THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 101 of 2011

BETWEEN:

STANLEY DEFREITAS
(TRADING AS DEFREITAS AND ASSOCIATES)

Claimant/Respondent

AND

TRANSGLOBAL INC
(IN LIQUIDATION)

First Defendant/Applicant

AND

INTERNATIONAL FINANCIAL SERVICE AUTHORITY

Second Defendant

NO. 102 OF 2011

STANLEY DEFREITAS
(TRADING AS DEFREITAS AND ASSOCIATES)

Claimant/Respondent

AND

HORIZON BANK INTERNATIONAL LIMITED
(IN LIQUIDATION)

First Defendant/Applicant

AND

INTERNATIONAL FINANCIAL SERVICE AUTHORITY

Second Defendant

Appearances:

Mr. Joseph Delves for the Claimant/Respondent
Mr. Grahame Bollers for the First Defendant
Mr. P.R. Campbell Q.C. for the Second Defendant

2012: October
2013: March 12

JUDGEMENT

[1] **THOM J.** - On March 4 2011 Mr. Stanley DeFreitas having obtained leave of the Court instituted proceedings against Transglobal Bank Inc. (In Liquidation), (Transglobal) and the International Services Authority (IFSA) and against Horizon Bank International (In Liquidation) (Horizon), seeking payment of the sum of US$26,490.25 along with interest at 6% from April 2005 until payment from Transglobal and IFSA, and the sum of US$130, 127.23 along with interest of 6% from April 2005 until payment and interest on US$31,452.43 at 6% from April 2005 to January 10, 2011, from Horizon and IFSA.

[2] Transglobal and Horizon seek to have the order granting leave set aside and the claim struck out.

BACKGROUND

[3] Transglobal and Horizon were licensed by IFSA to operate as International Banks pursuant to the International Banks Act 1996, (IBA Act) as amended.

[4] On November 11, 2004 IFSA acting pursuant to Section 18(2) (e) of the IBA Act appointed Mr. DeFreitas as controller of Transglobal and Horizon. The terms of the engagement in each case were set out in two letters of the Executive Director of IFSA dated November 11, 2004 and November 29, 2004.

[5] On 6th June, 2005 and on 29th July, 2005 the Court ordered that Horizon and Transglobal be compulsorily wound up and the Court appointed Mr. Marcus A. Wide as the Liquidator. Paragraph 14 of the Horizon winding up Order and Paragraph 16 of the Transglobal winding up Order which are in identical terms prohibits the institution of proceedings against the company without the leave of the Court. The paragraphs read as follows:

> "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 against the liquidator or the Bank without leave of this Honourable Court."

[6] On November 12, 2010 Mr. DeFreitas lodged a proof of debt with the Liquidator in relation to Horizon in which he asserted that he was owed the sum of US$161,579.69 for services rendered as controller of Horizon. In his proof of debt Mr. DeFreitas contended that he was a preferred creditor by virtue of his appointment by IFSA.

[7] The Liquidator rejected Mr. DeFreitas' claim as preferred creditor and treated Mr. DeFreitas as an ordinary creditor. On December 17, 2010 Mr. DeFreitas was paid the sum of US $31,452.56 representing 19.20% share to which unsecured creditors were entitled. Mr. DeFreitas did not appeal the decision of the Liquidator.

[8] On the 14th March 2011 Mr. DeFreitas by without Notice Application sought leave of the Court to institute proceedings for payment of the sums mentioned in paragraph 1.

[9] On March 9, 2011 Bruce-Lyle J. granted Mr. DeFreitas leave to institute these proceedings.

[10] On April 5, 2012 Transglobal and Horizon applied to the Court to set aside the leave granted to Mr. DeFreitas and to strike out the claim.

[11] The grounds set out in the Transglobal application are:

(1) Leave was obtained without notice to Transglobal. Leave is only granted without notice in exceptional cases where leave is urgently required.

(2) Mr. DeFreitas is an ordinary creditor who is seeking to obtain an unfair advantage over the other ordinary creditors and leave ought not to have been granted.

(3) Leave ought not to have been granted because the issue of Mr. DeFreitas' fees can be determined in the winding up, there is no need for a separate action.

[12] The grounds set out in the Horizon application are:

(1) Leave was obtained without notice to Horizon. Leave is only granted without notice in exceptional cases where leave is urgently required.

(2) Mr. DeFreitas failed to disclose material facts and law at the hearing of the Without Notice Application including:

(a) His proof of claim to be admitted as a secured creditor had been rejected by Horizon.

(b) Rule 4.83 of the Insolvency Rules required him to file an appeal within 21 days and he failed to file an appeal within the requisite time.

(c) He failed to inform the Court that he had received US$31,152.58 from Horizon as an unsecured creditor.

(d) He failed to inform the Court that he as an unsecured creditor does not fall within any of the preferential payment items set out in Section 457(a) to (c) of the Companies Act and as an unsecured Creditor he is not entitled to institute proceedings in order to obtain an unfair advantage over the other unsecured creditors.

(3) Mr. DeFreitas is seeking to obtain an unfair advantage over the ordinary creditors.

[13] Mr. DeFreitas opposed the applications on the following grounds:

(a) The court has no jurisdiction to set aside the order.

(b) Section 386 of the Companies Act does not require an applicant to give notice of an application for leave.

(c) The material facts were disclosed to the Court.

(d) Section 381 does not permit the claim to be struck out, only a stay could be granted and no application was made for a stay. Also Transglobal and Horizon have not satisfied the requirements for the statement of case to be struck out.

JURISDICTION TO SET ASIDE THE ORDER

[14] Learned Counsel Mr. Delves for Mr. DeFreitas submitted that where leave is granted a court of equal jurisdiction cannot set aside the order. An appeal has to be made to the Court of Appeal.

[15] Learned Counsel Mr. Bollers in response submitted that the High Court has jurisdiction to set aside its own orders made without notice if made without full and frank disclosure. This principle applies to all without notice orders and not just to interim injunctions granted without notice. Mr. Bollers relied on the following authorities; **R v The General Commission Ex Parte Poligrac pp 505-506; Eton v Consultants Holdings Ltd v Dorot Properties Ltd BVIHCV 2007/0209; Kensington International Ltd v Montrow International Ltd (In Provisional Liquidation) BVIHCV 2007/0041; Fabric Sales Ltd v Eratex Limited and Another [1984] 1 WLR. 863.**

[16] Mr. Delves did not refer to any legal authority in support of his proposition. The jurisdiction to set aside its own order is a jurisdiction of the High Court. It is not a jurisdiction that is limited only to the judge who made the order. Each judge of the High Court has concurrent jurisdiction. In the Court of Appeal case of **Beach Properties Barbuda Limited, CCL Group Inc, All American Plazas Inc, v Laurus Master Fund Ltd, Laurus Capital Management LLC,** Civil Appeal No. 2 of 2007, the order granting the interim injunction was made by Thomas J. , on the return date Blenman J. (as she then was), set aside the order granting the injunction. This principle applies not only to injunctions but to all orders made without notice. I agree with the submission of Mr. Bollers that this court has jurisdiction to set aside the leave granted on the without notice application.

NOTICE

[17] In response to the contention of Transglobal and Horizon that they were not given notice of the Application for leave, Mr. Delves submitted that Section 386 of the Companies Act does not require notice to be given, nor is notice a requirement under the Insolvency Rules.

[18] Mr. Bollers submitted in response that leave ought not to be granted on an application without notice other than in exceptional cases where leave is urgently required. This was not an exceptional case where leave was urgently required. Mr. Bollers relied on **Mosbert Berhad (in Liquidation) v Stella D'Cruz; Fabric Sales Ltd v Eratex Limited and Another,** and **Derek French Applications to Wind up Companies** 2nd Edition Oxford University press 2008 at para 11.9.2

[19] Section 386 of the Companies Act reads"

> "When a winding up order has been made or a provisional liquidator has been appointed, no action or proceedings shall proceed with or commence except by leave of the Court, and subject to such terms as the Court may impose."

[20] In **Mosbert Berhad (In Liquidation),** a decision of the Supreme Court of Malaysia, the Supreme Court considered Section 226(3) of the Companies Act of Malaysia which is in identical terms as Section 386, the Court found that an application for leave should be made inter partes. However the Court found that since the Receiver was heard on the application to set aside the order granting leave, the judge having reviewed the matter could determine whether to set aside or reaffirm the decision to grant leave.

[21] The same position was adopted by the English Court of Appeal in **Fabric Sales Ltd.** Leave ought not to be granted ex parte except in exceptional cases. Kerr L. J at p.866 paragraph D-E stated the position as follows:

> "In my view this is one of these exceptional cases because of its urgency, where it was not improper to proceed by way of an ex parte application to the judge in chambers who was available and who as Eveleigh L.J has said, had jurisdiction to make his order, being a judge of the High Court, although it should generally be avoided to make such an application ex parte. What should then have happened is what we are faced with now. The liquidator, having had this order made against him ex parte with virtually no notice that the application was going to be made, should have gone back on the return date and applied for that order to be discharge, not on the ground that there was no jurisdiction to grant leave to institute the proceedings but on the ground – if he wished so to contend that such leave should not have been granted."

In **Fabric** there was an urgency in that the liquidator was in possession of goods which the Claimant alleged belonged to him and not the company in liquidation. In these circumstances an interim injunction was granted ex parte to prevent the liquidator from disposing of the goods.

[22] The principle that emanates from the authorities is that while leave should only be granted on an ex parte application in exceptional cases the failure to give notice is not fatal. The application to set aside being heard inter partes it is for the Court to determine whether to affirm the order granting leave or to set aside the order.

NON-DISCLOSURE

[23] Mr. Bollers submitted that there was non-disclosure of material facts and law by Mr. DeFreitas. In relation to Horizon, Mr. Bollers outlined the non-disclosure as being that;

(a) his proof of claim to be admitted as a preferred creditor had been rejected by the liquidator of Horizon,

(b) He failed to inform the Court that he had received US$31,152.58 from Horizon as an unsecured creditor,

(c) Rule 4.83 of the Insolvency Rules requires him to file an appeal within 21 days and he failed to file an appeal within the requisite time,

(d) He failed to inform the Court that he as an unsecured creditor does not fall within any of the preferential payment items set out in section 457(a) to (c), of the Companies Act and as an unsecured creditor he is not entitled to institute proceedings in order to obtain an unfair advantage over the other unsecured creditors.

(e) leave will not be given on an application made without notice to the insolvent Defendant other than in exceptional cases where leave is urgently required,

(f) leave will not be given if the question in issue can be resolved in the winding up proceedings.

(g) A claim in respect of something for which the Claimant has already put in a proof in the winding up will not be allowed to continue because he has elected to have the matter dealt with in the winding up.

(h) failure to inform the Court that leave will not be granted where the action will result in prejudice to the other creditors or to the orderly winding up of the First Defendant.

(i) failure to disclose that it is usual to give an undertaking where leave is granted that no order obtained in the proceedings will be enforced against the First Defendant without leave of the Court.

[24] Mr. Delves submitted that the statement of claim which was identical in every respect to the claim filed was disclosed with the Without Notice Application. The allegation of non-disclosure is therefore not true. In relation to Horizon, Mr. DeFreitas disclosed at paragraph 14 of the claim that the liquidators had acknowledged his claim but as an ordinary creditor. Mr. DeFreitas also disclosed that he had received the sum of US$31,152.58.

[25] In relation to Transglobal Mr. Delves submitted that Mr. DeFreitas is yet to prove his case as a creditor. Leave was granted to see if Mr. DeFreitas could get in the line of creditors.

[26] In response Mr. Bollers submitted that the application in support of each Application for leave consisted of two (2) paragraphs which contained no material facts other than the Banks (Transglobal and Horizon) were indebted to him while the statement of claim was disclosed, the proper place to disclose facts is in the affidavit not the exhibits - **National Commercial Bank of Sharjah v Dellborg and Others, The Times 24th December1992.**

[27] In relation to Transglobal Mr. Bollers submitted that there is no evidence that the liquidator has not recognised the claimant as a creditor of Transglobal. The issue whether he is a preferred creditor can be dealt with by submitting a proof of claim which can be appealed if it is rejected by the Liquidator.

[28] I agree with Mr. Bollers that it is settled law that an applicant who seeks leave on a Without Notice Application has a duty to make full and frank disclosure to the Court of all material facts. The material facts are to be disclosed in the affidavit in support of the application.

[29] The affidavit in each application which is sworn by a clerk in Mr. Delves' Chambers simply states in paragraph 1 that she is a clerk in the Mr, Delves' Chamber and has personal knowledge of the matters sworn in the affidavit. And in paragraph 2 that the Claimant seeks to bring a claim against the Defendants for a debt owed to him and that the claim form is exhibited.

[30] The law on disclosure as it relates to without notice applications is very clearly outlined by Gibson L.J. in **Brink's Mat Ltd. V. El Combe and Others** [1988] 1 WRL 1350. This approach was adopted by the Court of Appeal in **Edy Gay Addari V Enzo Addari** BVICVA No.2 of 2005. The principles are very well known therefore I will not repeat them. I will apply them to this case.

[31] While the disclosure should have been made in the affidavit rather than in an exhibit, the statement of claim in both, Transglobal and Horizon is very short, a mere three pages in the case of Transglobal and four pages in the case of Horizon. This is not a situation where the exhibit were voluminous and material facts were buried in them.

[32] While I agree that all of the matters identified by Mr. Bollers were not disclosed, I do not find that to be fatal in view of the test that the Court was required to apply in determining whether to grant leave.

[33] In deciding whether to grant leave the Court had to determine whether the claim cannot be dealt with adequately in the winding up, or whether the remedy the applicant seeks cannot be given in the winding up proceedings. Mr. DeFreitas' claim in both cases is that he was owed certain sums of money for services rendered to Transglobal and Horizon pursuant to his appointment as Controller of IFSA.

[34] In considering the Without Notice Application the Learned Judge had before him the following;

(a) Transglobal and Horizon were licensed to conduct banking business under IFSA.

(b) IFSA was the Regulatory Authority for such Banks.

(c) IFSA appointed Mr. DeFreitas as Controller of Transglobal and Horizon.

(d) Mr. DeFreitas performed the duties of Controller.

(e) He submitted his bills for payment to IFSA.

(f) He was not paid.

(g) Transglobal and Horizon were put into liquidation in 2005.

(h) In relation to Horizon Mr. DeFreitas made a proof of claim as preferred creditor, this was rejected and he was treated as an ordinary creditor and accordingly paid US $31,152.46.

I agree that Mr. DeFreitas did not state that he did not appeal the decision of the liquidator within the time limited for doing so Mr. DeFreitas having disclosed that his claim as a preferred creditor was rejected, and Mr. DeFreitas not having stated that he had appealed the decision, it must have been very obvious to the Learned Judge that the decision was not appealed.

[35] Having regard to the nature of Mr. DeFreitas' claim in both cases that he was owed either by Transglobal and Horizon for which he did work or by IFSA who appointed him Controller, and having regard to the test to be applied in determining whether to grant leave I do not find that there was material non-disclosure.

No Need for a Separate Action

[36] Mr. Bollers submitted that leave should not have been granted as there was no need for a separate action since Mr. DeFreitas' claim can be dealt with in the winding up proceedings. Mr. DeFreitas choose this scheme in relation to Horizon Bank. His claim was considered and rejected as being a preferred claim. Mr. DeFreitas had a right to appeal the decision of the liquidator. He choose not to file an appeal. Mr. Bollers referred the Court to the case of **Craven v Blackpool Greyhound Stadium and Racecourse Ltd** [1936] 3 AER p.423.

[37] Mr. Delves in response submitted that the application to set aside ought to have been made in the liquidation action. Further the application is irregular since there has been no application to enforce the winding up order pursuant to Section 7.2(1) and 7.2(2), of the Insolvency Rules and Transglobal and Horizon have not demonstrated that it would be just and beneficial for the Court to order a stay- see **Kippers et al v Stanford International Bank** Civ App. No. 25 of 2010. **Re J Burrows (Leads) Ltd** [1982] 2 AER p. 882, and **Cook V "X" Chair Patents Co. Ltd** [1959] 3 AER p.906.

[38] Mr. Bollers in response submitted that Mr. DeFreitas' application for leave should have been made in the winding up proceedings. He referred the court to paragraph 20.4 of the text **Corporate Insolvency Law and Practice** which states:

> "Where a winding up order has been made against the company or a provisional liquidator has been appointed, the leave of the Court is required before any action or other proceedings may be commenced or continued against the company. Leave must be obtained from the Court which made the winding up order. Where the order is made in the High Court any judge of the High Court may give leave. Leave should be sought by ordinary application in the winding-up proceedings where those proceedings are continuing ..."

[39] It is settled law that where a winding up order has been made by the Court, leave to institute proceedings against the company should be sought by an ordinary application in the winding up proceedings.

[40] It is not disputed that the winding up proceedings arising from the orders of the Court made on June 6, 2005 and July 29, 2005 are still pending. The application in this case was not made in the winding up proceedings and the application to set aside leave was not made in the winding up proceedings. This is an irregularity which could be put right by the Court. No injustice has been caused to either party by the irregularity - **Kippers v Stanford International Bank Ltd,** and Rule 7.55 of the Insolvency Rules which states;

> "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."

[41] I will now deal with Bollers' submission that Mr. DeFreitas' claims can be dealt with in the winding up proceedings so leave should not have been granted.

[42] The rationale for Section 386 was stated by Widgery L.J. in **Langley Construction (Brixton) Ltd v Wells** [1989] 2 AER p.46 as follows:

> "It is to ensure that when a company goes into liquidation the assets of the company are administered in an orderly fashion for the benefit of all the creditors, and that particular creditors should not be able to obtain an advantage by bringing proceedings against a company. What is contemplated is that the companies court shall be seized of all these matters and shall see that the affairs are wound up in a dignified and orderly way."

[43] A similar statement was made by James L.J. in **Re David Lloyd & Co** 1877, 6 Ch. D.339:

> "These sections ... 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 in the best way for distribution among all the persons who have claims upon them. There being only a small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should he harassing the company with actions and incurring costs which would increase costs against the company and diminish the assets which ought to be divided among the creditors."

[44] The Court has a discretion whether or not to grant leave to an applicant to institute proceedings against a company in liquidation. The Learned Authors of **Corporate Insolvency Law and Practice** at paragraph 20.5 outlines how this discretion should be exercised as follows:

> "In exercising its discretion to grant leave to continue or commence proceedings against the company the Court will be concerned to ensure that no creditor gains an advantage over other creditors in the same class. The essential object of a winding up is to ensure an equal distribution of the company's assets to the ordinary creditors after payment of any preferential claims ... where the proceedings are in existence, particularly where they are well advanced, the Court will generally give leave for the action to continue on the ground that it is more convenient to determine the issue between the Claimant and the Company in the existing proceedings than by invoking the procedure for determining disputed proofs, that is by application to the Court in the winding up proceedings. It is usual for leave to be granted on terms that no judgment obtained may be enforced without leave of the Court. Where no proceedings are in existence the creditor will usually not be given leave to commence proceedings, but will be expected to submit a proof of debt and follow the procedure on disputed proof before the winding up Court. After a creditor has submitted a proof he will be required to

follows the procedure in disputed proof; he will not be permitted to start proceedings in another Court."

[45] Leave to institute proceedings against a company in liquidation will only be granted where there is some issue which cannot properly be determined in the winding up proceedings. Where there is some issue which can be resolved in the winding up proceedings then leave to institute proceedings should not be granted. This principle is well illustrated in **Re Exchange Securities and Commodities Ltd and Others.** The Applicants had invested sums in companies which were later put into liquidation, and some applicants had also invested with a Mr. Hunt who was the principal shareholder of the companies. The applicants contended that they were not mere creditors but investors and the companies held their money on trust. Therefore they should be permitted to bring an independent action against both the company and Mr. Hunt. The Court refused the applications on the basis that the issue whether any trust interest subsist could be determined in the winding up proceedings. There were no special circumstances which necessitated a departure from the general approach.

[46] The issue in both cases is simply whether Mr. DeFreitas should be treated as a preferred creditor. In my opinion, this issue can be resolved in the winding up proceedings. In the case of Transglobal, Mr. DeFreitas has simply not filed a proof of claim in the winding up. No reason is given for his failure to so do. The submission of Mr. Delves that in relation to Transglobal, Mr. DeFreitas is now seeking to get in the line of creditors is wholly without merit. It is not necessary for Mr. DeFreitas to get an order against Transglobal before he is able to file a proof of claim in the winding up proceedings. In the case of Horizon the liquidator has already considered Mr. DeFreitas' claim to be treated as a preferred creditor and has denied it. The liquidator has found that Mr. DeFreitas is an unsecured creditor and he has been paid accordingly. The principle in **Craven V Blackpool** is that a creditor who has opted to prove his debt in winding up proceedings ought not to be allowed to select another method of adjudication; if he is dissatisfied with the decision of the liquidator then he should appeal that decision.

[47] Rule 4.83 of the Insolvency Rules gives a person who is dissatisfied with a decision of the liquidator of his proof of claim, a right of appeal to the court, Rule 4.83 reads:

> "4.83 – (1) If a creditor is dissatisfied with the liquidator's decision with respect to his proof (including any decision on the question of preference, he may apply to the court for the decision to be reviewed or varied. The application must be made within 21 days of his receiving the statement sent under Rule 4.82(2).
>
> (2) A contributory or any other creditor may, if dissatisfied with the liquidator's decision admitting or rejecting the whole or any part of a proof, make such an application within 21 days of becoming aware of the liquidator's decision.
>
> (3) Where application is made to the Court under the Rule, the court shall fix a venue for the application to be heard, notice of which shall be sent by the applicant to the creditor who lodged the proof in question (if it is not himself) and to the liquidator.
>
> (4) The liquidator shall on receipt of the notice, file in court the relevant proof, together (if appropriate) with a copy of the statement sent under Rule 4.82(2).
>
> (5) After the application has been heard and determined, the proof shall unless it has been wholly disallowed be returned by the Court to the liquidator.
>
> (6) The official receiver is not personally liable for costs incurred by any person in respect of an application under this Rule; and the liquidator (if other than the official receiver) is not so liable unless the court makes an order to that effect."

UNFAIR ADVANTAGE

[48] Mr. Bollers also submitted that Mr. DeFreitas in his claim in both cases is alleging that he is a preferred creditor which cannot he supported in law or fact. The purpose of Section 386 of the Companies Act is to ensure that the Bank's assets will be administered in accordance with the Companies Act and that no person obtains an advantage to which he is not entitled. – **Ex parte Walker.**

[49] Mr. Delves in response submitted that Transglobal and Horizon have failed to demonstrate how the granting of leave gave Mr. DeFreitas an unfair advantage over the ordinary or other creditors in the present circumstances where:

(a) Both Transglobal and Horizon can defend the action.

(b) The application to set aside leave and strike out was made twelve (12) months after leave was granted.

(c) The case has not reached the case Management stage.

[50] Mr. Delves further submitted that an ordinary creditor seeking an advantage is not a bar to relief - **Re Motivex** [1992] 2 AER, 246.

[51] In **Ex parte Walker** the Court found that the Claimant's claim for damages for negligence based on an industrial action was unlikely to obtain any advantage over the creditors and there was not likely to be any prejudice to the creditors or to the orderly winding up of the company. In so finding the Court adopted the statement of McLelland J in **Re Sydney Formworks Pty Ltd** (in liquidation) 1965 (NSWR) 646:

> "That the intention of the section is to ensure that the assets of the company in liquidation would be administered in accordance with the provisions of the Companies Act and that no person would get an additional advantage to which under those provisions, he was not properly entitled and to enable the court effectively to supervise all claims brought against the company which was being wound up.

[52] I agree that the principle which emanates from **Re Motivex** is that the fact that a Claimant may get an advantage, is a matter to be considered in the exercise of the discretion, but is not a complete bar to the grant of leave.

[53] The advantage which Mr. DeFreitas would get if these proceedings are allowed to continue is that in the case of Horizon Mr. DeFreitas would be given a second opportunity to make a claim to be treated as a preferred creditor before another forum instead of following the appeal procedure in the winding up. In the case of Transglobal it would be allowing Mr. DeFreitas to bypass the entire winding up procedure. In my opinion such an advantage would weigh against the granting of leave. In considering whether to grant leave the court

considers what is right and fair in the circumstances. It is simply not right or fair to permit Mr. DeFreitas not to follow the appeal procedure under the Insolvency Rules but to allow him to institute proceedings against the company. In relation to Transglobal it would also not be right or fair to permit Transglobal to bypass the winding up procedure when his claim could be dealt with adequately in the winding up procedure, the remedy he seeks could be granted in the winding up procedure.

[54] Mr. Delves also submitted that the matter involves other interests being IFSA and so leave ought to be granted – see **New Cap Reinsurance Corporation Ltd V HIH Causality and General Insurance Ltd.** [2002] EWCA Civ 300.

[55] The present case can be distinguished from **New Cap Reinsurance**. In **New Cap Insurance** the actions were at an advanced stage of litigation prior to the appointment of provisional liquidators, a stay of proceedings was lifted allowing them to continue. The Court was also of the view that the various claims should be tried together since there was a risk of inconsistent findings if all the cases were not heard at the same time, Etherton J. whose findings the Court of Appeal upheld stated:

> "I now come to what seem to me to be the decisive factors on these applications. As I have said and as Mr. Phillips Q.C. accepts there is on the face of the pleading in the Mainframe litigation and the Retrocession litigation to which NCR is a party, a risk of inconsistent finding if all the litigations are not conducted at the same time NCR defends against the Charman Syndicate on the basis among other things that it was a condition precedent to any reinsurance contract that NCR was protected by retrocession and if HIH is entitled to avoid the retrocession by virtue of non-disclosure and misrepresentation as pleaded by HIH in the Retrocession Litigation, then that condition precedent to the reinsurance contract was not satisfied."

[56] Mr. DeFreitas has named IFSA as the Second Defendant in the actions. Mr. DeFreitas' contentions against IFSA in both cases are as follows:

> "(i) That IFSA as the entity which contracted with the Claimant had a duty to ensure that the Claimant was paid.
>
> (ii) That the fees, expenses and disbursements of the controller is an expense of the licensee but IFSA is entitled to recover it from the Bank.

(iii) All rates and charges of IFSA are charges on the assets of the Bank in priority to all other debts pursuant to Section 457 of the Companies Act, 1994.

(iv) IFSA was therefore duty bound, given that the Claimant was not paid to ensure that the Bank paid him.

(v) Further, IFSA was therefore duty bound, given that the Claimant was not paid, to ensure that the Bank paid him at the time he first submitted his bill.

(vi) It is the further contention of the Claimant that IFSA failed in these duties, and as a result the Claimant may have lost an opportunity to be paid in priority to other debts.

[57] In view of the contentions of Mr. DeFreitas against IFSA there is no risk of any inconsistent finding if his claim against Transglobal and Horizon are heard in the winding up proceedings. His contentions are simply that IFSA had the duty of ensuring that he was paid by the Banks which are now in liquidation.

STRIKING OUT OF THE CLAIM

[58] Mr. Delves submitted that the court cannot strike out the claim, the action could be stayed, however there is no application for a stay. Mr. Delves relied on Section 381 of the Companies Act.

[59] Mr. Delves also submitted that the Court ought not to strike out the claim as the principles governing the striking out of the statement of case do not assist the applicants in these cases. Mr. Delves referred the Court to the cases of **Edison James and Hector John v The Speaker of the House of Assembly of the Commonwealth of Dominica et al.** DOMHCV 2010/199 and **Citco Global Custody v Y2K Finance** BVICAP 22 of 2008.

[60] It is not disputed that there is no application for stay. Mr. Bollers in his written submissions dated October 15, 2012 stated:

> "The first Defendant has not requested a stay. The Notice of Application specifically asks for the setting aside of leave and striking out of the statement of claim...."

[61] Section 381 of the Companies Act reads:

> "At anytime after the presentation of the winding up petition, and before a winding up order has been made, the company, or any creditor or contributory where any action or proceedings is pending against the company, may apply to the court to stay or restrain further proceedings, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit."

[62] Section 381 simply provided for a stay of proceedings to be granted on the application of the company, a creditor or contributory where a petition for a winding up has been made but a winding up order has not yet been made. A winding up order has been made in both cases. In Transglobal the Order was made on June 6, 2005 and in Horizon on July 29, 2005. Further Horizon and Transglobal have not made an application to strike out the statement of case pursuant to CPR 26.3. The application is for the leave to commence proceedings be set aside and as a consequence the claims be struck out. Thus the principles outlined by Edward J.A. **Citco Global Custody V Y2K Finance** are not relevant.

[63] When leave is granted ex parte, it should only set aside when there is a clear case that leave ought not to have been granted. In view of the above I find that these are clear cases where leave ought not to have been granted. I will therefore set aside the leave that was granted without notice and as a consequence I will strike out the claim against Transglobal and Horizon.

[64] It is ordered that:

(1) Leave granted to commence proceedings against Transglobal Bank Inc (In liquidation) and Horizon Bank International (In liquidation) is hereby set aside.

(2) The claims filed against Transglobal Bank Inc (In liquidation) and Horizon International Bank Limited (In liquidation) are hereby struck out.

(3) Mr. Stanley DeFreitas shall pay Transglobal Bank Inc (In Liquidation) and Horizon Bank International (In liquidation) costs to be assessed if not agreed.

Gertel Thom

HIGH COURT JUDGE