

IN THE EASTERN CARIBBEAN SUPREME COURT  
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

Claims No. ANUHCV 0126 of 2009

In the Matter of the International Business Corporations Act, Cap 222

-And-

And in the Matter of the Petition for the Compulsory Winding-Up of Stanford International Bank Limited

BETWEEN:

Alexander M. Fundora

Claimant

And

Stanford International Bank Limited

Defendant

AND

Claim No. ANUHCV 2009/0149

In the Matter of Stanford International Bank Limited (In Receivership)

-And-

In the Matter of the International Business Corporations Act, Cap 222 of the Laws of Antigua and Barbuda

-And-

In the Matter of an Application for the Liquidation and Dissolution of Stanford International Bank Limited and the Appointment of Liquidators

APPEARANCES:

Mr. Marcel Commodore and Mr. C. Clarke for Alexander Fundora

Mr. Charlesworth Brown with Ms. Jasmine Wade for Financial Services Regulatory Commission.

Ms. Brisette of Rika Bird & Associates for Regulatory Commission

Sir Clair Roberts Q. C. for Ralph Janvey as *amicus curiae*

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2009: April 6, 7, 8, 9, 14 & 15

2009: April 24  
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JUDGEMENT

1. **Harris, J:** These were applications by way of the presentation of two (2) Petitions by (i) Mr. Alexander Fundora (the Fundora Petition)<sup>1</sup> and (ii) The Financial Services

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<sup>1</sup> The Fundora Petition was brought under S. 220 of the IBCA and the “Inherent Jurisdiction” of the Court so as to read in to the section certain additional grounds upon which a Petition may be brought; who may petition the court under that section and; the remedy available to the Petitioners.

Regulatory Commission of A & B (the FSRC) respectively; for the Liquidation and Dissolution of the Stanford International Bank Limited (**SIB**); a company registered under the Laws of Antigua and Barbuda and resident in Antigua and Barbuda.

2. The applications, by way of Petition, are brought under the Antigua and Barbuda International Business Corporation Act Cap 222 as amended (the **ICBA**), along with the U.K 1986 Insolvency Rules in relation to practice and procedure provided for therein .<sup>2</sup> The Petitions were heard together.<sup>3</sup>
3. The first petitioner, Mr. Fundora; is a U.S. Citizen and resident of Miami FL. U.S.A and alleges substantial Certificates of Deposit (CD's) with SIB<sup>4</sup>. Mr. Fundora claims to represent several similar creditors collectively holding CD's to the value of approximately US\$169,000,000.00. SIB is alleged to have accepted deposits to the value of US\$7.2 Billion.
4. The other Petitioner, the F.S.R.C, is the Antigua and Barbudan Financial Services Regulatory Authority and so designated under the Act, ICBA,<sup>5</sup>
5. One, Mr. Ralph Janvey, at the instance of the US Security Exchange Commission ("the **SEC**") was appointed by a United States [of America] District Court Judge for the Northern District of Texas, Dallas Division; for the said Stanford International Bank (SIB) along with several other corporations and individuals, as a Receiver (also referred to herein as the "**US receiver**"). That court found itself to have jurisdiction over the Antigua registered and resident Company, SIB. Mr. Janvey, the US Receiver,

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<sup>2</sup> The UK rules, where the Antigua and Barbuda Laws are silent on a particular point, are, with the requisite modifications, the applicable rules in Antigua and Barbuda; See also *Hugh C Marshall Snr. v Antigua Aggregates Limited and others*, Civil Appeal No. 23 of 1999 per Singh J.A. Save for counsel for the FSRC raising the application of S.372 of the IBCA, the application of the 1986 UK Insolvency rules were not contested. The court recognizes these decisions did not arise out of an International Business Corp. Act.

<sup>3</sup> For hearing petitions together see *APPLICATIONS TO WIND UP COMPANIES* by Derek French 2<sup>nd</sup> edit para 4,7.2

<sup>4</sup> Approximately US\$2,5 m.

<sup>5</sup> The FSRC brought their Petition under S. 300 of the IBCA.

claims that SIB has its centre of main interest in the U.S.A.<sup>6</sup> It appears also that the USA has enacted the UNCITRAL Model rules. Antigua is not a designated state under those US UNCITRAL rules. Antigua has not enacted the UNCITRAL rules. To state the obvious, the proceedings initiated by the S.E.C are not insolvency or Dissolution proceedings as are these present proceedings before the High Court of Antigua and Barbuda<sup>7</sup>. On the 2<sup>nd</sup> March 2009 the S.E.C obtained a temporary restraining order in the USA, freezing assets of SIB located in the USA.

6. I gave my decision and the core of my reasons for my decision to liquidate and Dissolve SIB orally and in brief at the conclusion of the hearing of the Petitions and undertook then to put the full text of it in writing and do so now.

#### BACKGROUND

7. The Stanford International Bank is registered in Antigua and Barbuda and is resident in Antigua and Barbuda and has corporate offices here in Antigua and Barbuda. The Company carries on the business of International Banking which included but was not limited to, taking deposits from customers and issuing Certificates of Deposits to the said Customers.
8. Certain international media news items concerning SIB operations followed by the application by the Security Exchange Commission (S.E.C) of the United States of America for the appointment of the U.S Receiver to, inter alia, assume exclusive jurisdiction and take possession of the Assets, Securities, properties, real and personal tangible and intangible of SIB and others, including it appears, Mr. Allan Stanford the substantial shareholder of SIB, appear to have – at least in part - set in motion a series of independent actions by depositors worldwide. And, in Antigua and Barbuda the regulatory commission moved to appoint a local receiver under the IBC Act (IBCA) of Antigua and Barbuda.

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<sup>6</sup> The evidence discloses that although substantial assets were held in the USA, the majority of SIB's assets were held in several jurisdictions outside of the USA.

<sup>7</sup>The reason for this determination by the High Court was given in open court during the substantive hearing of the Petitions.

9. The end result was that the Bank was inundated by depositors demand for their deposits to which SIB could not meet.<sup>8</sup>
  
10. On the 19<sup>th</sup> February 2009 the FSRC; by instrument under the IBCA, appointed Mr. Nigel Hamilton – Smith and Peter Nicholas Westell of Vantis Business Recovery Services (Vantis) as Joint Receiver – Managers of SIB and Stanford Trust Company Limited (a company, not part of these liquidation proceedings). The said Joint Receiver – Manager of SIB was subsequently appointed as Receiver-Managers by the High Court in Antigua on the 26<sup>th</sup> February 2009.
  
11. On the 3<sup>rd</sup> of March 2009 the Fundora Petition was filed. The said Petition was served on SIB and the counsel for the Receiver – Manager (Vantis) on the 11<sup>th</sup> March 2009 both. The Petition was advertised by way of publication in the local newspaper at a time and in a sequence as provided for in the UK 1986 Insolvency Rules (Rules).
  
12. On the 18<sup>th</sup> March 2009 the F.S.R.C made an application without notice, in the ordinary way under the IBCA, for an order for supervision by the Court of the Liquidation and Dissolution of SIB pursuant to S. 300 of the IBCA The F.S.R.C subsequently discontinued this action (ANUHCV 2009/0110) at the substantive hearing opting to pursue instead its parallel Petition (2009/0149) for the winding up of SIB.
  
13. The FSRC, as mentioned above, had filed a Petition (ANUHCV 2009/0149) in the High Court of Antigua and Barbuda for the Liquidation and Dissolution of SIB. This Petition was presented on the same basis (i.e. S.300 1b, 1c) as its earlier application (ANUHCV 2009/0110) for winding up, dated the 18<sup>th</sup> March 2009. The Petition was published in less than 7 days from the service of the Petition on the Respondent. Further, the 2<sup>nd</sup> publication of the Petition was on the 3<sup>rd</sup> March, again, less than 7 days before the hearing fixed for the 6<sup>th</sup> April 2009.

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<sup>8</sup> See the Affidavits from the Petitioners, local Receiver and depositors/creditors with respect to their efforts to redeem their deposits or their observations as to the failure of SIB to honor the demands of depositors/creditors.

14. The FSRC's Petition like that of Mr. Fundora, was advertised in the daily newspaper<sup>9</sup> in Antigua and Barbuda.
15. On the date of the 1<sup>st</sup> S.E.C application before a U.S Court and thereafter, the 'run' on the SIB in Antigua and abroad appeared to continue<sup>10</sup>. The affidavits filed by creditors in these several matters speak to their demands for the redemption of their CD's and other investment instruments and, SIB's unwillingness or inability to honor the said demand.
16. Mr. Fundora alleges that SIB is insolvent and its insolvency is what underlies its right to Petition the Court for the Liquidation and Dissolution of SIB pursuant to S. 220 of the IBCA.
17. The FSRC alleges that SIB is in breach of s. 300 1b and 1c of the IBCA by failing to file quarterly returns with the Registrar of companies since September 2008, failing to take reasonable precautions to prevent falsification of entries in the records required by the IBCA to be prepared and maintained in respect of the Corporation; submitting to the commission statutory records the contents of which are inconsistent with the Banks private records and, that notwithstanding this failure SIB had procured a certificate of Compliance under the IBCA by misrepresentation. For these reasons the FSRC, by way of the presentation of its Petition, seeks an order of the court for the Liquidation and Dissolution of S.I.B. under the IBCA.
18. Appearing at the hearing was counsel for the FSRC, Mr. Charlesworth Brown with Ms. Jasmine Wade , counsel for Mr. Fundora, Mr. C Clarke of Commodore and Assoc. and Mr. Marcel Commodore himself, Counsel for Five of the persons who gave notice on the Fundora Petition of their intention to appear in opposition to that Petition and persons who gave notice on the FSRC Petition of their intention to support the FSRC

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<sup>9</sup> The newspaper has a free on line edition

<sup>10</sup> See the Affidavits of the creditors filed in this matter and of the other parties.

Petition, Ms. Brisette of Rika Bird and Assoc. and counsel for the US Receiver appearing as *amicus curiae*, Sir Claire Roberts Q.C.

19. A list of all the persons who filed such notices was produced and filed by Counsel for Mr. Fundora along with their respective affidavits in support of their notices. Two of the person in opposition to the Fundora Petition were present in court on the 6<sup>th</sup> and 7<sup>th</sup> of April but were, according to their Counsel Ms Brisette, unable to remain in Antigua and Barbuda for the continuation of the hearing into the 8<sup>th</sup> of April 2009 and beyond.
  
20. Counsel for Mr. Fundora, counsel for the FSRC, counsel for the persons notifying the respective Petitioners of their interest to appear at the hearing, and counsel for the U.S Receiver, appearing as *amicus curiae*, indicated to the court that they were not desirous of examining or cross examining any of the parties or any of the person(s) who sent in notices of their intention to appear, either in support or in opposition to the Petitions, both. Ultimately though, the parties and the US Receiver through his counsel, cross examined Mr. Paul Ashe, the Director of the FSRC and Mr. Nigel Hamilton – Smith, one of the joint Receiver – Managers appointed by the Court in Antigua and Barbuda , in relation to certain SIB documents and the submission of local statutory reports.
  
21. Several issues were disposed of as preliminary issues:
  - (i) Whether the mode of advertisement of the Petition by Mr. Fundora was done in accordance with the Law
  - (ii) Whether the mode, and time of the advertisement by FSRC was in accordance with the Law
  - (iii) Whether the U.S receiver was an interested party under the Act or otherwise entitled to appear as of right, to the Petition.

22. Upon the substantive hearing of the Petitions, several issues arise for determination:

Substantive Issues

- (i) Whether the Petitioners are proper parties
- (ii) Whether the Petition was presented upon Lawful grounds – Statute.
- (iii) Whether in all the circumstances the Petitioner has satisfied the court that Respondent Company SIB should be wound up.

Preliminary Issues

ADVERTISEMENT

23. The Petitioner, Mr. Fundora (AHUHCV 2009/0126) published the advertisement of the Petition in several issues of the local newspaper as opposed to the gazette as provided for in the U.K insolvency Rules<sup>11</sup>.

24. Counsel on the Fundora Petition, Mr. Clake of Commodore s Associates submitted that first, by virtue of the Cumulative effect of S. 7 (1), 11 and 12 of the Eastern Caribbean Supreme Court Act Cap, where there is a lacunae in the practice and procedure necessary to give effect to the provisions of a local statute, recourse may be had to the practice and procedure in the U.K or as nearly in conformity with it as practical.

25. Counsel Cited in further support of this the authorities of: (i) High C Marshall Saw v Antigua Aggregates Limited et al Civil Appeal No. 23 of 1999 per Singh J.A at para 15; (ii) Globe X Management Ltd. etal v Clifford Johnson and another Civil Appeal No. 4 of 2003 Eastern Caribbean Supreme Court per Hon. Michael Gordon, Q.C. ,J.A. at pp 12

26. That the U.K Insolvency Rules of 1986 do apply in Antigua and Barbuda, IBCA is not contested in this matter.

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<sup>11</sup> These rules it is submitted by counsel, by virtue of The Eastern Caribbean Supreme Court Act, are the applicable rules (with the necessary adaptations) in Antigua and Barbuda. See S.372 of the IBCA limiting the extent to which the court can resort to law outside of the IBCA.

27. This Court gave its ruling at the hearing, on the propriety of the publication of the Advertisement in the Fundora Petition and the FSRC Petition. Briefly, Mr. Clark for Mr. Fundora contended that the publication in the Newspaper was so nearly in conformity with the UK 1986 Insolvency rules as was practical. He contended that unlike the weekly publication of the Gazette in the U.K, the Antigua & Barbuda Gazette is at best published monthly and very often quarterly and in any event published irregularly.
28. Counsel contended that the gazette has limited readership and circulation where as the local daily newspaper has wide readership and circulation both in Antigua and abroad. In addition contends counsel, the local newspaper publishes on the internet and was the source of notification of the hearing of the Petition for many persons who up to the date of the hearing were communicating with him on the matter. The evidence is that the Petition was published in more issues as was required by the rules.
29. Further submits counsel, the rules do provide for a substituted form of advertisement upon application to the Court and had he applied for such; it would have been for advertisement by way of the said Newspaper, a method, that having regard to the urgency of this matter and precedent, the court was likely to grant.
30. Counsel submits that no substantial prejudice to the parties or interested persons has occurred and that the court can by order deem the Petition lawfully advertised.
31. The Court noted that in Antigua and Barbuda advertisement of any document required to be advertised by way of the official gazette has been virtually superceded by parallel publication in the Newspaper unless there is no discretion to do otherwise. This has resulted by reason of delay and low distribution of the Official Gazette.
32. If the intention is to bring the notice of the hearing of the Petition to as many interested person (including Creditors) around the world in a timely manner; there is no doubt that

publication in a daily newspaper with an e-edition is the most effective and practical medium available in Antigua and Barbuda and certainly far more effective than publication in the gazette.

33. The Rules do not preclude Publication by alternative means and indeed clearly contemplates the reliance on alternative methods of publication where appropriate and beneficial to the process.
34. In the all circumstances, I find the method of Publication i.e. by way of the local Newspaper, is deemed sufficient and in compliance with the Law of Antigua and Barbuda In relation to both Petitions.
35. The FSRC published the Petition two (2) days after it was served on the Respondent Bank. It was served on the Bank at its Registered Place of Address and Address of its registered agent. Further, the FSRC notified the Antiguan receiver – manager, Vantis, of this proceeding. The receiver – manager in the person of Mr. Nigel Hamilton-Smith was present through out the preliminary hearings and the substantive hearings between the 6<sup>th</sup> of April and 9<sup>th</sup> of April 2009 and the 14<sup>th</sup> and 15<sup>th</sup> of April 2009.
36. The FSRC Petition was again published/advertised on the 31<sup>st</sup> March; some 5 clear days before the advertised hearing date of the 6<sup>th</sup> April 2009. To date neither the Respondent nor interested party, nor any person, creditor, contributory debenture holder, SIB Director or other Officer of SIB have taken issue with the time at which the Petition was advertised either after service or prior to the conclusion of the hearing.
37. The Rules provide that the Petition not be advertised prior to the expiration of seven (7) days after serve of the Petition on the Respondent or shorter than 7 days before the hearing.
38. Counsel for the FSRC submits that no substantial prejudice attends this; That the purpose of the 7 day grace period prior to advertisement is to allow sufficient time in a

Petition for winding – up in an insolvency, for the Respondent to pay a debt or otherwise to allow time for the Respondent who contests the debt or for some other proper reason; to apply to the court to restrain the advertisement so as avoiding the detrimental effects that usually attend such advertisement.

39. Further, counsel submits that by service on the Bank of it's earlier application (2009/0110) and by service on the SIB of the Fundora Petition and by the FSRC Petition being brought to the attention of the Antiguan receiver – manager who at that time were “standing in the shoes” of the Board of SIB; all relevant parties had adequate notice of the date fixed for the hearing of the Petition so as to enable them respectively to apply to the Court to pay off the creditors, or to apply to the court to restrain the advertisement of the Petition or to send in their notification of their intention to appear at the hearing. The three (3) applications to wind –up SIB were all fixed for hearing for the 6<sup>th</sup> of April 2009.

40. The FSRC acknowledges that its shortcoming in advertising the petition on the dates that it did was at worst, an irregularity or formal defect but contends that no substantial prejudice attends this default, for the reasons provided by the Petitioners above<sup>12</sup>. The Court deemed the time and method of the advertisement did not create a substantial injustice or injustice at all, to the relevant parties and interested persons in the circumstances of this case and deems the advertisements as lawfully published.

#### U.S Receiver as an interested party/person having an interest in SIB

41. The U.S Receiver founded his interest in these local proceedings in an unenforceable order of a U.S District Court in receivership type proceedings in the U.S.A. It is unclear whether the initial order of the U.S Court was intended to have extra territorial affect. In any event, it cannot in its present state have the force of Law in Antigua and Barbuda. Further, Antigua and Barbuda has no reciprocal enforcement of Judgments

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<sup>12</sup> See *Signland Ltd* [1982] 2 All ER Ch. D 609; See stenographers full text of the court’s oral ruling on this preliminary issue delivered earlier in the hearing.

or orders treaty with the U.S.A; neither, as I said earlier, are we either a reciprocal party designated by the USA under their UNCITRAL model rules applicable in the USA, nor have we enacted the said UNCITRAL model rules in Antigua and Barbuda.

42. I cannot say that the proceedings in the U.S.A are Insolvency proceedings or proceedings with a view to winding up SIB and as such they are not strictly “parallel” proceedings.<sup>13</sup> Neither does it appear from the text of the several orders issuing from the U.S District court, that those proceedings are at this time fundamentally about preserving creditor interest and very importantly, that those proceeding have as their end game, satisfying the priorities set out in S. 286, S. 289 and the objects generally, of the IBCA of Antigua and Barbuda.<sup>14</sup>
43. The U.S receiver, by virtue of the US District Court Order, has no legal entitlement to standing in Antigua and Barbuda.<sup>15</sup>
44. Parliament, in my view could not have intended that the words ‘interested person’ means a person who purports to get his entitlement by an unenforceable foreign court receivership order over a solely Antiguan registered and resident company operating in Antigua and abroad thereby throwing open the flood gates to court appointed entitles from the myriad jurisdictions that the IBC’s may operate in, but not be registered in, to apply to liquidate and Dissolve companies registered under the ICBA of Antigua and Barbuda . Liquidation and Dissolution is a final remedy that must be left to the class of persons most intimately concerned with its business including; the local regulatory commission, contributories, shareholders, Board members and creditors. Persons whose interest in the results of the dissolution do not accord with that of the ICBA or who otherwise have other masters to serve are also not, in my view necessarily contemplated by the Act as ‘interested parties’. I have considered section

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<sup>13</sup> See also *Galbraith v Grimshaw* [1910] AC 508. for issues that arise in resolving a conundrum of the sort that the court now faces.

<sup>14</sup> See *In the Matter of Parmalat Capital Finance Limited (in provisional Liquidation)* 2004-2005 CILR 22 for considerations with respect to incompatible liquidator. See further, *HIH Casualty and General Insurance Ltd* [2007] 1 All ER 177.

<sup>15</sup> *Orient Networks Holdings* [2004-2005] CILR 540 applied and followed.

371 of the IBCA in relation to this issue. I recognize also that the categories of person falling under the IBCA as an “interested Party” is not closed. Further, whether one’s interest is as an “interested person” or as a “person having an interest” in SIB, parameters must be set as to who qualifies. Certainly, to one extreme some persons having an interest in SIB have that interest entirely out of mere curiosity, others, to the other extreme, from share holding, creditor or regulatory interest. The only section that is available to an interested person to wind up a company in circumstances where a Receiver – manager has already been appointed is section 300. The FSRC has already made an application to wind-up under this section and to duplicate it serves no useful purpose. Under the IBCA and considering all the options for a court winding up, I am of the view that the line is drawn as I have set out here – to the exclusion of persons in the circumstances of the US Receiver.

45. Further, I note that the fundamental issue to be determined on a winding up Petition is whether the company should be wound up. Issues such proving whether in law the company owes, for instance, ‘X’ dollars in taxes to the US Government, is not an issue fundamental to the petition. One appears either in support of the Petition or in opposition.
46. Although as an example, a tax issue can arguably be peripherally relevant to a winding up petition in so far as it may underpin ones objection or support of the Petition as the case may be, it is likely to be a more central concern of the Liquidator in carrying out his duties under the Act.
47. The U.S receiver as a person with information that will undoubtedly be of interest to the court is granted the status as *amicus curiae* on the two Petitions. This enabled the U.S. receiver to make submissions and to submit evidence on the two (2) Petitions.<sup>16</sup> All the affidavit evidence filed by the US Receiver in both Petitions were admitted in

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<sup>16</sup> See *Bradford Navigation Co. In re* (1870). L.R. 5 Ch. App 600 *North Australian Territory Co. v Goldborough Mort & Co.* [1883]. See also ruling delivered at hearing of the Petition.

evidence with no sufficient objection from the other parties in the matters and was considered by the court along with all the other relevant evidence.

### THE FUNDORA PETITION

48. This Petition was brought under section 220 of the IBCA. This section falls under part II; CREDITOR PROTECTION. The section provides that *“Upon an application of a receiver or receiver-manager of a corporation, whether appointed by the court or under an instrument, or upon an application by any interested person, the court may make any order it thinks fit, including - ...”* The section lists several orders from a - f, which for the most part either specifically refer to a receiver – manager or to matters related to receivership as opposed to Liquidation and Dissolution. In deed, when one looks at the entire Part II, “Creditor Protection”, every section therein from S.213 – S.225 refers to a receiver or receiver-manager in either the column headings or in the text of the respective section. No where in any of those sections is any reference made to Liquidation or Dissolution of a company.
49. It is however, the contention of Mr. Fundora that either by implication or otherwise to read into the S. 220 pursuant to the court’s inherent jurisdiction<sup>17</sup>; all that is required to facilitate; (i) a Liquidation and Dissolution (ii) on the grounds of an insolvency. Counsel for Mr. Fundora contends that having regarded to S. 371 of the IBCA and its dictates that a purposive interpretation be adopted in construing any of its provisions; that the court can read the S. 220 as submitted.
50. The Winding up of a corporation is provided for under Part IV – WINDING UP CORPORATIONS (as amended by Act 10 of 2007). This part deals with winding-up by the court and voluntary winding up not part II which contains the section 220. Part IV also provides for situations of solvency and insolvency and considerations in relation to creditors.

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<sup>17</sup> This court recognizes the existence of its inherent jurisdiction, exercised however, within certain parameters. See also the Globe X case; Civil Appeal No.4 of 2003 per Gordon J.A. at para 12 of Judgment.

51. Giving S. 220 (under Part II) the most liberal of interpretations and having regard to S.371 of the IBCA, the various rules of construction and the alternative provisions of the Act, I am unable to ascribe to S.220 the meaning that counsel for Mr. Fundora urges on this court.
52. Outside of a voluntary winding up, the IBCA substantially rests the decision to wind-up a corporation with the regulatory commission for breaches of the regulatory requirements of the Act, such as failing to file accurate records required to be filed under the Act and, including, like defaults that can result in the true financial position of the Bank been concealed from the regulators and bank customers. The information with respect to a Banking Institution's breach of the regulatory provisions, although at times can be information peculiarly within the knowledge of the commission and perhaps at all times initially exclusively within the knowledge of the commission; is generally information that ultimately can be accessed by other persons.
53. In my view, that in circumstances such as prevails in this case, the legislation, by no accident or slip, placed the protection of persons such as creditors like Mr. Fundora, in the hands of the regulators. It is in their hands that the citizens of Antigua and Barbuda have placed the regulation and/of development of Antigua and Barbuda as a responsible off-shore financial, trade and business centre.<sup>18</sup>
54. Accordingly, Mr. Fundora's petition, grounded as it was in S.220 of the IBCA was dismissed as not being brought under a section upon which a court can grant the order sought under his Petition and further, in any event, not satisfying the requirements of the IBCA as to the statutory grounds for the Court liquidation and Dissolution .<sup>19</sup>

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<sup>18</sup> See S.371 (a) and (c) of the IBCA.

<sup>19</sup> See McPherson's Law of Company Liquidation by Andrew keay, 1st edit. at para 3.03.

55. The court raised on its own volition whether a grant of an amendment to the Petition to bring it under S. 300 would serve the justice of the situation. However, the content of the Fundora Petition and the evidence in support do not sufficiently speak to the statutory grounds set out in S. 300. Further, such a fundamental amendment would probably require re-advertising and service of the Petition. In any event, no application was made by counsel for Mr. Fundora for such an amendment.

### THE FSRC PETITION

56. Upon the dismissal of the Fundora Petition the court was left with the FSRC Petition. This is a Petition brought under S. 300 of the IBCA. The FSRC allege that SIB was in breach of S. 300(b) and (c).

57. The FSRC alleged that the SIB failed to submit its quarterly statutory returns since September of 2008 and that further, immediately prior to that, the statutory returns filed were inaccurate and at variance with actual foreign Bank records setting out the value of the accounts/deposits held in the name of SIB.<sup>20</sup> The FSRC alleged that the company failed to take reasonable steps to prevent inaccuracies in the Bank's statutory returns. To this end, the local Receiver manager gave evidence of having entered and searched the premises of SIB, located the original foreign Bank documents stored in a locked basement of the SIB registered offices, and that such documents evidenced a substantially lower deposit held with them by SIB than SIB had disclosed for the same period and account, in its statutory returns to the regulatory commission.<sup>21</sup>

58. The FSRC tendered in evidence several Bank documents and statutory returns and led additional evidence in relation to these documents. No objection was taken either to the taking of the additional evidence or to the tender of the said documents. Two witnesses for the FSRC gave evidence in relation to the Petition and the documents;

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<sup>20</sup> See affidavit of Paul Ashe filed on the 25<sup>th</sup> March 2009 and his supplemental affidavit and testimony at the hearing along with that of Mr. Nigel Hamilton-Smith..

<sup>21</sup> See Mr. Hamilton-Smith's affidavit evidence on the bank's failure in this regard.

Mr. Paul Ashe, director of the FSRC and Mr. Nigel Hamilton-Smith one of the Joint Receiver-Managers of SIB. Both witnesses were cross examined by counsel for Mr. Fundora, as an interested Party in the FSRC<sup>22</sup> Petition, and Sir Claire Roberts Q.C. counsel for the US Receiver appearing as *amicus curiae*. Ms. Brisette for the several parties who gave notice of their intention to appear at the hearing declined cross examination; her questions having already been put to the witnesses by other counsel.<sup>23</sup>

59. The FSRC contends that this is an egregious breach in this industry, which in the prevailing circumstances both in Antigua and abroad warrant the order sought under their Petition<sup>24</sup>.

60. The court sought submissions on several issues from all counsel including Sir Claire Roberts Q.C. and is grateful to counsel for their assistance in this matter.

61. The court is satisfied that the breach under S. 300 is made out and further to this considered the final question; having been satisfied that the grounds for winding up and dissolution under S. 300 have been made out, should the court grant the order sought. Counsel for FSRC submits that the court ought to grant the Order. Counsel for Mr. Fundora, as a party who filed its notice of intention to appear on the FSRC Petition submitted that SIB ought to be wound up. Both counsel directed the court to the obvious insolvency and international crisis arising from it. Further, Mr. Nigel Hamilton-Smith, receiver-manager of SIB testified to the effect that no other arrangement under the act nor would the re-organization of SIB, serve a useful purpose. Sir Claire Roberts Q.C. made representations opposing the liquidation and Dissolution of SIB from the onset but further represented, that if, in the end, SIB were liquidated and Dissolved, that Mr. R. Janvey, the US Liquidator, would be the most fit and proper

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<sup>22</sup> The Fundora Petition had by this time been dismissed for the reasons provided above.

<sup>23</sup> Only two parties who gave notice actually appeared at the hearing in person. The others filed affidavits in the matter.

<sup>24</sup> See the various affidavits filed in this matter describing the plight of SIB.

person to appoint as liquidator jointly with his designated appointee.<sup>25</sup> Ms. Brisette, counsel for a group of creditors who had given notice of their intention to appear in opposition the Fundora Petition but in support of the FSRC Petition, urged the court to grant the order under the FSRC Petition. Looking at the qualifications of all the recommended liquidators it is clear to me that all are technically suitably qualified to discharge the function of Liquidator in this matter.

#### APPOINTMENT OF LIQUIDATOR

62. On the question of the appointment of the liquidator, counsel for Mr. Fundora urged the court to appoint the joint liquidators recommended by Mr. Fundora. Counsel contended that the appointment of the present Receiver-Managers of SIB would not be proper, for reasons, not least of which is their apparent bias and conflict of interest. Put shortly, he contends that the FSRC is a Government of Antigua organization and that the Government is a debtor of SIB. The FSRC first appointed the receiver-manager and in all the circumstances the receiver-manager as a liquidator is likely to act for the benefit of the Government and in any event, is likely to be perceived as such. Mr. Fundora submits that the liquidator is an officer of the court and the court should avoid the appointment of an officer of the court that might be the subject of an application to have him removed for a conflict of interest or bias.<sup>26</sup>

63. There was no evidence in the matter of the Government's indebtedness to SIB. I accept that none exists.<sup>27</sup> The court rejects the contention of counsel for Mr. Fundora on this point. The full text of the argument by counsel for Mr. Fundora and counsel for the US Receiver is contained in their written submissions before the court and need not be repeated here.

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<sup>25</sup> Sir Claire Roberts Q.C. relied on the affidavits filed by Mr. Janvey in this matter and on counsel's written submissions on the fitness of Mr. Janvey as a Liquidator in this matter. However, Mr. Janvey accepted that the liquidation was urgent so as to be able to act in a timely manner.

<sup>26</sup> See the written submission of counsel for the comprehensive citation of the authorities on this and other points on the considerations entered into by the court in the appointment of a Liquidator. Further, the IBCA provides for the removal of a Liquidator and the appointment of other persons as liquidators in the appropriate circumstances.

<sup>27</sup> See affidavit of Mr. Hamilton-Smith filed the 25<sup>th</sup> March 2009 at para 31 and 32 thereof.

64. Having considered all the arguments for Mr. Fundora, the US Receiver and that of the FSRC, both oral and written, the court is of the view that the existing receiver – managers, Mr. Nigel Hamilton-Smith and Mr. Peter Nicholas Wastell, jointly, are best placed and are suitably qualified to carry out the functions of Liquidator. The court notes also; that the FSRC's Petition was the successful petition; that the receiver-managers are already in place and familiar with the operations of the bank; that they are already in communication with the relevant parties concerned in this matter world wide, including the US Receiver<sup>28</sup>. The international practice and regime that has evolved for the recognition of liquidators in foreign jurisdictions along with the obvious logic and practical imperative in cooperation between the Liquidator and the relevant foreign entities suggest that the Liquidator hereby appointed is not prevented from attaining its ultimate objective under the IBCA.

#### CONCLUSION

65. For all the reasons provided herein, the Order to Liquidate and Dissolve SIB was granted as per the signed order of the 17th day of April 2009.

**David C. Harris**  
**High Court Judge**  
**Antigua and Barbuda.**

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<sup>28</sup> Orient Networks Holdings [2004-2005] CILR 540 on the Court's reluctance to displace appointees from the jurisdiction of incorporation. as opposed to the COMI. I expect that the SIB liquidators will enter into arrangements throughout the globe to assist them in carrying out their function and this may well involve the US Receiver.

