ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2010/025

BETWEEN:

[1] IGORS KIPPERS
[2] JEVGENIJS KIPPERS
[3] MISSION FINANCE LTD.
[4] ELENA SPIVAK

Appellants/Claimants

and

STANFORD INTERNATIONAL BANK LIMITED
(In Liquidation)

Respondent/Defendant

Before:
The Hon. Mde. Ola Mae Edwards — Justice of Appeal

Appearances on Paper:
Mr. Kelvin John of Thomas & Co. for the Appellants
Nicolette Doherty with Mr. Craig Christopher for the Respondent

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2012: March 14.

Civil Appeal – Procedural appeal – Court's jurisdiction under the International Business Corporation Act Cap. 222 Revised Laws of Antigua and Barbuda (as amended) ("the IBC Act) – section 11 of the Eastern Caribbean Supreme Court Act Cap. 143 Revised Laws of Antigua and Barbuda – English Insolvency Act and Rules 1986 (as amended) – English Practice Direction for Distribution of Business of the Companies Court - Winding-up order prohibiting filing of claims without leave of the Court - Whether the Master had jurisdiction to raise the issue and pronounce on the validity of the claims

A liquidation order mandating that the respondent be liquidated and dissolved pursuant to the International Business Corporation Act was made on 15th April 2009. Paragraph 25 of the Order stipulated that leave of the court is required before any person or body corporate can bring or continue with a claim against the respondent. On 26th 2009, the appellants, without leave of the court and in breach of the Order, all filed claims against the respondent. The Master determined applications brought by the insolvent respondent to set aside default judgments entered in all of these claims between 23rd September 2009

and 6th May 2010. The question as to whether the claims were validly filed was raised by the Master who directed counsel for the parties to file submissions on the issue. The Master reserved a specific date for determination of this issue by her. At the hearing, the appellants submitted that the Master being of coordinate jurisdiction, ought to pronounce on the validity of the Order. The respondent contended the contrary. The Master ruled: (i) that as Master with coordinate jurisdiction, she was unable to pronounce on the validity of the Order; and (ii) the proceedings before her were commenced without the leave of the court, are clearly not in compliance with the Liquidation Order, and were improperly before the Court. The learned Master struck out the four claims with costs to the SIBL to be determined by the Court if not agreed. The appellant appealed to the Court of Appeal on several grounds alleging *inter alia* that the order which the Master relied on was not properly construed to refer to subject matter which did not fall within the liquidation and that the application to strike the claims was not supported by law. The respondent's counsel contended that the proceedings before the Master were entirely separate from the insolvency proceedings which resulted in the Winding-up Order; and that any challenge to that Order should be by way of the appeal process or perhaps by a set aside application in the insolvency proceedings which the Master had no jurisdiction to determine. The appellants seek an order reversing the judgment of the master.

Held: allowing the procedural appeal; setting aside the order of the Master which struck out the claims and awarded costs to the respondent; and making no order as to costs, that:

1. In the absence of local statutory provisions and rules regulating the practice and procedure for challenging a winding-up order made pursuant to section 304 of the IBC Act or bringing proceedings during the pendency of the winding-up proceedings against or on behalf of the Company in liquidation, The Third Group of Parts: Part VII in the English Insolvency Rules 1986 as amended relating to Court Procedure and Practice and Practice Direction PD5 relating to the Distribution of Business of the Companies Court in England applies.

2. Although the applications to set aside the default judgments were not "ordinary applications" or "originating applications" within the meaning of Rule 7.2 (2) of the English Insolvency Rules and were not brought by the liquidators for the respondent or titled as, the Rules required the decision of the Master is to be treated as a decision within the winding-up proceedings under the Rules despite the irregularities.

3. The Master's jurisdiction in winding-up proceedings is prescribed by the relevant Insolvency Rules and the English Practice Direction 5 and her authority arising from the respondent's applications came to an end when she made her order setting aside the default judgments.

4. Since the appellants had filed their claims without the leave of the Court and were in breach of the winding-up order, the Rules provide for the order to be enforced as a judgment in appropriate proceedings before a judge publicly.

5. The Master was correct in concluding that she had no jurisdiction to pronounce on the validity of the Liquidation Order. However, she erred in assuming jurisdiction without there being an existing ordinary application before the court addressing the appellants' non-compliance with paragraph 25 of the Order.

JUDGMENT

[1] EDWARDS, J.A.: This is a procedural appeal against the decision of Master Mathurin made on 6th May 2010 in a written ruling relating to the validity of four claims: Nos. ANUHCV 2009/0347; ANUHCV 2009/0348; ANUHCV 2009/0349; and ANUHCV 2009/0350. These claims were all filed on 26th June 2009 after a liquidation order was made in Claim No. ANUHCV 2009/1049 on 15th April 2009 in respect of the respondent/defendant Stanford International Bank Limited ("SIBL").

[2] The Liquidation Order mandated that the respondent/defendant SIBL be liquidated and dissolved pursuant to the International Business Corporations Act[1] ("the IBC Act"). The Order appointed Mr. Nigel Hamilton-Smith and Mr. Peter Wastell to be the liquidators of SIBL. Paragraph 25 of the Liquidation Order stated that:

> "All actions, proceedings and any claims whatsoever and wheresoever initiated against the Bank, its assets and property, are hereby stayed and no person, which shall include a body corporate, shall bring or continue with a claim or proceeding in Antigua or Barbuda or elsewhere as against the Liquidators or the Bank without leave of this Honourable Court."

The appellants did not obtain leave from the Court to file their claims.

The Ruling of the Master

[3] Between 23rd September 2009 and 6th May 2010 Master Mathurin determined applications to set aside the default judgments entered in relation to these four claims, made an order on 13th November 2009, and apparently gave further directions to the parties prior to her questioned ruling. She reserved the question arising, as to whether the claims were validly filed where they were filed without

[1] Cap. 222, Revised Laws of Antigua and Barbuda 1992 (as amended).

the leave of the Court, to be determined at the hearing on 18th March 2010 after counsel for the parties had filed their submissions.

[4] At the hearing before the Master on 18th March 2010, the claimants contended that the direction at paragraph 25 of the Liquidation Order is not one which the Court could validly make under the IBC Act, and as such the Master, being of coordinate jurisdiction ought to pronounce on its validity. The appellants also requested the Master to determine whether the Liquidation Order could validly refer to monies which are not the subject matter of SIBL's assets or over which they had a lien prior to the liquidation. The respondent's counsel contended that the Master had no jurisdiction to pronounce on the validity of the directions in the Liquidation Order. Neither did the Master have jurisdiction to determine what assets are a part of the assets of liquidation.

[5] The Master ruled: (i) that as Master with coordinate jurisdiction, she was unable to pronounce on the validity of the Order; and (ii) the proceedings before her were commenced without the leave of the court, are clearly not in compliance with the Liquidation Order, and were improperly before the court. The learned Master struck out the four claims with costs to the SIBL to be determined by the court if not agreed.

The Procedural Appeal

[6] The appellants obtained leave to appeal on 22nd June 2010. The Notice of Appeal was filed on 6th July 2010. Considering that this was a procedural appeal (as it then was prior to the Amendment Rules 2011 in October 2011 which repealed CPR 62.10 and substituted a new Rule) the appellants were required to file and serve their written submissions in support of the appeal with the Notice of Appeal. The legal representatives for the appellants did not file any written submissions, and did not serve notice that they intended to rely on the submissions in support of the application for leave to appeal which were previously filed on 14th May 2010. The parties kept silent, the procedural appeal escaped the case management

radar, and was brought on track only after the Full Court made an order on 17th May 2011 at the Antigua sitting of the Court, and Edwards J.A. made an order on 1st July 2011.

[7] In their Notice of Appeal, the appellants state that they are challenging the following findings of law:

> "1. That the claims could not be brought in the High Court without leave of a judge.
> 2. That an order made by the High Court (Harris J.) in proceedings in which the appellants were not parties prevented them from bringing the proceedings herein without leave.
> 3. That the claims were not properly brought without leave and must be struck out."

The Grounds of Appeal

[8] The grounds of appeal are repetitious and badly drafted. Only grounds 2 and 9 are really grounds of appeal. They allege:

> "2. The order of the High Court upon which the Master relied was not properly construed to refer to subject matter which did not fall within the liquidation the Master having found compelling the contention that the assets claimed by the appellants in their action did not so fall.
> …
>
> 9. The Master misapplied the law which requires the Court to protect the integrity of its process…"

[9] The other so called grounds are not in accordance with CPR 62.4(5) as they are arguments and narrative in my view. They may be summarised as follows: the appellants were entitled to access the High Court without leave to pursue their claims, that there was no jurisdiction in the High Court to prevent their access to the court, there being no constitutional or statutory bar to the institution of their claims; the Liquidation Order did not bind the appellants; the Judge had no inherent jurisdiction to bar the appellants' access to the court to claim monies due to them after their accounts were closed with SIBL; the application to strike the claims was not supported by law and was an abuse of process; the Master ought

to have held that the respondent and/or its liquidators were not entitled to hold the monies claimed by the appellants.

[10] The appellants seek an order reversing the judgment of the Master with costs in the Court of Appeal and in the High Court and a further order that judgment for the monies claimed be entered for the appellants or in the alternative that the matter be heard and determined by a judge of the High Court on its merits in the event there is a defence to the claims.

The Court's Jurisdiction under the International Business Corporations Act

[11] There are no special statutory provisions in the IBC Act which regulate the practice and procedure to be followed by persons who are aggrieved by and wish to mount a challenge against a winding–up order made pursuant to section 304 of the IBC Act. Neither are there any local rules of court regulating the practice and procedure that must be followed by persons wishing to commence or continue proceedings against a company that is in liquidation pursuant to an order made under section 304 of the IBC Act. However, section 351(2) of the IBC Act provides that, "the court may make such regulations and rules of court as it considers necessary for the better administration of Part IV" [i.e. sections 284 to 315 which deal with winding up corporations]. No such rules have been made to date. It is settled law that in the absence of special provisions in the IBC Act and local court rules in Antigua and Barbuda, section 11 of the Eastern Caribbean Supreme Court Act[2] calls for the existing English law and practice governing winding-up proceedings by the court, that can be conveniently used in Antigua and Barbuda to be adopted.[3]

[12] The Companies Court which is a part of the Chancery Division, adjudicates on High Court applications under the English Companies Act 1985 and the

[2] Cap. 143, Revised Laws of Antigua and Barbuda 1992.
[3] See Hugh C. Marshall Snr. v Antigua Aggregates Limited and Others, Antigua and Barbuda Civil Appeal No. 23 of 1999 at paras. 15-16, (delivered 26th June 2000, unreported).

Insolvency Act 1986 as amended. The Companies Court hears and determines issues arising from proceedings under both Acts which may include the winding up of companies, liquidation of companies, giving directions to liquidators, proceedings between a company in liquidation and other persons who may be creditors or contributories, and granting the relief sought by the parties or refusing to exercise its powers or jurisdiction in those circumstances.

[13] It is convenient to start the review of the relevant provisions of the English Insolvency Act 1986 as amended ("the English Act") by referring to The First Group of Parts: Part IV Chapter VI which contains provisions for the winding up of companies by the court. Sections 122 and 125 of the English Act are comparable to section 304 of the IBC Act. It is also important to note that although the court's powers under section 304 of the IBC Act do not include a power to stay existing legal proceedings against the company in liquidation, or the power to order that no future legal proceedings must be brought against the company without the leave of the court, section 130 of the English Act states as follows:

> "130. Consequences of winding-up order
> (1) On the making of a winding-up order, a copy of the order must forthwith be forwarded by the company (or otherwise as may be prescribed) to the registrar of companies, who shall enter it in his records relating to the company.
> (2) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.
> (3) When an order has been made for winding up a company registered under section 680 of the Companies Act, no action or proceeding shall be commenced or proceeded with against the company or its property or any contributory of the company, in respect of any debt of the company, except by leave of the court, and subject to such terms as the court may impose.
> (4) An order for winding up a company operates in favour of all the creditors and of all the contributories of the company as made on the joint petition of a creditor and of a contributory."

[14] The Third Group of Parts: Part VII in the English Insolvency Rules 1986 as amended ("the English Rules") contains provisions dealing with miscellaneous

matters bearing on both company and individual insolvency relating to Court Procedure and Practice.

[15] The English Civil Procedure Rules like our Civil Procedure Rules 2000 do not apply to insolvency proceedings except to the extent that they are applied to those proceedings by another enactment. Chapter 9 Rule 7.51A(1) states that certain provisions of the English CPR (including Practice Directions) must be applied to insolvency proceedings in the High Court "with any necessary modifications, except so far as inconsistent with these Rules." For the purposes of the instant appeal, those Rules in the English CPR are Parts 1, 31, 37, 44, 47 and 52.

[16] Rule 7.51A(2) and (3) state as follows:

> "(2) Subject to paragraph (3) the provisions of the CPR (including any related practice direction) not referred to in the table [this table lists the provisions in the CPR and the corresponding enabling English Insolvency Rules which make the CPR provisions applicable] apply to proceedings under the Act and Rules with any necessary modifications, except as far as inconsistent with these Rules.
>
> (3) All insolvency proceedings must be allocated to the multi-track for which CPR 29 makes provision, and accordingly those provisions of the CPR which provide for allocation questionnaires and track allocation do not apply."

The multi-track in England is for claims over 15,000 pounds or claims which are considered complex.

[17] Rule 7.51A suggests that the Insolvency Rules prevail where there is conflict between the Insolvency Rules and the applicable provisions of the English CPR. Arguably, it may be more convenient to substitute the corresponding practice or procedure under our CPR 2000 which is comparable to the applicable rule in the English CPR where the rules governing such practice and procedure in the English CPR conflict with our CPR 2000 Rules. Those are my observations however, and I make no determination on that matter in this appeal.

[18] Rule 7.6 in Chapter 1 tells us how the court's business is allocated. It states:

> "7.6 (1) Unless allowed or authorised to be made otherwise, every application before the registrar shall, and every application before the judge may, be heard in chambers.
>
> (2) Unless either–
>
> (a) the judge has given a general or special direction to the contrary, or
>
> (b) it is not within the registrar's power to make the order required, the jurisdiction of the court to hear and determine the application may be exercised by the registrar, and the application shall be made to the registrar in the first instance.
>
> (3) Where the application is made to the registrar he may refer to the judge any matter which he thinks should properly be decided by the judge, and the judge may either dispose of the matter or refer it back to the registrar with such directions as he thinks fit.
> …
>
> (4) Nothing in this Rule precludes an application being made directly to the judge in a proper case."
> (My Emphasis.)

[19] There are also Practice Directions issued by the Lord Chancellor which complement the English Rules. Practice Direction ("PD") 5 deals with the Distribution of Business of the Companies Court. PD 5 provides:

> "5. DISTRIBUTION OF BUSINESS
> 5.1 The following applications shall be made direct to the Judge and, unless otherwise ordered, shall be heard in public:
> (1) Applications to commit any person to prison for contempt;
>
> (2) Applications for urgent interim relief (e.g. applications pursuant to s.127 of the Act prior to any winding up order being made);
>
> (3) Applications to restrain the presentation or advertisement of a petition to wind up; or
>
> (4) Applications for the appointment of a provisional liquidator;
>
> (5) Petitions for administration orders or an interim order upon such a Petition;

(6) Applications after an administration order has been made pursuant to s.14(3) of the Act (for directions) or s.18(3) of the Act (to vary or discharge the order);[4]

(7) Petitions to discharge administration orders and to wind up;

(8) Applications pursuant to s.5 (3) of the Act (to stay a winding up or discharge an administration order or for directions) where a voluntary arrangement has been approved

5.2…

5.3 The following matters will also be heard in public:
(1) Petitions to wind up;

(2) Public examinations;

(3) All matters and applications heard by the judge, except those referred by the Registrar or the District Judge to be heard in private or so directed by the Judge to be heard.

[20] These English Rules must be tailored to the circumstances existing in Antigua and Barbuda where the jurisdiction of the High Court in insolvency proceedings is exercised only by a judge who may hear insolvency matters either (i) in public or where directed in private; or (ii) in chambers, depending on the nature of the matter or application. Since the master exercises the authority and jurisdiction of a judge of the High Court sitting in chambers, the master has the authority to hear only those insolvency matters which may be heard by a judge in chambers.[5]

[21] The law that I have considered so far has confirmed that an application in insolvency proceedings may be heard by the judge or master in chambers, unless–(a) it falls into the category of applications designated to be heard in public by the English Distribution of Business Practice Direction 5; or (b) it is an

[4] Section 14 (3) of the Insolvency Act 1986 as amended deals with cross border insolvency.
[5] See section 12A of the Eastern Caribbean Supreme Court Act amended by Section 3 of Act No. 17 of 2000 which inserted the following provision as section 12A: "12A (1) Masters shall exercise the authority and jurisdiction of a judge of the High Court sitting in chambers and such other authority and jurisdiction as may from time to time be assigned by Rules of Court made under section 17 of the Courts Order. (2) Where a Master has and exercises jurisdiction in relation to any matter, the Master shall have all the powers, rights, immunities and privileges of a Judge in relation to such matter."

application which the judge directs should be heard publicly or in private; or (c) it is an application which the master has referred to a judge for hearing in public or in private; or (d) where the application is requesting a declaration or an injunction or some other order that the master has no jurisdiction to make.

[22] Finally, the review and appeals process is regulated by Rules 7.47 and 7.49 of the English Rules and the PD–Insolvency Proceedings 17. Rule 7.47 as amended states:

> "(1) Every court having jurisdiction under the Act to wind up companies may review, rescind or vary any order made by it in the exercise of that jurisdiction.
>
> (2) Appeals in civil matters in proceedings under Parts 1 to 4 of the Act and Parts 1 to 4 of the Rules lie as follows–
>
> (a) to a single judge of the High Court where the decision appealed against is made by the county court or the registrar;
>
> (b) to the Civil Division of the Court of Appeal from the decision of a single judge of the High Court.
>
> …
>
> (4) Any application for the rescission of a winding-up order shall be made within 5 business days after the date on which the order was made."

[23] Rule 7.49A deals with procedure on appeal and states as follows:

> "(1) An appeal against a decision at first instance may only be brought with either the permission of the court which made the decision or the permission of the court which has jurisdiction to hear the appeal.
>
> (2) An appellant must file an appellant's notice (within the meaning of CPR Part 52) within 21 days after the date of the decision of the court that the appellant wishes to appeal.
>
> (3) The procedure set out in CPR Part 52 applies to any appeal to which this Chapter applies."

[24] The PD–Insolvency Proceedings paragraph 17.3 states:

> "(1) Section 55 of the Access to Justice Act 1999 has amended section 375 (2) of the Act and Insolvency Rules 7.47(2) and 7.48(2) so that an appeal from a decision of a judge of the High Court made on a first appeal lies, with the permission of the Court of Appeal, to the Court of Appeal.

(2) An appeal from a judge of the High Court in insolvency proceedings which is not a decision of a first appeal lies with the permission of the judge or the Court of Appeal, to the Court of Appeal (See CPR Part 52 rule 3);

(3) The procedure and practice for appeals from a decision of a judge of the High Court in insolvency proceedings (whether made on a first appeal or not) are also governed by Insolvency Rule 7.49 which imports the procedure and practice of the Court of Appeal as stated in Paragraph 17.2(2)."

[25] PD 17.14 states that: "Unless the appeal court or the lower court orders otherwise an appeal notice shall not operate as a stay of any order or decision of the lower court." PD 17.25 states that where a judge of the High Court has made a winding-up order and an application is made for a stay of proceedings pending appeal:

> "(1) the judge will not normally grant a stay of all proceedings but will confine himself to a stay of advertisement of the proceedings.
>
> (2) where the judge has granted permission to appeal any stay of advertisement will normally be until the hearing of the appeal but on terms that the stay will determine [terminate] without further order if an appellant's notice is not filed within the period prescribed by the rules.
>
> (3) where the judge has refused permission to appeal any stay of advertisement will normally be for a period not exceeding 28 days. Application for any further stay of advertisement should be made to the Court of Appeal."

[26] I am reminded by PD 17.17 to 17.18 as to my powers as a single judge determining this appeal, and how I should proceed on this procedural appeal which relates to insolvency proceedings under the IBC Act. Every appeal shall be limited to a review of the decision of the lower court. The appeal court has power to: (a) affirm, set aside or vary any order made or given by the lower court; (b) refer any claim or issue for determination by the lower court; (c) order a new trial or hearing; (d) make a costs order. The appeal court may exercise its powers in relation to the whole or part of an order of the lower court.

[27] PD 17.18 reminds me further that:

> "17.18 (3) The appeal court will allow an appeal where the decision of the lower court was:
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

The Submissions of Counsel

[28] Learned counsel Mr. John submitted that the learned Judge had no power to make the order at paragraph 25 of the Winding-up Order in relation to the appellants rights to access the court to file their claims for redress arising from the respondent's breaches of contract and trust which were not caught by the liquidation proceedings. In so far as the Master properly heard and determined the applications to set aside the judgments, she was exercising case management powers at that stage and she may, in exercise of those powers, dismiss the claims on the authority of the Rules. However, the Master in considering whether to dismiss the claims should consider the merits of the claims in view of the Judge's Winding-up Order and the absence of statutory provision in the IBC Act for the Judge to make an order preventing proceedings being brought without leave. Mr. John submitted further that where the Master considered that she had no jurisdiction to determine whether Harris J. had jurisdiction to make the order barring unimpeded access to the court without statutory authority, the Master would have jurisdiction under CPR 26.1(2)(q) and (w) to refer the question back to the Judge to hear the objection and to determine whether the objection is made out. CPR 26.1(2)(q) and (w) give the court case management powers to: "(q) stay the whole or any part of any proceedings generally or until a specified date or event; (w) take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective."

[29] Mr. John contended also that the Master had jurisdiction to determine the scope of the Winding-up Order and what assets are part of the liquidation, having regard to his submissions on paragraph 25 of the Winding-up Order and the appellants'

case that the Order does not apply to proceedings which do not concern assets not available for distribution to creditors. He stated that where the Master decided that she had no jurisdiction to determine the scope, she ought to have referred the issue to the judge for determination instead of striking out the claims.

[30] Learned counsel Mr. Christopher contended that the proceedings before the Master were entirely separate from the insolvency proceedings which resulted in the Winding-up Order. Any challenge to that Order should be by way of the appeal process or perhaps by a set aside application in the insolvency proceedings. He submitted quite correctly, that regardless of the appellants' contention about paragraph 25 of the Winding-up Order, it remained a valid order which the appellants were obligated to obey until it is discharged. Mr. Christopher referred to the observations of Rommer L.J. in Hadkinson v Hadkinson[6] who stated that:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void." (Emphasis added)

[31] Mr. Christopher submitted also that under the applicable English Rules the power to review, rescind or vary the Winding-up Order can only be exercised by a court with jurisdiction to hear substantive winding-up applications; and the Master had no jurisdiction to hear such applications since those applications have to be made within the winding-up proceedings. In the circumstances, the Master was correct in holding that she did not have the requisite jurisdiction to examine the validity of the stay provision, he said. She was also correct in striking out the claims.

Were the Proceedings Before the Master Insolvency Proceedings?

[32] It was the applications to set aside the default judgments in the four claims that were filed on 29th September 2009 by the legal representatives of the respondent

[6] [1952] 2 All E.R. 568 at 569.

company which supposedly gave the Master jurisdiction to determine the issues she identified in her written decision. These applications were not brought by the joint liquidators for the benefit of the creditors of the respondent company despite paragraph 19 of the Winding up Order.[7] Under section 305(1)(b) of the IBC Act upon the liquidation order being made, "the powers of the directors and shareholders cease and are vested in the liquidator, except as specifically authorised by the court." Each Notice of Application was supported by an affidavit not from either of the joint liquidators, but from Juliette L. Dunnah a legal clerk in the Chambers of Messrs. Lake & Kentish.

[33] Rules 7.2 to 7.9 of the English Insolvency Rules govern the special procedure for making applications under the English Insolvency Act. These rules provide for the specific form, content, making, filing, and service of an 'originating application' in Form 7.1 or an 'ordinary application' in Form 7.2. Further, Rule 7.2(1) of the English Rules states that: "originating application" means an application to the court which is not an application in pending proceedings before the court; and "ordinary application" means any other application to the court." Rule 7.2(2) states that, "Every application shall be in the form appropriate to the application concerned." (Emphasis mine.)

[34] The applications to set aside the default judgments were not "originating applications in Form 1 under the Insolvency Rules. They were standard applications under Part 11 of CPR 2000 bearing no title which was consistent with insolvency proceedings.[8] The scope of the respondent's applications to set aside the default judgments would be a limited one confined to a Part 13 investigation under CPR 2000. In other words it is different from an investigation under the IBC Act and the English Insolvency Rules. An application to set aside a default judgment where the applicant/defendant is not a company in liquidation would

[7] Paragraph 19 of the Winding up Order states: "The liquidators shall have the authority to initiate, prosecute and continue the prosecution of any and all proceedings, and to defend all proceedings for the benefit of the Bank's creditors now pending or hereinafter initiated with respect to the Bank and, upon receiving the approval of this Court, to settle or compromise any such proceeding."
[8] See paragraph 37 below.

normally be heard by the master or a judge in chambers. Where such an application is brought within insolvency proceedings, then pursuant to Rule 7.6 and the English Distribution of Business Practice Direction 5, that application could be heard by a judge in chambers or a master, subject to a direction from the court that it be heard by a judge in open court.

[35] However, the affidavit of Ms. Dunnah in support of each of the applications deposed that:

> "I am advised by counsel that the claim herein is an abuse of process as it is designed to unlawfully "jump the queue of creditors and depositors" by pursuing this claim for breach of contract. The claims of all creditors and depositors must be determined and settled in accordance with the order of priority set out in the International Business Corporations Act, Cap. 222. Consequently, I believe that the Defendant/Applicant has a real prospect of successfully defending the Claim."

Surprisingly, the respondent's applications did not refer to paragraph 25 of the Winding-up Order which forbade the filing of proceedings against the respondent company in liquidation. Neither was this mentioned in the filed draft defence which accompanied each application. Neither the original statements of case for each appellant, nor their amended statements of case foreshadowed any challenge to paragraph 25 of the Winding-up Order.

[36] There was obviously pending insolvency proceedings before the court, namely the winding up proceedings arising from the Order made on 15th April 2009 by Harris J. In that regard, the rules contemplate that an "ordinary application" under Part 7 of the English Insolvency Rules would be made within the winding-up proceedings in my view. Section 308(1)(b) of the IBC Act states that a liquidator may bring, defend, or take part in any civil criminal or administrative action or proceeding in the name and on behalf of the company in liquidation. I have also previously (at paragraph 32 above) referred to paragraph 19 of the Winding-up Order and section 305(1)(b) of the IBC Act to buttress my view. Consequently, I conclude that the applications should have been brought by the liquidators on behalf of the creditors of the respondent Company by way of an "ordinary application" in

relation to each claim in the winding up proceedings, and the applications would bear the appropriate title prescribed by the English Insolvency Rules.

[37] Rule 7.26 in Chapter 5 mandates that: "(1) Every proceeding under Parts 1 to VII of the Act shall, with any necessary additions, be entitled "IN THE MATTER OF ... (naming the company to which the proceedings relate) AND IN THE MATTER OF [THE INTERNATIONAL BUSINESS CORPORATION ACT CAP. 222 AND] THE INSOLVENCY ACT 1986 [UK]."

[38] Although the respondent's applications were irregularly brought outside the scope of the IBC Act and the English Insolvency Rules, I do not agree with Mr. Christopher that the master could not assume insolvency jurisdiction at all over the application. It seems to me, without hearing arguments from counsel for the parties on this, that the applications may be treated as insolvency proceedings which would be validated by Rule 7.55 in Chapter 9 of the English Rules. This rule states that:

> "No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect of the irregularity, and that the injustice cannot be remedied by any order of the court."[9]

Counsel for the respondent who was then Mr. Kendrickson Kentish did submit before the Master that there was no application under the Insolvency Rules. The learned Master thereafter, apparently proceeded as if she was exercising jurisdiction within the winding-up proceedings. In the circumstances, I would waive the defect in the proceedings before the Master, and treat those proceedings as having been brought within the winding-up proceedings. I would also treat the Master's decision as a decision arising in insolvency proceedings under the IBC Act and the English Insolvency Act and Rules.

[9] See Re Continental Assurance Co. of London Plc (in liquidation) No. 2 [1998] 1 B.C.L.C. 583.

Did the Master have Jurisdiction to Rule on the Validity of the Claims and Strike out the Claims?

[39] On 13th November 2009, the learned Master set aside the default judgments and ordered that the parties file submissions on whether the claims are validly before the Court. Under the English Rules, Rule 7.10 regulates adjournments of hearing. It states:

> "Adjournments of hearing: directions
> 7.10 - (1) The court may adjourn the hearing of an application on such terms (if any) as it thinks fit.
> (2) The court may at any time give such directions as it thinks fit as to –
> (a) service or notice of the application on or to any person, whether in connection with the venue of a resumed hearing or for any other purpose;
> (b) whether particulars of claim and defence are to be delivered and generally as to the procedure on the application;
> (c) the manner in which any evidence is to be adduced at a resumed hearing and in particular (but without prejudice to the generality of this sub-paragraph) as to –
> (i) the taking of evidence wholly or in part by affidavit or orally;
> (ii) the cross-examination either before the judge or registration the hearing in court or in chambers, of any deponents to affidavits;
> (iii) any report to be given by the official receiver or any person mentioned in Rule 7.9(1)(b);
> (d) the matters to be dealt with in evidence.

[40] Considering that there was no application by the respondent for relief on grounds that the appellants had disobeyed paragraph 25 of the Winding up Order, the question to be answered is whether the Court could raise the validity of the claims of its own motion, under the applicable English Rules, as the Master did. Both under the English Civil Procedure Rules and our CPR 2000 a court in the exercise of its case management powers would be able to decide on how issues arising from the pleadings should be dealt with, and permit the parties to address

them in their submissions. However, on the applications that were before the Master, and on the amended claims and amended statements of claim for each appellant, the details of paragraph 25 of the Winding-up Order, were never pleaded or referred to at all. Neither did the question arise on the documents before the Master as to whether the appellants had previously obtained the leave of the Court to file the claims. Where that question arose as a result of oral submissions only, the submissions would give the Court no jurisdiction to investigate whether it can pronounce on the validity of paragraph 25 of the Order in my view. I am also of the view that the Master would have no jurisdiction to determine whether or not the claims were validly filed in the circumstances. The Court's jurisdiction for further investigation would arise only where an application with supporting affidavit alleging a breach of the Order was before the Court, and the appellants were given the opportunity to respond to the application in the manner contemplated by Rule 7.8 and/or other relevant Rules.

[41] Rule 7.19(1) in the Third Group of Parts: Part 7 Chapter 4 of the English Rules provides that: "In any insolvency proceedings, orders of the court may be enforced in the same manner as a judgment to the same effect." The fact that Rule 7.19(1) specifically stipulated how a breach of paragraph 25 of the Winding-up Order should be treated strongly suggests that in the absence of an ordinary application addressing the appellants' non compliance with paragraph 25 of the Winding-up Order that issue was not validly before the Master. Looking at the relevant Rules governing Insolvency proceedings in Antigua and Barbuda, it appears that the Master's authority arising from the respondent's applications to set aside the default judgments came to an end when the Master made her order setting aside the default judgments. Her powers thereafter would be confined to giving case management directions concerning the filing of a defence and further pleadings from the appellants if necessary so that the matter would come on for case management.

[42] Moreover, Rule 7.47 in Chapter 6 states: "7.47(1) Every court having jurisdiction under the Act to wind up companies may review, rescind or vary any order made by it in the exercise of that jurisdiction." The process of review is apparently by way of an application and is different from an appeal. It would be open to the appellants to make an "ordinary application" consistent with Rules 7.2 in the insolvency proceedings for paragraph 25 of the Winding up Order to be reviewed or varied. They would also be entitled to make an "ordinary application" for leave to proceed with their claims if they chose to. Rule 7.53 in Chapter 9 of the English Rules states that where a company is being wound up a creditor of the company is entitled to attend in court or in chambers at any stage of the proceedings at his or her own costs. The Rules also permit the liquidators to apply to the court in the liquidation proceedings, to enforce paragraph 25 of the Winding-up Order against the appellants.

[43] Having filed their claims without leave, the appellants were in breach of the Winding-up Order which may be enforced as a judgment in appropriate applications and circumstances under the relevant English Rules. Neither the appropriate circumstances nor the appropriate applications existed when the Master assumed jurisdiction to strike out the claims. Though the Master was quite correct in concluding that she had no jurisdiction to pronounce on the validity of the Winding-up Order, the Master was wrong to assume jurisdiction without there being any existing application before the court to enforce the Winding up Order against the appellants. In the premises she erred in striking out the appellant's claims. The appellants' other grounds of appeal have been rendered otiose in light my findings on the jurisdiction issues.

[44] I would allow the procedural appeal, set aside the order of the Master which struck out the claims and awarded costs to the respondent.

[45] The appellants have succeeded on the grounds relating to the wrongful striking out of their claims and have not been successful on the other grounds. Considering that it was the Master who assumed jurisdiction and directed that submissions be filed I would apply our costs rules under CPR 64.6(2) and (6); and CPR 65.11(3) instead of the English Rules governing costs in insolvency proceedings, and make no order as to costs. In doing so I have also taken into account the conduct of the appellants in pursuing their claims as an additional special circumstance for not ordering the respondent to pay the costs in the appeal to the appellants.

Ola Mae Edwards
Justice of Appeal