

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 194 OF 2005



IN THE MATTER OF HORIZON BANK INTERNATIONAL LIMITED
AND
IN THE MATTER OF THE INTERNATIONAL BANKS ACT NO. 40 OF 2004
AND
IN THE MATTER OF THE COMPANIES ACT NO. 8 OF 1994
AND
IN THE MATTER OF THE INTERNATIONAL BUSINESS COMPANIES ACT NO. 18 OF 1996

BETWEEN:

HON. JUDITH JONES-MORGAN ATTORNEY-GENERAL OF THE STATE OF SAINT VINCENT
AND THE GRENADINES

Applicant

v

HORIZON BANK INTERNATIONAL LIMITED

Respondent

AND

IN THE MATTER OF AN APPEAL BY THE APPLICANTS AGAINST THE DISALLOWANCE OF
THEIR PROOFS OF CLAIM

BETWEEN:

ALLEN WALSH

First Applicant

And

HANS TAAL

Second Applicant

AND

THE LIQUIDATOR OF HORIZON BANK INTERNATIONAL LIMITED

Respondent

Appearances: Mr. P.R. Campbell Q.C. and Mr. Mcauley Peters for the Applicants
Mr. Grahame Bollers for the Respondent

2007: January 12 & 22
February 15

RULING

[1] **THOM, J (IN CHAMBERS):** This is an application for a stay of an appeal against the disallowance by the Liquidator of proofs of claim filed in the liquidation of Horizon Bank International Ltd and for leave to amend their claim against the Liquidator in proceedings in Bermuda to include a claim for damages.

BACKGROUND:

[2] Horizon Bank International Ltd (hereinafter referred to as "Horizon Bank") is a company incorporated under the laws of Saint Vincent and the Grenadines.

[3] In August 2004 the Applicants instituted proceedings in Bermuda against Horizon Bank (hereinafter referred to as the Bermuda proceedings). Those proceedings are still pending in Bermuda.

[4] On April 20, 2005 the Attorney-General of Saint Vincent and the Grenadines filed a petition for the winding up of Horizon Bank.

[5] On April 21, 2005 Mr. Marcus Wide was appointed provisional liquidator of Horizon Bank.

[6] On June 9, 2005 the High Court made a winding up order in relation to Horizon Bank and appointed Marcus Wide as Liquidator.

[7] On June 30, 2006 the Applicants filed proofs of claim in the liquidation of Horizon Bank.

- [8] By letter dated July 18, 2006 the Liquidator notified the Applicants that their proofs of claim were rejected.
- [9] On October 17, 2006 the Applicants filed an appeal against the decision of the Liquidators. This appeal is still pending.
- [10] On November 2, 2005 the Liquidator commenced ancillary winding up proceedings in Bermuda.
- [11] On December 9, 2005 the Liquidator consented to the lifting of the automatic stay of proceedings in relation to the Bermuda proceedings.
- [12] On November 10, 2006 the Applicants filed this application in which they sought four reliefs, but on the hearing of the application only the following reliefs were pursued:
- (1) An Order that all proceedings on the Applicant's Appeal before the Court in Saint Vincent and the Grenadines be stayed pending the final determination of all proceedings between the parties hereto currently pending in Bermuda in the Supreme Court of Bermuda (Commercial Court) Suit No. 257 of 2004 ("the Bermuda proceedings") including the final determination of any appeal from any ruling or decision of the Bermuda proceedings.
 - (2) An order that the Applicants be at liberty to pursue their claims for damages in the proceedings pending the Supreme Court of Bermuda, and Civil Jurisdiction Suit No. 257 of 2004 ("the Bermuda proceedings").

STAY OF THE APPEAL

- [13] Learned Queen's Counsel for the Applicants submitted that the Court should grant the relief sought for the following reasons:

- (a) The facts and matters underlying the claim in these proceedings and in the Bermuda proceedings are the same.
- (b) There will be a full trial in Bermuda on the issues underlying the propriety claim.
- (c) If the appeal proceeds in Saint Vincent and the Grenadines there will be a full trial involving a parallel set of proceedings in Saint Vincent and the Grenadines on the underlying facts as are being determined in Bermuda.
- (d) Costs to the parties would be significantly reduced.
- (e) The proceedings in Bermuda are already at the discovery stage.

[14] Learned Counsel for the Respondent submitted that the relief sought should not be granted for the following reasons:

- (a) The relief sought amounts to a request that the Court should delegate jurisdiction over this matter to the Bermuda Court.
- (b) There was procedural error in making this application.
- (c) The Applicants have no locus standi.
- (d) If the relief sought is granted the unsecured credits of Horizon Bank would be prejudiced.
- (e) The appeal can be determined sooner than the Bermuda proceedings.

(i). **Procedural Error and Delegation**

[15] Learned Counsel for the Respondent submitted that the Applicants had adopted the wrong procedure in seeking relief. The application is made under Sections 395 and 399 of the Companies Act, while the appropriate provision is Rule 4.93 of the United Kingdom Insolvency Rules 1986 and Part 26.2 (a) of CPR 2000.

[16] Learned Queen's Counsel for the Applicants referred the Court to Section 9 of the Eastern Caribbean Supreme Court (St. Vincent and the Grenadines) Act Cap. 18, section 5 of the Application of English Law Act Cap. 8 and Part IV of the Companies Act No. 8 of 1994 and submitted that the U.K. Insolvency Rules 1986 are to be applied in Saint Vincent and the Grenadines subject to the provisions of the Companies Act 1994.

[17] The Applicants' application which was filed on November 10, 2006 stated that it is made under sections 395 and 399 of the Companies Act and under the inherent jurisdiction of the Court. In Halsburys Laws of England 4th Edition Volume 37 in dealing with the grant of a stay of proceedings the learned Authors stated at paragraph 437:

"The court's power to stay proceedings may be exercised under particular statutory provisions, or under the Rules of the Supreme Court or under the Court's inherent jurisdiction, or under one or all of these powers, since they are cumulative, not exclusive, in their operation."

[18] Learned Counsel for the Respondent stated in paragraph 32 of his written submissions and I agree with Learned Counsel that:

"Essentially, the Court has inherent jurisdiction to order, where the circumstances dictate, that certain proceedings be stayed until such time as it is fair and just that they be heard and determined. In this regard, the Court engages in a balance of the respective prejudice to be suffered by the parties should the stay application not be determined in their favour. The fundamental principle to be observed by the Court in this regard is to ensure that justice is being done between the parties in the exercise of its discretion."

Further under Part 26.9 of CPR 2000 the Court has a discretion to rectify an error of procedure where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified.

[19] In view of the above I find that the submission has no merit. I also find that there is no merit in the submission that the granting of a stay would amount to a delegation of jurisdiction. I agree with the submission of Learned Queen's Counsel for the Applicants that the statutory winding up scheme contemplates that the Court in the exercise of its supervisory authority may direct that certain matters be dealt with in other jurisdictions. If a stay of proceedings is granted this will not mean that at the end of the Bermuda proceedings the Court would not have jurisdiction to hear the appeal if the Applicants wish to pursue their appeal.

(ii) Locus Standi

- [20] Learned Counsel for the Respondent submitted that the Applicants have no locus standi since they are not creditors of Horizon Bank. Learned Counsel further submitted that a person is only a creditor if his claim is accepted by the liquidator or if his claim succeeds before the Court on appeal. Where persons are not creditors then they must have a relevant interest in the estate and that relevant interest can only arise upon recognition as a creditor. In support of this proposition Learned Counsel referred the Court to the decision of the Privy Council in **Deloitte and Touche AG v. Christopher D Johnson and Another** (Cayman Islands) [1999] UKPC 25 10TH June, 1999.
- [21] Learned Queen's Counsel for the Applicants submitted in response that the Applicants have standing pursuant to Section 399 (5) of the Companies Act to appeal against the rejection of their proofs, this was confirmed by the Liquidator in his letter of July 18, 2006 to the Applicants and his affidavit of October 30, 2006. Learned Counsel referred the Court to the case of **Re Capital Project Home Pty** [1992] 10 ACLC P 75. **Re David Lloyd and Co.** (1877) 6ch. O. P339 and **Mahomed V Morris** [2000] BCLC P 536 and **Macpherson's Law of Company Liquidation** 2001 ed. Paragraph 9.87.
- [22] It is settled law that when the Court makes a winding up order in relation to a company a statutory scheme for dealing with the assets of the company comes into force. The statutory scheme is outlined in Part IV of the Companies Act No. 8 of 1994.
- [23] Section 399 (5) of the Companies Act No. 8 of 1994 provides that:

"If any person is aggrieved by any act or decision of the liquidator that person may apply to the Court and the Court may confirm reverse or modify the act or decision complained of and make such order as it thinks fit.

This provision is similar to section 168 (5) of the UK Insolvency Act 1986. Section 168(5) of the UK Insolvency was considered by the Court of Appeal in **Mahomed V Morris**. Peter Gibson LJ in considering whether the claimants came within the section stated:

"In general I respectfully agree with the sentence which I have cited from **Re Eden note Ltd** [1996] 2BCHC p 389. It could not have been the intention of parliament that any outsider to the liquidation, dissatisfied with some act or decision of the liquidator, could attack that act or decision by the special procedure of Section 168

(5). However I would accept that someone like the landlord in Re Hans Place Ltd (1993) BCLC 768 who is directly affected by the exercise of a power given specifically to liquidators, and who would not otherwise have any right to challenge the exercise of that power can utilize 168 (5). It may be that other persons can properly bring themselves within the subsection. But the mere fact that the act or decision is that of a liquidator in respect of an asset of the company the proceeds of which would be available for unsecured creditors is not enough, as can be seen from the example of the persons denied an opportunity to buy an asset of the company from the liquidators in Re Edennote Ltd [1996] 2 BCLC 389. Nor in my view is it enough that the persons claiming to be aggrieved by the act or decision of the liquidator in respect of assets of the company is a surety when his subrogation rights do not in any way depend on the company being in liquidation.

[24] In the Deloitte and Touche Case the Privy Council in considering whether under section 106 (1) of the companies law of the Cayman Islands a debtor of an insolvent company could maintain proceedings to remove a liquidator, the Court held that a debtor had no locus standi since he had no relevant interest in the relief sought. Lord Millet in delivering the judgment of the Privy Council stated at paragraphs 18-21 as follows:

“18. In their Lordship's opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the Court. The first occurs when the Court is asked to exercise a power conferred on it by statute. In such a case the Court must examine the statute to see whether it identifies the category of persons who may make the application. This goes to the jurisdiction of the Court, for the Court has no jurisdiction to exercise a statutory power except on the application of a person qualified by statute to make it. The second is more general. Where the Court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the Court are coercive. Every order of the Court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the Court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.

19. Where the Court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the appellants submit that he “has an interest in making the application or may be affected by its outcome”. It means that he has legitimate interest in the relief sought. Thus even though the statute does not limit the category of persons who may make the application the Court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor....

20. The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made. Section 106(1) does not limit the category of persons who may make the application. The appellants, therefore, do not lack a statutory qualification to invoke the section. But the question remains whether they have a legitimate interest in the relief which they seek. They are not asking the Court to appoint a liquidator to fill a vacancy. They are asking the Court to remove incumbent liquidators for cause. The English cases relied upon by they appellants show that an interest which is sufficient to support an application of the former kind may not be sufficient to support an application of the latter kind.

21. The company is insolvent. The liquidation is continuing under the supervision of the Court. The only person who could have any legitimate interest of their own in having the respondents removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors. The respondents are willing and able to continue to act, and the creditors have taken no step to remove them. The appellants are not merely strangers to the liquidation; their interests are adverse to the liquidation and the interests of the creditors. In their Lordships' opinion, they have no legitimate interests in the identity of the liquidators, and are not proper persons to invoke the statutory jurisdiction of the Court to remove the incumbent office-holders."

[25] The same cannot be said about the applicants in these proceedings. The Applicants are persons who are alleging that they were defrauded of considerable sums of money by the principals of Horizon Bank and that their money or a substantial part of it is held in an account in the name of Horizon Bank in Bermuda. In these circumstances the applicants proofs of claim having been rejected by the liquidators I am of the view that they are aggrieved persons within the meaning of Section 399 (5) of the companies Act and also a creditor within the meaning of Rule 4.83 of the Insolvency Rules 1986. I note that this is only an application to stay the appeal. I agree with the submissions of Learned Counsel for the Applicants that the Applicants do have locus standi to seek a stay of the appeal.

(iii) **Exercise of Discretion**

[26] I will deal with the issues raised in subparagraphs (d) and (e) of Learned Counsel for the Respondent submissions under this heading. Both Learned Queen's Counsel for the Applicants and Learned Counsel for the Respondent agree that the grant of a stay of proceedings is discretionary. I will therefore consider the various factors in this case. These are:

- (a) The Respondent in rejecting the Applicants' proofs of claim gave as his reasons the matters he pleaded in his Points of Defence in the Bermuda proceedings. He stated in his letter of July 18, 2006 as follows:
 - "(2) The evidence of necessary facts in order to support a claim for damages for an alleged fraud committed by Horizon Bank International Ltd have not been submitted and for the reasons as disclosed in the Points of Defence filed by Horizon Bank International Ltd (in liquidation) in the Supreme Court of Bermuda (Commercial Court) 2004, No. 257 annexed hereto as Schedule "A" and
 - (3) The evidence of necessary facts in order to support a proprietary trust claim based on equitable principles of constructive trust and tracing have not been submitted or made out and is disallowed by reason of the matters and facts disclosed in Schedule "A" annexed hereto."
- (b) The Claim in Bermuda would proceed irrespective of whether a stay of these proceedings is granted.
- (c) The Bermuda proceedings are at the discovery stage.
- (d) The claim in Bermuda and the Appeal would involve substantially the same facts and circumstances, the same parties and substantially the same documentation.
- (e) The hearing of the appeal would be a hearing de novo. Both Counsel referred the Court to the case of Re Kentwood Construction Ltd [1960].
- (f) The cost to both parties in funding two sets of proceedings if a stay is not granted and the possibility of funding only one set of proceedings if a stay is granted, having regard to the points of claim and points of defence in the Bermuda proceedings and having regard also to the fact that the Respondent has identified the matters that he has pleaded in his points of defence as reasons for the rejection of the Applicants' proofs of claim.
- (g) A stay of proceedings would bring the liquidation process to a halt. The unsecured creditors would have to wait a longer period to receive their distribution. This is assuming that if the appeal is heard it would be determined before the Bermuda proceedings.

[27] When all of the above factors are taken into consideration the only factor in favour of not granting the stay of proceedings is the possibility that the unsecured creditors may have to wait a longer period to receive their money from Horizon Bank. I find that the factors in favour of the granting of a stay, being the factors stated above at subparagraphs (a), (b), (c), (d), (e) and (f) far outweigh this factor.

LEAVE TO PURSUE CLAIM FOR DAMAGES

[28] Learned Counsel for the Respondent submitted that the issue in relation to the claim for damages could be determined on the appeal. Further no good reason was given in the Affidavit in support of the application on which the discretion of the court could be exercised and if leave is granted the hearing in Bermuda would be further delayed since it would be necessary to amend the Points of Claim and the Points of Defence.

[29] Learned Queen's Counsel for the Applicants submitted that the Bermuda proceedings are at the discovery stage and if leave is granted both parties would save time and expense. Further the Applicants in the Bermuda proceedings allege that Horizon Bank knowingly received the proceeds of fraud and this gives rise to a claim for damages and may be made out even if Horizon Bank was held not to have participated in the fraud itself. Having the damages claim dealt with in the same proceedings as the proprietary claim would avoid the real risk of inconsistent findings.

[30] When a winding up order is made in relation to a company, no proceedings against the company can continue or commence without the leave of the Court. In David Lloyd & Co. (1877) 6 Ch. D. p. 339 James LJ at p. 344 explained the effect of similar provisions in the U.K. Companies Act in the following manner:-

"These sections in the Companies Act, and the corresponding legislation with regard to bankruptcy, enabling the Court to interfere with actions, were intended, not for the purpose of harassing, or impeding, or injuring third persons, but for the purpose of preserving the limited assets of the company or bankrupt in the best way for distribution among all the persons who have claims upon them. There being only a small fund or limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors. But that has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property. The position of a mortgagee under such circumstances is to my mind exactly similar to that of a man who said, "You the company have got property which you have taken from me; you are in possession of my property by way of trespass and I want to get it back again." A landlord might say, "You have property under lease from me; you have broken the covenants of the lease, and I

have a right of re-entry in consequence of that breach." The company ought not, because it has become insolvent or has minded to wind up its affairs, to be placed in a better position than any other lessee with regard to his lessor."

[31] The rationale for this as stated in cases such as **Re Kentwood Construction Ltd** is that under the statutory scheme the inconvenience and the expense of litigation is avoided, it is expeditious and provides for an orderly process of winding up.

[32] In determining whether to grant leave the Court is required to perform a balancing exercise. The Court is required to consider the interest of the estate of the company on the one hand and the interest of the party seeking leave on the other hand. The authorities show that leave to proceed is not granted readily. Leave will not be granted to a claimant if the proposed action raises issues which can conveniently be decided in the winding up and at less expense except where there are special circumstances. In **Re Exchange Securities and Commodities and Others** [1983] BCLC p. 186 in considering section 231 of the U.K. Companies Act 1948 which is in the same terms as section 386 of the Companies Act No. 8 of 1994 the Court stated:

"The Court in exercising its discretion under Section 231 of the Companies Act 1948 should do what is right and fair in all the circumstances. If the proposed action for which leave is sought raises issues which can be conveniently decided in the course of the winding up then, in the absence of special circumstances, permission to bring the action should be refused. There is a positive benefit in having the issue decided in the liquidation proceedings as this should be less expensive and quicker than an independent course of action. Also, as the liquidator is obliged to act even-handedly as between each class of claimant, the settlement of claims through the winding up proceedings will normally not cause prejudice to any particular class of claimant."

[33] In **New Cap Reinsurance v HIH Casualty and General** [2002] 2 BCLC p.228 the Court stated in considering whether to grant leave the court will have regard to factors such as the cost to the estate and the risk of inconsistent findings in other pending proceedings. While in **Ogilvie-Grant v East** [1983] 7 ACLR p. 699 the Court stated factors to be considered would include:

"The amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved, and the stage to which the proceedings, if already commenced, may have progressed."

[34] It is not disputed that the claim in damages can be determined in the winding up proceedings. What then are the special circumstances in this case for the granting of leave? The circumstances are –

- (a) The Respondent is presently engaged in litigation with the Applicants in Bermuda. In those proceedings the Applicants claim that Horizon Bank is in receipt of the proceeds of fraud.
- (b) The claim for damages is linked to the proprietary claim in the proceedings in Bermuda. If the claims are heard together it would also avoid the risk of any inconsistent findings.
- (c) The Bermuda proceedings are at the discovery stage.
- (d) Both parties would save expense and time if the claim in damages is heard in the same action as the proprietary claim.

[35] Having regard to all of the circumstances and being mindful of the purpose of the automatic stay as stated earlier I am of the opinion that it is right and fair to permit the Applicants to pursue the claim for damages in the proprietary claim which is pending in Bermuda.

[36] The Application is granted. It is ordered:

- (1) That all proceedings on the Applicants' Appeal before the Court in Saint Vincent and the Grenadines be stayed pending the final determination of all proceedings between the parties hereto currently pending in Bermuda in the Supreme Court of Bermuda (Commercial Court) Suit Number 257 of 2004 ("The Bermuda proceedings") including the final determination of any appeal or appeals from any ruling or decision of the Bermuda proceedings.
- (2) That the Applicants be at liberty to pursue their claims for damages in the proceedings pending in the Supreme Court of Bermuda in Civil Jurisdiction Suit No. 257 of 2004.

(3) That there be no order as to costs.


.....
Gertel Thom
HIGH COURT JUDGE