thereon was entitled to claim interest which accrued on the debt after the commencement of winding up. This, he submitted, correctly, is not the issue in the present case as it is not concerned with contractual rights to interest, but, rather, with the restraint of cash property which is alleged to be the proceeds of crime and is subject to forfeiture. The learned Attorney General insisted that for the purpose of such proceeds, the restraint order can extend to any interest which accrues on that cash property if the court so orders. He pointed out that the order of Mitchell J did not authorize the liquidators to use the interest accrued on these funds, and the restraint continued even after the funds were transferred back into the hands of the liquidators.

[33] However, it is the alternative submission by the Attorney General that seems attractive in my view. He argued that the restraint order separated Lazarenko funds from the liquidation funds as being proceeds of crime pending determination on subsequent forfeiture proceedings. The Attorney General accordingly contended that it is reasonable to conclude that all interests which accrue is per se traceable to and constitutes proceeds of crime and should be disbursed by the court at the forfeiture proceedings. I agree. In essence, inasmuch as the US restraint order is aimed at funds allegedly the proceeds of crime, in effect, the restraint order takes precedence over the winding up order. The result, in my view, is that, as a matter of law, the restraint order requires that the principal funds, which may be the proceeds of crime, is not to be considered a part of the liquidation corpus of assets. By extension, the interest accrued on the principal funds cannot be caught by the liquidation.

[34] Returning to the effect of sections 289(1) and (2) of the International Business Corporations Act, the Attorney General submitted that these provisions clearly mean that one of the duties of the liquidator is to pay the costs of the liquidation out of the property of

the company and another is to make adequate provision for all claims against the company. He stated that while these provisions make the costs of the liquidation a priority over all the other debts of the company, these must be “the necessary and reasonable expenses incurred in carrying out the winding-up”.¹⁵ He submitted that the critical provisions are section 289(1)(f), as well as section 289(3) of the Act, which states as follows:

“3. When the amount available to pay the claims of any class of claimant specified in this section in respect of priorities is not sufficient to provide payment in full to claimants in that class, the amount available shall be distributed on pro rata basis among the claimants in that class.”

[35] In my view, section 289(1)(f) of the International Business Corporations Act is not helpful in the resolution of the critical issue in this appeal as the provision speaks only to the priority that is to be recognized and applied in liquidation. I do not think that section 289(2) of the International Business Corporations Act is applicable for the resolution of the critical issue in the present appeal either because it speaks to the payment of all remaining claims which were not filed within the time limit pursuant to this Part of the Act. Payments, which include interest, under section 289(2) only arise after all claims against the corporation have been satisfied. Additionally, the interest referred to in this subsection is in addition to payment by the liquidator of all remaining claims as determined by the court. Neither these provisions nor section 289(3) speak to the distribution of interest on funds of any entity in an insolvent liquidation but which are the proceeds of crime and therefore subject to forfeiture.

[36] Mr. Astaphan, SC, submitted, on behalf of the appellant liquidators, that the funds which were subject to the pre-liquidation freezing order remained the assets of Eurofed Bank throughout the liquidation. He insisted that their status remained unchanged throughout despite the freezing order. He further contended that these assets formed part of the general assets which are subject to the common law rule on interest, the liquidation order, and the legislative rules and framework governing the liquidation under the IBC Act. He

¹⁵Section 289 (1)(a)

asked us to conclude that the legal consequence of the bank being insolvent must be that the accounts were not entitled to interest on liquidation.

Decision

- [37] It seems to me that the trial judge was quite correct when notwithstanding that he accepted the submissions on behalf of the liquidators on the law that governs the status of the accrued interest in the fund after the commencement of the liquidation, he held, in effect, that this did not prevent the registration of the US restraint order because, ultimately, at the forfeiture proceedings, all issues, including the legal status of the accrued interest can be ventilated and resolved according to law.¹⁶
- [38] The critical consideration, in my view, is that any funds or assets which are obtained from criminal activity are subject to property tracking or monitoring orders even where they are in the hands of third parties. This is by virtue of section 15 of the Money Laundering (Prevention) Act 1996, as amended, and the applicable equitable principles of tracing.
- [39] It follows that even where, as in the present case, funds that are allegedly the proceeds of crime are invested in a company which is subsequently wound up, not only the principal but the interest thereon as well could be the proceeds of crime. The interest element cannot be alienated from the principal to make the interest a part of funds available to liquidators. This is not governed by the general principle that interest does not accrue on the principal fund or assets after the liquidation commences as a part of the liquidation fund. The interest is as much a part of the alleged proceeds of crime as the principal sum. They are all subject to tracing, and such principal and interests thereon that are proved, at the enforcement stage, to be the proceeds of criminal activity, are subject to be forfeited. In this case principal and interest will remain frozen, unless otherwise ordered, pending the outcome of forfeiture proceedings. In my view, the trial judge was also correct when he held that the registration of the order did not preclude the court from enforcing only against that part of the funds on which enforcement is found to be permissible at the enforcement stage.

¹⁶ See paragraphs 36-38 of the judgment.

- [40] In my view, this approach may also be justified on public policy grounds as well. This is because it also raises the question whether funds, which are the subject of criminal activity, should, where an entity in which they are invested has gone into liquidation, be used for or be at the disposal of the general body of the creditors of that entity. This would mean that all of the creditors of the bank would be entitled to share in the benefit of criminally tainted money. That would, in my view, be contrary to the very object and purpose of combating money laundering.
- [41] In the foregoing premises, severability is a redundant issue in this appeal.
- [42] The foregoing conclusions are rendered even clearer, in my view, because the funds, the subject of the US restraint order of 8th July 2005, have been frozen and isolated by orders of the High Court of Antigua and Barbuda from 1999, on the grounds that those funds are allegedly the proceeds of criminal activity.¹⁷ At the time when the US restraint order was made in 2005, those funds were under a freezing order made by Satrohan Singh JA in July 2000. That order directed that they be held in the name of the Registrar of the High Court in the Bank of Nova Scotia in Antigua. Even when in February 2009, Harris J ordered that the funds be retransferred to the account of the liquidators, he directed that they were still to be subject to the freeze order made by Olivetti J in 2004. In these circumstances, it should not be difficult to determine the quantum of interest that accrued to the funds.
- [43] Learned counsel for the parties submitted arguments concerning the possible date or dates from which such interest should be held to have accrued. They did so by further submissions in July 2011 at our direction.
- [44] Mr. Astaphan, SC, argued that based on sections 20(1) and 20(2) of the Money Laundering (Prevention) Act 1996, forfeiture takes effect 90 days after conviction and not on the date of the freezing order or liquidation. He contended that the earliest date upon which a forfeiture order can take effect is on or after the expiration of 90 days from conviction. He therefore submitted that accrued interest prior to or from the date of

¹⁷ See the background to the proceedings in the Antigua High Court from paragraphs 9 to 15 of this judgment.

liquidation is not payable on the frozen funds. He further submitted that unless a forfeiture order is made by the High Court, no forfeiture or transfer of assets can lawfully take place.

[45] Sections 20(1) and 20(2) of the Money Laundering (Prevention) Act 1996 state as follows:

“20 (1) If

(a)...

(b)...

(c) the freeze order, to the extent to which it relates to the property, is not the subject of a discharging order under section 19B(5) subject to subsection (2) the frozen property is forfeited to the Crown upon the expiry of 90 days after

(i) the making of the freeze order; or

(ii) the conviction of the defendant,

whichever is later.

(2) If, within the period of 90 days referred to in subsection (1), an application has been made for an order under section 19B(5) in respect of frozen property, the property is forfeited to the Crown —

(a) if the application is refused or dismissed, at the end of the period during which the person may appeal against the refusal or dismissal or, if such an appeal is lodged, when the appeal is abandoned or finally determined without the order having been made;

(b) if the application is withdrawn or struck out, on that withdrawal or striking out.”

[46] Alternatively, Mr. Astaphan submitted that to date the respondent Authority has failed to apply for a forfeiture order. He insisted that while interest is not payable on an insolvent estate that is in liquidation, it is the liquidators who have a discretion to pay interest at the conclusion of liquidation. The onus, he said, is therefore on the Authority to act promptly to make an application for a forfeiture order.

[47] The Attorney General, on the other hand, relied on section 20 and, in particular, section 20A of the Money Laundering (Prevention) Act 1996. Section 20A states as follows:

“20A. (1) There shall be established a Forfeiture Fund (in this Act referred to as “the Fund”) under the administration and control of the Minister.

(2) All funds and the proceeds from the sale of all property forfeited under section 20 shall be deposited in the Fund after the deduction of a 20% administrative fee to be deposited into the Consolidated Fund.

(3) The funds and proceeds forfeited under section 20 and deposited into the Fund shall be used for the purpose of anti-money laundering activities and other activities the Minister deems fit.”

The learned Attorney General submitted that the referable date is the date of the conviction as, pursuant to this section, it is on that date that the right to forfeiture crystallizes.

- [48] Having arrived at the conclusions above, we do not think that this court need be troubled with the issue as to the effective date from which interest should be said to follow the principal. This may be determined at the enforcement stage. This appeal is centrally concerned with whether the trial judge erred in ordering the registration of the US restraint order. The only decision that I can reasonably make, based on the reasoning in paragraphs 37 to 41 of this judgment, is that the learned trial judge did not err when he issued the registration order. Accordingly, I would dismiss the appeal against his decision.

Costs

- [49] I have not seen any mention of costs in the judgment or order of the learned trial judge. The appellant liquidators appealed seeking their costs in the High Court and in this appeal. However, they have not prevailed either in the High Court or in this court. The Supervisory Authority did not make costs an issue. In the premises, I would not make a costs order.
- [50] Based on the foregoing, the order that I would make on this appeal is that the appeal is dismissed; the decision and order of the learned trial judge registering the US restraint order of 8th July 2005 is affirmed, with no order as to costs.

Hugh A. Rawlins
Chief Justice

I concur.

Janice Pereira
Justice of Appeal

I concur.

Davidson Baptiste
Justice of Appeal