THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

Claim No: ANUHCV2009/0149

In the Matter of Stanford International Bank (In Liquidation)
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 Seeking the Court's Directions

MARCUS A. WIDE AND HUGH DICKSON AS JOINT LIQUIDATORS OF STANFORD INTERNATIONAL BANK LIMITED (IN LIQUIDATION)

Applicants

[1] AMICUS CURIAE
[2] TIMOUR GAINOULLINE

Respondents

Appearances:
Mr Malcolm Arthurs, Ms Nicolette Doherty, Counsel for the Applicants;
Professor Mark Watson-Gandy, Mr Lenworth Johnson and Ms Fiona Murphy, Counsel for the *Amicus Curiae*;
Mr Lawrence Daniels, Counsel for the Second Named Respondent

2015: March 16, 17, 18; November 20

Liquidation – alleged "Ponzi scheme" - whether liquidators can pursue claims pursuant to section 204 of the International Business Corporations Act of Antigua and Barbuda, Cap. 222 – liquidators as "proper persons" to be "complainant" pursuant to section 200 of the International Business Corporations Act of Antigua and Barbuda, Cap. 222 – oppression, unfair prejudice, unfair disregard for interests of creditors – repayment or "claw-back" of monies received by creditors/depositors – adjustment of creditor claims – meaning of "creditor" – eve or zone of insolvency – wrongful preferences - common law of preferences

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– unjust enrichment – constructive trust – tracing – money had and received – defence of change of position - breach of directors' fiduciary duties – statutory interpretation – section 371 of the International Business Corporations Act of Antigua and Barbuda, Cap. 222 – "Hampshire Land principle" - "pari passu" - "ex turpi causa non oritur actio" – "de minimis" – "equity is equality" – reasonable expectations – exercise of discretion.

Stanford International Bank Limited ("SIB") was incorporated as a bank pursuant to the **International Business Corporations Act of Antigua and Barbuda, Cap. 222** ("IBC Act"). SIB sold customers Certificates of Deposit ("CDs") as its main business product. Customers were led to believe that sums deposited with SIB would be invested using a low-risk investment strategy concentrating on maximum liquidity in a well-balanced, widely diversified global portfolio that would provide generous (but not improbable) returns. As a result, approximately US$10 billion in CDs were sold to more than 21,000 creditors/investors in approximately 113 countries. SIB collapsed in February 2009. Compared with the same period for the previous year, there was a 216% increase in sums withdrawn in the final six months of SIB's existence, totaling approximately US$1.3billion, indicating a run on the bank. Joint Liquidators were appointed in April 2009 to liquidate SIB compulsorily. CD holders are a very large body of creditors in this liquidation ("CD creditors").

The current Joint Liquidators contend that there was no, or no significant, underlying commercial activity to the bank, indicating that SIB may have been operated as a "Ponzi scheme" at least since 1999. The Joint Liquidators also contend that SIB's controlling persons permitted the outflow of funds in its last six months, even though they knew that SIB was insolvent. They contend that SIB's directors, or at least those who knew SIB's true state, including SIB's sole shareholder Mr Robert Allen Stanford, should have prevented such outflows but that they intentionally did not do so. The Joint Liquidators contend that these payments in SIB's last six months were in effect wrongful preferences, which should be unwound.

The Joint Liquidators also identified that approximately US$200million had been paid out to CD holders in excess of their respective capital investments. If SIB was a "Ponzi scheme", payments representing interest (as well as part of alleged capital repayments) would have been taken from the capital investments of other CD holders. In SIB's insolvency, the latter CD holders would be "net losers", and those who had received more than their respective capital investments would be "net winners".

The Joint Liquidators have applied to the Court for directions, seeking permission to pursue legal claims against Mr Stanford for breaches of his duties as a Director of SIB and against certain CD depositors as "CD Defendants". The proposed claims against CD Defendants would seek orders requiring monies paid out as, in effect, preferences, and as exceeding capital investments, to be paid back to the liquidation estate. Alternatively the Joint Liquidators propose to recoup such payments by adjusting future distributions to such CD Defendants.

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The Joint Liquidators propose to invoke section 204 of the IBC Act, the provision restraining "oppression" in management of corporate affairs, as the primary statutory enabling provision. Further or alternatively, the Joint Liquidators propose to use common law and/or equitable remedies.

Held: permitting the Joint Liquidators to pursue their intended claims pursuant to section 204 to enable an eventual adjustment of future distributions, but not to require CD Defendants to pay back money already received by them*:*

(1) The Joint Liquidators are, in the discretion of the Court, proper persons pursuant to section 200 (b) of the IBC Act to act as a "complainant" to make an application pursuant to section 204 of the IBC Act;

(2) The remedies provided by section 204 can be invoked by liquidators after a corporation has been ordered to be wound up;

(3) If conduct of a corporation's directors is oppressive, unfairly prejudicial to, or unfairly disregards the interests of creditors, the Court may, upon a complaint made by a "proper person", make any interim or final order it thinks fit, including an order varying or setting aside a transaction or contract to which a corporation is a party. Such an order includes an order that alleged preference creditors or alleged "net winners" be required to pay back money to SIB's liquidation estate, or to adjust future distributions;

(4) An alleged creditor must be a creditor of the corporation at the time of the alleged impugned conduct;

(5) The Court must take care not to use section 204 as itself an instrument of oppression. The Court must exercise its discretion, in a judicial manner, taking into consideration all relevant factors and disregarding irrelevant matters. The Court should have regard to the reasonable expectations of the CD Defendants;

(6) The predominant reasonable expectations of the CD Defendants in this case appear to have been that

(a) when SIB paid out money to CD Defendants in accordance with the contractual terms of their CDs, such CD Defendants would be entitled to retain the money; and

(b) when CD Defendants invested money with SIB they did so on the express, written understanding that such investment carried the risk that they could lose the entirety of their investment;

(7) The maxim "equity is equality" is to be used in cases of commutative justice in a manner which takes into consideration all relevant factors and disregards irrelevant matters, and not by imposing a presumption of equality where there may be none.

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JUDGMENT

[1] **WALLBANK J (Ag):** This Judgment sets out the written reasons for the Court's Order made on 20 July 2015. The terms of this Order were as follows:

> 1. The Applicants are permitted to pursue claims pursuant to section 204 of the IBC Act against persons formerly exercising controlling influence over SIB, to establish whether:
>
> a. SIB was operated as a "Ponzi scheme"; and/or
>
> b. such person(s) caused or permitted SIB to make payments to Certificate of Deposit holders whilst insolvent, fraudulently, or in breach of statutory, fiduciary or other duties, or in a manner which unfairly prejudiced or unfairly disregarded the interests of other creditors; and
>
> c. such person(s) ought to compensate the liquidation estate of SIB, and if so, in what amount.
>
> 2. The Applicants are permitted to pursue claims for ancillary orders pursuant to section 204 of the IBC Act against Certificate of Deposit holders who received payments from SIB, but any recovery from such Certificate of Deposit holders shall only be effected by adjusting further distribution to such Certificate of Deposit holders from funds held within the SIB liquidation estate.
>
> 3. The Applicants shall be entitled to recover their reasonable costs of and incidental to pursuing such claims from the liquidation estate of SIB.
>
> 4. The Court's discretion to make orders as to costs of the Defendants to such claims from the liquidation estate of SIB is hereby expressly reserved.
>
> 5. The Applicants are not prohibited from pursuing claims against Certificate of Deposit holders under heads other than section 204 of the IBC Act, but if the Applicants do so, they shall be at risk as to costs, save as the Court may otherwise order.
>
> 6. The funds ring-fenced pursuant to paragraph 2 of the Order dated 21 October 2013 shall continue to be ring-fenced until further order.

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7. The Applicants and the Amicus Curiae shall be entitled to recover their reasonable costs of this application from the cash assets of the liquidation estate of SIB. No order as to costs is made in respect of the Second Respondent.

8. The parties shall have liberty to apply.

9. The period for any appeal from this Order shall run from the date the Reasons are delivered.

10. By consent, the parties shall have leave to appeal. Any application for funding for an appeal shall be by separate application, either to the Court of Appeal or to this Court.

[2] The main issue was whether certain claims proposed by the Joint Liquidators of SIB to recover, or "claw back", payments made to certain former CD holders (including certain creditors of SIB) are in accordance with the Laws of Antigua and Barbuda and proper, and thus whether the Court should permit these to proceed.

[3] The Joint Liquidators applied to this Court for directions. Liquidators have a "*high standard of care and diligence*"[1] and they have a right "*in every case of serious doubt or difficulty to submit the matter to the Court and obtain its guidance*."[2] The Courts in many jurisdictions have encouraged Liquidators and other fiduciaries not to hesitate to apply for directions.

[4] That is not to say, however, that the parties and the Court attempted in this case to explore fully all possible legal arguments for and against the proposed claims. Whilst the discussion went to considerable depths the range of issues was too broad to attempt a full analysis.

[5] In the interests of the many creditors of SIB who are personally interested in the outcome of this application but who did not take part directly, I shall summarize below the material procedural history and the main arguments advanced by the Joint Liquidators, the *Amicus Curiae* ("*Amicus*") and the creditor who did take part, Mr Timour Gainoulline. These summaries are not exhaustive.

[6] This matter has its genesis in an *ex parte* application for directions by the Joint Liquidators dated 21 October 2013. Upon hearing that application, and based upon the affidavit evidence and submissions presented, this Court made an order, dated 21 October 2013 and entered on 30 October 2013, permitting the Joint Liquidators of SIB to adjust claims of

[1] **Re The Home & Colonial Insurance Company Limited** [1930] 1 Ch. 102
[2] Ditto, and Loose on **Liquidators**, 1972, Chapter 2 page 14

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creditors whom they had identified as having received alleged preference payments in the final six months before SIB ceased trading on 23 February 2009.

[7] In that period, a net amount of approximately US$1.3 billion is said by the Joint Liquidators to have been paid out to holders of SIB CDs.

[8] The Joint Liquidators have referred to these creditors as Preference Creditors. I shall refer to them as Alleged Preference Creditors. It is unnecessary for the purposes of this ruling to decide whether or not they in fact are Preference Creditors.

[9] The order required that all funds withheld from the adjusted claims were to be set aside, or "ring fenced", in a separate account for 120 days pending any challenge from any Alleged Preference Creditor to the Joint Liquidators' decision to make this adjustment. This 120 day period ran from the date notification letters were sent to the Alleged Preference Creditors.

[10] In the event that any Alleged Preference Creditors would not challenge the Joint Liquidator's decision, the ring fenced funds pertaining to them would revert back to the liquidation estate.

[11] The requirements to ring fence that part of the funds, and for 120 days, were applied because the Joint Liquidators' application for directions had been made on an *ex parte* basis. Parties with sufficient standing had to be given sufficient opportunity to object to the Joint Liquidators' decision but without unduly delaying the winding up of SIB.

[12] The Joint Liquidators sent notification letters to the holders of some 4,404 creditor accounts. By 12 May 2014 about 313 creditors had objected. By 12 November 2014 the Joint Liquidators had received approximately 687 emails containing objections.

[13] On 12 May 2014 the Joint Liquidators filed a further application. In this they reported the status of the matter and sought directions from the Court for the appointment of an *Amicus* who could independently analyze, formulate and present the arguments against the Joint Liquidators' proposed course of action.

[14] Another issue was raised in this application. The Joint Liquidators presented evidence that approximately US$200 million had been paid to certain investors in SIB in excess of their respective capital investments. The Joint Liquidators refer to these as "Net Winners". For convenience only, I shall refer to them as Alleged Net Winners. The Joint Liquidators contend that because, in their analysis of SIB's books and records, SIB operated as a "Ponzi scheme", such payments were unfair and prejudicial to SIB and its other investors/creditors. The reason for this is that such payments would have been taken from

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other investors' capital investments, causing those to become "net losers". The Joint Liquidators sought directions on a proposal to claim back the alleged excess payments from the Alleged Net Winners, so that the recovered funds can be redistributed, in part, to improve the position of such "net losers" and other creditors.

[15] The Joint Liquidators propose to seek a recovery of, in total, approximately US$1.5 billion from the Alleged Preference Creditors and Alleged Net Winners. They say they hope thereby to give 80% of SIB's creditors an uplift of up to US$0.24 on each dollar invested.

[16] The means by which the Joint Liquidators propose to achieve this goal is by pursuing claims first in Antigua against Mr Stanford for breach by him of statutory and/or fiduciary and/or common law duties as a director or officer of SIB. Creditors, and certain other depositors who received money (such as Alleged Net Winners who are not claiming as creditors in the Liquidation), from whom the Joint Liquidators seek recovery would be additional Defendants. I shall refer to these as "CD Defendants". No wrongdoing *per se* would be alleged against them (or at least most of them), but the Joint Liquidators seek to invoke section 204 of the **IBC Act** to obtain orders rectifying what they contend were wrongful payments, as being oppressive or unfairly prejudicial or made with unfair disregard for the interests of other creditors. They also seek to invoke tracing remedies to reach and recoup money in the hands of CD Defendants, and the doctrines of constructive trusts and unjust enrichment.

[17] If the Court were to make the orders requested against the CD Defendants, the Joint Liquidators would seek to enforce these in the jurisdictions where the CD Defendants and/or their assets may be found.

[18] Objections to the Joint Liquidators' asset recovery proposals have predictably come from those who would be required to repay money, and from those who might be required to forego a further distribution from the ring-fenced funds. Some of the objections raised serious issues of law.

[19] None of the "net losers" have objected, again predictably, as they stand to gain. The situation therefore is that whatever the Joint Liquidators do, one set of creditors will be discontented.

[20] This Court agreed to appoint an *Amicus*, funded by the estate, because the amounts of money at stake are large, a considerable number of objections were lodged and not all those who objected might have the means or ability to instruct lawyers to present their objections adequately.

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[21] The order appointing the *Amicus*, made on 15 May 2014, included provisions for notice to be given to the Alleged Preference Creditors and Alleged Net Winners, case management directions for an orderly marshalling of the arguments, and permission for all Alleged Preference Creditors and Alleged Net Winners to retain their own legal representatives to make their own submissions to the Court at the contested substantive directions hearing.

[22] Only one objecting creditor, Mr Timour Gainoulline, availed himself of this permission. Mr Gainoulline appeared at the hearing through Counsel, Mr Lawrence Daniels.

[23] This is not to say that there was only one earnest objection. A considerable number of creditors went to much trouble, and in some cases, obvious expense, to express their objections.

Background

[24] I give the following background only to present the context of the present application, and not as findings of fact.

[25] SIB was incorporated as a Bank in Antigua and Barbuda pursuant to the IBC Act. That is therefore the statute which primarily governs SIB as a corporation.

[26] SIB was part of a wider group of entities, which can loosely be referred to as the "Stanford Group" ("Group"). The sole beneficial owner of the Group is one Robert Allen Stanford ("Mr Stanford").

[27] SIB sold customers CDs, as its main business product. The customers were led to believe that sums deposited with SIB would be invested using a low-risk (but not no-risk) investment strategy concentrating on maximum liquidity in a well-balanced, widely diversified global portfolio that would provide generous (but not improbable) returns. As a result, approximately US$10 billion in CDs were sold to more than 21,000 creditors/investors in approximately 113 countries.

[28] SIB also provided its clients with "everyday" banking services such as credit cards and personal and business current and deposit accounts.

[29] The *Amicus* observed that it appears that many of the investors in SIB CDs were pensioners who were investing what amounted to their life savings in the belief that they would be getting a safe and prudently managed return from a reputable financial institution. There is no evidence before the Court breaking down the investor profile, but I am prepared to accept on the basis of the documentary evidence that I have seen and for

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the limited purposes of this application that a considerable number of investors were private individuals with moderate means.

[30] The Joint Liquidators contend that contrary to representations made for or on behalf of SIB, approximately 81 per cent of the proceeds of sale of CDs were used for the personal benefit of Mr Stanford and/or diverted to other companies of which Mr Stanford was the ultimate beneficial owner. The assets were then converted into highly speculative investments, many of them illiquid, including real estate in Antigua.

[31] SIB collapsed in February 2009, precipitated, apparently, by the global financial crisis in 2008. CD sales decreased that year. Conversely CD redemptions increased and grew exponentially in the wake of the collapse of Lehman Brothers in September 2008 and rumours of an investigation into the Group by the United States Securities and Exchange Commission ("SEC"). Compared with the same period for the previous year, there was a 216% increase in sums withdrawn in the final six months of SIB's existence.

[32] Ultimately SIB collapsed, say the Joint Liquidators, because SIB's liquid assets became insufficient to meet redemptions.

[33] The Joint Liquidators consider that the outflow of funds was allowed even though Mr. Stanford and at least one other individual, who, together, had ultimate control of SIB, knew that its method of operation was unsustainable, that SIB was insolvent, and that the assets would run out long before all potential claims by CD depositors on the bank could be met.

[34] On 17 February 2009 the SEC applied to the United States District Court of Dallas, Texas, and obtained an order appointing a Receiver, Mr Ralph Janvey (the "U.S. Receiver"), over the assets of SIB and some of its affiliates, directors or insiders.

[35] SIB was placed into liquidation by order of this Court in April 2009. The Joint Liquidators originally appointed by this Court were subsequently removed for cause and replaced by the incumbent Joint Liquidators pursuant to an order of this Court dated 12 May 2011.

[36] The investigations which ensued upon the collapse, both by the U.S. Receiver and the Liquidators appointed by this Court, indicated that SIB was heavily insolvent. There was also evidence that the Group, including SIB, had not been operating as a *bona fide* financial institution, but as a "Ponzi scheme" from at least 1999, with SIB at its centre.

[37] In the 23rd Affidavit of the Joint Liquidator Mr Marcus Wide, filed on 4 March 2015, Mr Wide gives evidence that in the final 6 months of SIB's operation three types of withdrawal can be categorized.

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[38] The first type he describes as "Regular Withdrawals". These formed part of a series of 5 or more withdrawal requests in that period, including where there was a standing order. The Joint Liquidators have identified 111 "Regular Withdrawals", with a total value of US$111,293,652.00. The Joint Liquidators do not seek to recover payments classified as Regular Withdrawals.

[39] The second type is described as "Other Withdrawals". These include withdrawal requests numbering between 2 and 4 in the final 6 month period. SIB paid out 299 redemption requests in this category, with a total value of US$298,930,030.00.

[40] The third type is described as "Extraordinary" or "Lump Sum Withdrawals". SIB paid out 1,090 redemption requests in this category, with a total value of US$1,090,302,924.00 in the final 6 months. Mr Wide remarks that there were 9 times as many "Extraordinary" or "Lump Sum Withdrawals" in this period as "Regular Withdrawals", indicating a run on the bank.

[41] Mr Wide's 23rd Affidavit connects two further significant pieces of information. The first is that the evidence currently available to the Joint Liquidators suggests that only Mr Stanford and a small number of other persons who held directorship and management positions within SIB knew that SIB was being operated as anything other than a *bona fide* bank. The second piece is that the funds which had been paid into SIB were transferred out of SIB into the wider Group, to be dealt with outside SIB. Only Mr Stanford and a small number of other persons who had vision over the divisions within the Group knew what was done with that money. The important implication of this information (if correct) is that most of the numerous other staff and numerous other directors of SIB were unaware that SIB had no significant underlying commercial banking activity and was insolvent.

[42] This information is supported by a 3rd Affidavit of Ms Beverly Jacobs. Ms Jacobs was employed by SIB in 1993 as an Administrative Assistant and rose to positions first of Manager's Assistant, then Clients Account Manager, then Operations Manager, and finally Vice President of Client Support.

[43] Ms Jacobs states that prior to SIB's winding up she was not aware that SIB would ultimately not be able to meet its obligations to creditors/investors. She states that she believes that most of SIB's staff and officers were similarly unaware.

[44] Ms Jacobs states that all of SIB's investments were carried out by Stanford Financial Group in Texas, through a separate agreement with SIB. SIB would be invoiced for Stanford Financial Group's alleged services.

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[45] Ms Jacobs states that when SIB needed money to pay investors, SIB would send a projected maturity and withdrawal report to the treasury department of Stanford Financial Group and the latter would then make funds available through banks in London or Toronto. Ms Jacobs states that SIB was therefore basically a conduit for funds.

[46] Ms Jacobs states that in the second half of 2008 there was a marked increase in redemption requests to SIB, and in the early part of 2009 the number of requests was such that SIB had difficulty meeting them all. She states that there was an ever increasing backlog of customer requests, which was in the region of US$100million at any given time.

[47] As an apparent reaction to this situation Ms Jacobs states that a decision was taken, probably by the President of SIB, to reject any requests to redeem U.S. Accredited Investor CDs prior to their maturity.

[48] Ms Jacobs exhibits spreadsheets containing financial data showing how SIB was dealing with redemption requests in its final weeks of operation. These show that smaller redemption requests were often processed more promptly than larger ones, with a pattern emerging (albeit not consistently) of an increased lapse of time between requests and payment.

[49] The Joint Liquidators contend that SIB was insolvent long prior to the US$1.3 billion in cash outflows which took place in the final six months of its operation; that these outflows occurred to the detriment of the majority of SIB's creditors (approximately 80%), and were permitted to be made in breach of trust and/or breach of fiduciary duty and/or that the Alleged Preferred Creditors were unjustly enriched by them at the expense of the estate and the general body of creditors. They further contend that these cash outflows took place in contravention of section 204 of the IBC Act, properly construed, as being oppressive, unfairly prejudicial to, or unfairly disregarded the interests of other creditors. Alternatively, the Joint Liquidators contend that these payments amounted to common law preferences which should be reversed.

[50] In relation to the Alleged Net Winners, the Joint Liquidators contend that payments of capital and interest made to this group, after the inception of the "Ponzi scheme", should be treated as wrongful payments on the same legal basis as the payments to the Alleged Preferred Creditors in the last six months of SIB's operation.

[51] The Joint Liquidators ask whether they ought to seek to recover excess payments from Alleged Net Winners for re-distribution to all SIB creditors. They argue that while individual Alleged Net Winners may have defences to the claims, the claims should not be abandoned purely on that basis and without requiring those defences to be presented.

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The Joint Liquidators assert that they owe a duty to achieve, so far as possible, fairness between the victims of the alleged fraud.

[52] The Joint Liquidators have raised the following primary issues for determination upon this application:

(i) Whether the Joint Liquidators should be treated as proper persons to bring the claim under section 204 of the IBC Act.

(ii) Whether a claim can be sustained under section 204 of the IBC Act. If so, what is the test under section 204 and is it made out on the facts before the Court?

(iii) Whether section 204 may properly form the basis of a claim against strangers to a company, like investors and creditors; and if so, when?

(iv) In respect of what time period can a claim under section 204 affect transactions engaged in by SIB?

(v) Whether a claim can be made out under the common law of fraudulent preferences in Antiguan law. If so, what is the test for it?

(vi) Whether the claim in common law fraudulent preference is made out on the facts before the Court.

(vii) In respect of what time period can a claim in common law preference affect transactions engaged in by SIB?

(viii) Whether any of the circumstances set out in sub-paragraphs viii (a) through (g) below, operate as a defence to a section 204 claim and whether any of these defences is capable of being made out on the facts before the Court;

(a) the investor and/or creditor was not causative of the unfair /oppressive conduct;

(b) the investor and/or creditor received money not knowing about the unfair /oppressive conduct;

(c) there was no intention on the part of SIB to prefer the investor and/or creditor;

(d) the payments were made in the ordinary course of business;

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(e) the payments were made after the investor/creditor pressed for payment;

(f) the payments were consistent with the usual way that SIB operated its business; and

(g) the investor/creditor had no knowledge of SIB's fraud and insolvency.

(ix) Whether the principle *ex turpi causa non oritur actio* can be deployed as a defence to either claim or otherwise.

(x) Whether there is a defence, or should relief be given, on the basis that valuable consideration was given in good faith, for example, in terms of the time use of money.

(xi) Whether the Joint Liquidators are entitled to withhold distributions to creditors of SIB who have received allegedly wrongful payments.

(xii) Whether the Joint Liquidators are entitled to pursue net winner/preferred creditor investors of SIB in order to recover allegedly wrongful payments.

The Joint Liquidators address these issues as follows.

The IBC Act

[53] The IBC Act governs the operation of International Business Companies in Antigua and Barbuda and thus the bank. Section 204 materially provides:

"*(1) A complainant may apply to the Court for an order under this section;*

(2) If, upon an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates;

(a) any act or omission of the corporation or any of its affiliates effects a result;

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any shareholder or debenture holder, creditor, director or officer of the corporation, the Court may make an order to rectify the matters complained of."

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[54] The Joint Liquidators submit that subsection (3) of section 204 confirms that the Court has the discretion to grant interim or final relief in respect of any application sought under the section. That subsection materially provides:

> "*In connection with an application under this section, the court may make any interim or final order it thinks fit.*"

[55] Several types of order are then expressed, without limiting the generality of this provision. Materially, at subsection (3)(h), the Court may make an order

> "*varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract*."

[56] Section 305(1)(b) of the IBC Act provides that where an order for liquidation has been made, "*the powers of the directors and shareholders cease and are vested in the liquidator, except as specifically authorized by the Court*."

Issue (i): Whether the Joint Liquidators should be treated as proper persons to bring the claim under section 204 of the IBC Act.

[57] The Joint Liquidators submit that there is no doubt that they are "complainants" within the meaning of section 204, because section 200 defines a complainant (so far as relevant) as "*a Director, or any other person who, in the discretion of the court, is a proper person to make an application*" under that part of the IBC Act. Because section 305(1)(b) provides that the powers of the directors cease and are vested in the liquidators upon liquidation, say the Joint Liquidators, the Joint Liquidators are brought within the definition of complainant. Alternatively, they submit, given the powers vested in the Joint Liquidators, it is clear that they are proper persons to bring a claim under section 204 and it would be a proper exercise of the Court's discretion so to find.

[58] The *Amicus* argues that the Joint Liquidators are not proper persons. First, he argues, from the face of section 204, unlike a director or security holder of the company, a liquidator has no *automatic* right of action. To bring an application, a liquidator would first face the hurdle of persuading the Court he is a proper person.

[59] Noting that there appear to be no decided cases on the interpretation of section 204, the *Amicus* refers to dicta of Ventour J in the Trinidad and Tobago case **In re Five Star Medical and Ambulance Services**[3], in relation to an equivalent provision in that jurisdiction. Ventour J considered that:

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[3] **In re Five Star Medical and Ambulance Services, Five Star Medical and Ambulance Services v Telecommunications Service of Trinidad and Tobago**, H.C.A. No. 1593 of 2001, 28th May 2002

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" The Court has to carefully consider the circumstances of each case to determine whether in the interest of justice and equity a person ought to be a proper person to make such an application. …

Thus the Applicant may not be an aggrieved person whose interests have been affected. The Applicant could be….someone whose interest is righting a wrong done to others…."

[60] However, in that case Ventour J then proceeded to consider that:

*"**…** in order to elevate the Applicant to a status of a proper person I must insist that some evidence of oppression or unfair prejudice or unfair disregard for the interests of the applicant ought to be established."*

[61] The *Amicus* contends that the Joint Liquidators can show no evidence that their own interests have been adversely affected. This, applying Ventour J's reasoning, would exclude them from being a "proper person".

[62] The *Amicus* acknowledges that the question has been a matter of some judicial debate in Canada[4], which has a closely equivalent provision to section 204.

[63] In **Canada (Attorney General) v Standard Trust Co.**, Houlden JA[5] ruled that it would be wrong to give permission to a liquidator to bring a claim to rectify oppressive conduct, because:

***"**A trustee in bankruptcy takes the property of a bankrupt as he finds it. Subject to statutory provisions, such as those dealing with fraudulent preferences and settlements, he only succeeds to the rights of the bankrupt and has no higher or greater rights…. The trustee in bankruptcy stands in the shoes of the bankrupt, except where statutory provisions otherwise decree… .*

The remedy given by s. 247 of the Business Corporations Act, 1982 is a personal remedy; it belongs to the person who has been oppressed by the actions of the corporation or its affiliates… . The trustee in bankruptcy, as I have said, has no higher rights than the bankrupt corporation, and consequently, it cannot bring the application under s. 247."

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[4] **Canada (Attorney General) v Standard Trust Co.** (Gen. Div.) 5 O.R. (3d) 660 [1991] O.J. No. 1946, cf **Gainers Inc. v Pocklington** [1992] AJ No 603, 7 BLR (2d) 87 and cf **Olympia & York Developments Ltd. (Trustee of) v Olympia & York Realty Corp. 2001** CanLII28269 (ONSC)

[5] **Canada (Attorney General) v Standard Trust Co.** (Gen. Div.) 5 O.R. (3d) 660 [1991] O.J. No. 1946

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[64] In the later case of **Gainers Inc. v Pocklington**, McDonald J[6] was to distinguish this decision and considered that:

> *"[5] It does not necessarily follow that the corporation cannot itself be a "proper person" to make an application for a remedy under s.234. … [I]n the present case the creditor (the Crown) has, by exercising its contractual rights, taken ownership and control of the corporation. That is an exceptional situation, not expressly contemplated by the definition of "complainant" in s.231(b), but I cannot say that in those circumstances the corporation cannot be a "proper person" to make application under s.234."*

[65] Farley J, in a more recent decision before the Ontario Supreme Court[7], took a still different stance:

> *"[30] It seems to me that while the bankrupt's trustee takes the property of the bankrupt as he finds it and that the trustee stands in the shoes of the bankrupt, the trustee has, as his primary obligation, the protection of the creditors of the estate of the bankrupt. While oppression cases should not be used by creditors to facilitate ordinary debt collections, where there is superadded to the equation allegations/facts to support one of the three claims of either (a) "oppression", (b) "unfairly prejudicial" or (c) "unfairly disregards", then creditors have been permitted to be complainants pursuant to s. 245(c) as a "proper person"."*

[66] The *Amicus* suggests that this reasoning may well enable the Joint Liquidators on behalf of creditors to bring a claim against the directors or shareholders of SIB for the manner in which they have conducted the affairs of the company concerned[8].

[67] However, the *Amicus* argues that a liquidator cannot claim against other creditors. The *Amicus* submits that the remedy is envisaged as being against the company and its insiders. Only in very rare cases is such relief available against a stranger to the corporation[9] as it would require an element of direct culpability for the oppressive conduct by the stranger.

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[6] **Gainers Inc. v Pocklington** [1992] AJ No 603, 7 BLR (2d) 87
[7] **Olympia & York Developments Ltd. (Trustee of) v Olympia & York Realty Corp**.2001 CanLII28269 (ONSC)
[8] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 303
[9] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 297, **Thomson v Quality Mechanical Services Inc** [2001] OJ No 3987, 18 BLR (3d) 99, 56 OR (3d) 234

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[68] The Joint Liquidators reply that the *Amicus* has not addressed SIB's argument that the liquidators in fact come within the definition of "complainant" in section 200(b)(ii) because section 305(1)(b) provides that on liquidation the powers of the directors cease and are vested in the liquidators. If there is no answer to that argument, then the issue of discretion under section 204(b)(iv) does not arise.

[69] The Joint Liquidators say that section 204 sits in a unique statutory matrix not shared by any other jurisdiction, and therefore that case law authority from other jurisdictions should be adopted, if at all, with caution.

[70] The Joint Liquidators also draw attention to section 2(1)(j)(iii) of the IBC Act, which defines the term "officer" in relation to a body corporate for the purposes of the Act, as "*any other individual who performs for the body corporate functions similar to those normally performed by the holder of any office specified in subparagraph (i) or (ii).* Those are: a chairman, deputy chairman, president, vice-president, managing director, general manager comptroller, secretary or treasurer. Since upon liquidation the functions of directors are vested in the liquidators, a liquidator falls within the definition of an officer in section 2(1)(j)(iii).

[71] Furthermore, the Joint Liquidators submit that they ought to be seen as proper persons by virtue of their representative capacity as liquidators within a collective proceeding.

[72] At the oral hearing of the application, the *Amicus* suggested that the requirement to persuade the Court that the Joint Liquidators are proper persons may be a "gymkhana hurdle" for the Joint Liquidators to surmount, which I understood to mean a low threshold.

Issue (ii): Whether a claim can be sustained under section 204 of the IBC Act. If so, what is the test under section 204 and is it made out on the facts before the Court?

[73] The Joint Liquidators urge that the starting point for interpreting the IBC Act and section 204 is section 371. So far as relevant, section 371 provides:

> *(1) This Act is to receive such fair, large and liberal construction and interpretation as will best ensure the attainment of its purposes.*
>
> *(2) The purposes of this Act are –*
>
> *(a) to encourage the development of Antigua and Barbuda as a responsible off-shore financial, trade and business centre;*
>
> *(aa) to prevent the international financial, trade and business centre from being utilized for money laundering or other activities illicit under the laws of Antigua and Barbuda;*

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[74] The Joint Liquidators submit that the plain words of a statute constitute the primary source of guidance for its interpretation by the judiciary. This approach has remained consistent since Courts have addressed their minds to the task of interpreting and understanding statutory provisions. It has always been taken at face value that:

> "*If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity*[10]."

Further, where textual interpretation is brought into question, courts have sought to effect meaning to parliament's perceived intention. In this case, the intention is clearly set out in section 371 of the IBC Act.

[75] The Joint Liquidators summon support for such an approach in **Re The Attorney General of St. Lucia**[11]**, Stock v. Frank Jones (Tipton) Ltd**[12] and **R v. Secretary of State for the Environment, Transport and the Regions, Ex Parte Spath Holme Ltd**[13]**.** The words of section 204 are clear and wide, say the Joint Liquidators, and the intention of "them that made it" is set out in section 371. So, the true and proper interpretation of section 204 of the IBC Act must start with the ordinary meaning of the words of the section, with the terms of section 371 in mind. Where the words may admit of more than one meaning, the Joint Liquidators submit that section 371 dictates that the wide, liberal construction should be adopted where that encourages the reputation of Antigua as a responsible financial and legal centre, discourages fraud, and assists the court to fashion appropriate and necessarily wide-ranging remedies in the case of fraud.

[76] The Joint Liquidators contend that Section 204, on its face, vests the Court with the authority to rectify any act of a corporation which *"effects a result"* which is oppressive or unfairly prejudicial to any creditor, or which unfairly disregards his interests. The Court may further rectify any oppression, prejudice or unfair disregard brought about by the conduct of the business or the exercise of the directors' powers. The plain words of the section are apt to cover the present situation, say the Joint Liquidators.

[77] The Joint Liquidators argue that the evidence shows that the bank was run as a "Ponzi scheme" for many years, with the money of subsequent depositors used to pay out earlier depositors. That is, say the Joint Liquidators, the very definition of acts of the corporation, conduct of the corporation's business and/or exercise of the directors' powers in an oppressive or prejudicial manner, with unfair disregard of the interests of ***all*** creditors whose deposits were diverted into illiquid investments, or paid to other CD depositors rather than invested as had been represented to them.

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[10] **R v. The Judge of the City of London Court** [1892] 1 QB 273 per Lopes LJ at 310.
[11] SLUHCVAP2012/0018
[12] [1978] 1 WLR 231 (HL)
[13] [2001] 2 AC 349

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[78] The Joint Liquidators submit that their Alleged Net Winners and Alleged Preferred Creditors claims seek to redress the unfair prejudice and disregard by, essentially, *"sharing the misery"*. They argue it is unfair to the vast majority of creditors that some should come out of the liquidation as winners under the fraud at the expense of others, whether the winners knew about the "Ponzi scheme" or not. If there was knowledge of the fraud or the insolvency, then it is clearly unfair to allow Alleged Preferred Creditors or Alleged Net Winners to retain their unfair advantage obtained with that knowledge. In the absence of knowledge of the fraud, or the insolvency, it is a matter of pure luck whether a CD depositor is a winner or a loser. Realistically, then, say the Joint Liquidators, had the Alleged Net Winners or Alleged Preferred Creditors been asked, before they managed to extract funds, what they would expect to happen in these circumstances, a first come first served, free for all in which they have an 80% chance of losing out, or an equal sharing of the available assets, it must be expected that the Alleged Net Winners and Alleged Preferred Creditors would have agreed that *pari passu* sharing would be appropriate. Taking any other position now is simply taking advantage of hindsight. It may be reasonably inferred that Antigua's essentially English law based insolvency provisions contributed to a customer's decisions to do business with an Antiguan bank.

[79] The Joint Liquidators submit that by setting up, running and continuing the "Ponzi scheme" during the apparent run on SIB, the affairs of the Bank were clearly conducted in a manner so as to prejudice an 80% majority of creditors who did not manage to get any money out of the Bank before or during the final six months of its operation. Indeed, every payment out to a creditor during the currency of the "Ponzi scheme" constituted a furtherance of the fraudulent scheme on other creditors who either (i) were induced to keep their money in the scheme by SIB's fraudulent marketing material or (ii) were not fortunate enough to be in the limited number of creditors to receive a payment.

[80] The Joint Liquidators submit that a *pari passu* sharing of assets is the fair and equitable result aimed at both in Antigua and in responsible international jurisdictions in insolvency matters. As in many things, not just insolvency, *"equity is equality"*. Anything else is unfair and prejudicial, especially to the victims of a fraud.

[81] The IBC Act itself, say the Joint Liquidators, expressly embraces the *pari passu* principle. In particular section 289 of the IBC Act sets out the order in which claims in an insolvent corporation ought properly to be paid. Subsection (3) of section 289 provides that:

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

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[82] The Joint Liquidators contend that this principle affects the manner in which any creditor of an insolvent international business corporation can reasonably expect to be treated in relation to other members of his class, and informs the interpretation of section 204 in accordance with section 371.

[83] The Joint Liquidators say that these claims seek to redress the imbalance created by the wrongful payments by recalling those payments so that they can be distributed fairly, and in the manner that all creditors would expect. That remedy is clearly within section 204(3)(h). Further, it is clearly within the wide powers of section 204(3), of which the sub-paragraphs are merely examples: the Court may make any order it thinks fit.

[84] The Joint Liquidators contend there is, therefore, no justification for interpreting the section narrowly to exclude these claims, or to suggest that the remedy sought is not encompassed by the section.

[85] The Joint Liquidators say that the effect of interpreting the section narrowly so as to exclude these claims would mean that there would be no fall back save the old and undeveloped English common law of preferences. This is because, unlike the legislation concerning domestic corporations, and English insolvency statutes, the IBC Act contains no provisions for setting aside preferences. If section 204 is not interpreted to include preference claims, or claw-back claims such as those envisaged, then the scope of the applicable common law is limited by the fact that it has not been considered judicially since its role was overtaken by statute as long ago as the mid-nineteenth century. Such an interpretation runs counter to the stated purpose of the IBC Act "*to encourage the development of Antigua and Barbuda as a responsible off-shore financial, trade and business centre"* and to discourage fraud, as required by section 371.

[86] Properly interpreted, argue the Joint Liquidators, section 204 is a flexible, powerful tool which gives the Antiguan Courts broad powers to ensure that equity is able to provide equality. It allows the Courts to develop flexible responses to ever more complicated or sophisticated frauds such as the "Ponzi scheme" in this case. It gives Antigua a response which is the equal, or better, than anything in England or the United States.

[87] The *Amicus* submits that the present application of the Joint Liquidators is far removed from the natural use of section 204. The investors are not an oppressive majority board or shareholder engaged in running the company. They did not themselves engage in the oppressive conduct. They are the victims of the bank's failure.

[88] The *Amicus* urges that care should be taken to avoid using section 371 of the IBC Act to do violence to section 204 and crowbar it into a shape at variance from the remedy understood by long established Commonwealth authority. The *Amicus* therefore submits that a claim under section 204 is not made out on the facts.

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[89] In reply the Joint Liquidators contend that section 371 of the IBC Act is particularly important in guiding the Court in interpreting section 204. No other legislative framework referred to by the *Amicus* team includes similar objectives/purposes as set out in the IBC Act – or such a wide gap for the equivalent to section 204 to fill. Further, very few of the other jurisdictions referred to by the *Amicus* provide the sort of interpretive discretion that section 371 provides[14].

[90] The Joint Liquidators reply that in the case of SIB, an off-shore bank which was used by the SIB insiders *inter alia* to defraud both SIB and its creditors, while duping its regulators, the relief they are seeking herein wholly comports with the objectives of the statute. Simply put, the reversal of preferred payments to a select number of creditors in circumstances when there was no possibility for any creditor to step in and intervene or wind up the bank, is, on balance, the responsible and proper approach to take. The alternative would be to permit a substantial number of the bank's creditors to suffer a disproportionate disadvantage as a direct result of a fraudulent scheme.

[91] The *Amicus*' complaint that the Applicants are seeking to use section 371 to do violence to the language of section 204 is simply not the case say the Joint Liquidators. The language of the section is wide enough to include the claims made by the Joint Liquidators. It is only by the use of case law in other jurisdictions addressing different problems that the *Amicus* can begin to limit the language and seek to exclude the normal use of the words in section 204. That itself is an interpretation which does violence to section 371.

[92] The Joint Liquidators further argue that amongst the jurisdictions examined by the *Amicus*, Antigua and Barbuda is alone in not according a creditor a right to apply for the winding up of a company. That, submit the Joint Liquidators, places creditors at a unique disadvantage compared to the position in other jurisdictions and it would militate against the purpose and intent of the IBC Act expressed in section 371 if remedies were held not to be available pursuant to section 204 to promote those ends.

Issue (iii): Whether section 204 may properly form the basis of a claim against strangers to a company, like investors and creditors; and if so, when?

[93] The Joint Liquidators contend that, given the plain words of sections 204 and 371, it is beyond peradventure that section 204(3) allows, and indeed encourages, the Court to grant remedies against "strangers" to the corporation, because section 204(3) allows the Court to make any order it thinks fit, without limitation. Were those plain words to be limited to orders against the corporation only, then the section would say so. To incorporate such a limitation without plain words in the section itself breaches section 371.

[14] Canada comes closest, albeit that the discretion is contained in a separate statute.

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[94] Further, say the Joint Liquidators, section 204(3)(h) expressly envisages remedies to be granted against strangers – any transaction or contract to which a corporation is a party may be set aside. Any contract or transaction at arms' length by a corporation will be with a stranger, and there is no limit on the contracts or transactions which may be set aside.

[95] Finally, and perhaps obviously, contend the Joint Liquidators, to deny remedies against strangers prevents section 204 being used to address preferences. Such payments have to be recovered from the strangers that received them. It would leave the law of Antigua with the problems identified above, and thus be contrary to the interpretation required by section 371.

[96] The Joint Liquidators submit therefore that as a matter of proper interpretation of section 204 of the IBC Act, they, as officeholders of the SIB liquidation estate are entitled to: (i) withhold dividends from creditors who made "Extraordinary"[15] withdrawals during the 6 month period prior to SIB being closed, pending a balancing exercise which will achieve *pari passu* distribution; (ii) pursue the return of wrongful payments from Alleged Preferred Creditors; and (iii) pursue the return of wrongful payments made to Alleged Net Winners.

[97] The *Amicus* submits that remedies under section 204 are envisaged as being against the company and its insiders, but that the Canadian Courts have accepted that relief might be available in very rare cases against a stranger to the corporation[16]. The *Amicus* submits that a claim against a stranger to the corporation would require an element of direct culpability for the oppressive conduct on the part of the stranger[17]. The *Amicus* submits therefore that the Joint Liquidators should not be allowed to bring a claim against the investors / creditors who are "strangers" to the bank.

[98] The Joint Liquidators reply that on the plain words of section 204 of the IBC Act there is no justification for suggesting that strangers, meaning recipients, need knowledge or guilty conduct, or that relief is fault based.

[99] While that might be relevant to a minority shareholder action, they submit it is entirely inapposite in a preference claim. Essentially, it seeks to impose on preference claims entirely unjustifiable requirements that would only apply if the claims being made were, for example, based on accessory liability such as knowing assistance or knowing receipt. However, it is no part of and no defence to a preference claim, and thus to the Joint Liquidators' section 204 claim, to show that the recipients of the money were not themselves causative of the unfairness. The issue is whether they benefited from it in a manner which ultimately was unfair to other creditors of SIB – not their knowledge or

[15] The Joint Liquidators contend that many of these withdrawals were not ordinarily requested by the relevant creditors and were not in the ordinary course of business on SIB's part.

[16] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 297, **Thomson v Quality Mechanical Services Inc** [2001] OJ No 3987, 18 BLR (3d) 99, 56 OR (3d) 234

[17] **Thomson v Quality Mechanical Services Inc** [2001] OJ No 3987, 18 BLR (3d) 99, 56 OR (3d) 234

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participation. Indeed, this must be clear not least from section 239(7) of the United Kingdom **Insolvency Act 1986**, which provides that conduct pursuant to a Court order may still be a preference.

Issue (iv): In respect of what time period can a claim under section 204 affect transactions engaged in by SIB?

[100] The Joint Liquidators submit that there is no time limit for claims under section 204. To impose a time limit would be arbitrary and would interfere with the purpose of the section, which is to rectify unfair prejudice or unfair disregard of interests.

[101] The Joint Liquidators observe that there are express time limits under other sections of the IBC Act – sections 176, 236, and 313 for example, but not under section 204. Although those sections are very different from section 204, they show that where time is considered to be important, a limit is set out. The *Amicus* agrees.

Issues (v) and (vi): Common Law Fraudulent and/or Voidable Preferences: Whether a claim can be made out under common law fraudulent preference in Antiguan law. If so what is the test for it? Whether the claim in common law fraudulent preference is made out on the facts before the Court.

[102] The Joint Liquidators contend that, save and except for the provisions in section 204, the IBC Act does not expressly address the question of preference transactions in an insolvency context, leaving a major gap if not filled by section 204. The Joint Liquidators submit that the issue is resolved by what they argue is the proper interpretation of section 204, and that there is no need for reliance on the common law. However, if section 204 is not so interpreted, then there is no remedy available but the English common law, with any necessary and appropriate development required for its application in this jurisdiction at this time.

[103] The Joint Liquidators refer to the common law position which existed in England prior to the introduction of the English **Joint Stock Companies Act 1844** and the **Bankruptcy Act 1869**. After that time, the common law stagnated, being replaced by statute.

[104] The Joint Liquidators submit that the fundamental principles governing the law in relation to voidable preferences (which ultimately became enshrined in English statutory provisions), are encompassed in the following central tenets:

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(i) Insolvency law will observe the rights and obligations created prior to liquidation, but in so doing, the law will distinguish between proprietary rights and personal claims, which are usually of a contractual nature; [18]

(ii) Creditors within the same class must be treated in exactly the same way; that is on a *pari passu* basis, reflecting one of the single most important principles of insolvency law particularly as it relates to unsecured creditors and reflects the tenet that equity is equality; and

(iii) All assets beneficially enjoyed by the insolvent as at the date that insolvency becomes manifest are subject to insolvency principles and, ultimately, even distribution across relevant classes of creditors. Assets which are held for the benefit of others however, remain unavailable to the insolvent's pool of creditors.

[105] The Joint Liquidators argue that these principles work interactively and ultimately with a view to ensuring that the process of insolvency is transparent, fair and achieves the goal of restoring, in so far as possible, the position a creditor might expect to be in had the debtor's insolvency not intervened. As such, even though transactions and obligations which take place and accrue prior to a winding up are generally respected, the concept of *pari passu* treatment may result in voiding a transfer to a creditor who has, to the detriment of other creditors in his class, unduly benefitted from the limited pool of the insolvent debtor's resources after the onset of insolvency.

[106] The Joint Liquidators observe that this fundamental approach was perhaps most clearly expressed in certain key decisions by Lord Mansfield CJ who greatly influenced later English insolvency statutes.

[107] In **Alderson v. Temple** (1768) 98 ER, the English Court was required to determine whether a note indorsed by the bankrupt to the defendants, in contemplation of his own bankruptcy, could be set aside by the plaintiffs. Lord Mansfield expressed the following view:

> "*All acts to defraud creditors or the public laws of the land are void; and if the nature of the act be a conveyance or a grant, 'tis not only void but an act of bankruptcy. It has been determined 'that a conveyance by a trader, of all his effects for the payment of one or more bona fide creditors of the most meritorious kind, though his effects do not amount to half what is due, is void; because it is not an act in the ordinary course of business; it is not such an act as a man could do, but it must be followed by an immediate act of bankruptcy, and it is defeating the*

[18] The Joint Liquidators state that there are, to date, no proprietary claims advanced by creditors. The law recognizes that proprietary claims (charges and other forms of security interests) are prioritized over other claims. The Estate at this time is exclusively concerned with personal claims made by CD investors.

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equality that is introduced by the Statutes of Bankruptcy, and the criminal (for the bankrupt is considered a criminal) is taking upon himself to prefer whom he pleases'…

A general question has been started, 'whether in any case, upon the eve of bankruptcy, a man may do that which in consequence prefers a particular creditor:' and that has been argued as a general question. But that will depend on the act. As, if a bankrupt, in a course of payment pays a creditor; this is a fair advantage, in the course of trade: or, if a creditor threatens legal diligence, and there is no collusion; or begins to sue a debtor: and he makes an assignment of part of his goods; it is a fair transaction, and what a man might do without having any bankruptcy in mind. Suppose such a case as Small and Oudley: there it was for the advantage of the creditors, and no fraud to them; and if part of the transaction were set aside as fraudulent, the whole must. But it never entered into the mind of any Judge, to say 'that a man in contemplation of an act of bankruptcy, could sit down and dispose of all of his effects to the use of different creditors:' for, that would be a fraud upon the acts of bankruptcy. But if done in a course of trade, and not fraudulent, it may be supported."

[108] In **Thompson v. Freeman** (1786) 99 ER 1026 the Court expressed the view that:

"*A bankrupt when in contemplation of his bankruptcy, cannot by his voluntary act favour any one creditor; but if under fear of legal process he gives a preference, it is evidence that he does not do it voluntarily*."

[109] The Joint Liquidators submit that the judgments by Lord Mansfield are the starting point. They ought properly to be viewed having regard to the specific circumstances which they sought to address, and the time in which they were given. In particular, Chief Justice Mansfield opined at a time when bankruptcy (as opposed to insolvency) was a criminal offence. As such, committing an "act of bankruptcy" triggered the criminal law and operated specifically to traders who were engaged in the sale and distribution of goods.

[110] The common law did not significantly develop once the English statutes were drafted and adopted. Indeed, many of Chief Justice Mansfield's judgments dealt with fairly small bankruptcies involving limited numbers of creditors in circumstances when activity engaged in on the "eve of bankruptcy" was considered extremely important.

[111] The Joint Liquidators observe that his pronouncements also came at a time when the law relating to fraud, fiduciary duties, accessory liability, restitution and unjust enrichment was barely beginning to develop. They say the law was a much blunter instrument and far less sophisticated than it is now. It has developed to take into account changing circumstances and the ever increasing sophistication of society, international business and the

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opportunities for fraud that such sophistications create. Preferences are very different creatures now than they were then.

[112] The Joint Liquidators observe that in contrast to the matters the common law was dealing with, SIB was at all material times a regulated and licenced financial institution operating internationally on a scale both geographically and financially not to be dreamed of by Mansfield CJ. It is wholly different to the businesses discussed in English common law cases. As such, the pronouncements in those cases sow the seeds, but they should not be regarded as artificially limiting the law as it should apply in Antigua if section 204 is not available.

[113] The Joint Liquidators comment that the insolvency of SIB involves claims made by 27,000 creditors for sums in excess of US$4 billion. The bank at all material times was, they say, a complex "Ponzi scheme" designed to induce investor input, and the sums claimed were invested as a result of those inducements. Payments out to the Alleged Net Winners and the Alleged Preferred Creditors, given the circumstances, were wrongful, since the bank was at all material times insolvent. At the very least, they say, it was abundantly clear in the last six months of its operation that not only was the bank insolvent, the "Ponzi scheme" was about to be discovered and the whole edifice come crashing down. Each transaction to a creditor during the six month period prior to the appointment of Receiver Managers, was, suggest the Joint Liquidators, part of a desperate attempt to prolong the life of this fraudulent scheme and stave off formal insolvency at a time when it was known by Mr. Stanford and his close associates that the bank was in fact insolvent.

[114] The Joint Liquidators argue that the 216% increase in withdrawals during this last six month period epitomises the disorderly rush for limited assets which the *pari passu* principle seeks most of all to avoid. The Joint Liquidators therefore submit that general common law principles can be applied, if necessary, and do apply if section 204 does not, but, and it is a large qualification, the common law rules and remedies may need careful reconsideration and development if they are to answer the needs of the Antiguan jurisdiction. They should not be artificially restricted to deny justice, urge the Joint Liquidators, when statutory development that has replaced the common law does answer.

[115] On the assumption that, properly applied, the Alleged Net Winners and Alleged Preferred Creditors' claims can and should succeed at common law, if not under statute, the Joint Liquidators contend that the wrongful payments should be treated as void acts to defraud creditors and the public laws of the land. These payments were not, they say, made in the ordinary course of business. The case law envisages as such payments, for example, the payment of invoices for goods which form the stock in trade of a business. Payment of CD deposits where the proceeds of such deposits had been misappropriated, not invested, and were not available for distribution is not payment in the ordinary course of business. To characterise it as such is to treat the operation of the "Ponzi scheme" as the bank's

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ordinary course of business, thus relying on and legitimising the fraud. That is clearly not what ordinary course of business was intended to mean – it was intended to draw a distinction between proper payments and payments in furtherance of fraud. Further, it is not possible to define the alleged wrongful payments as proper simply because they were made in response to the demand of CD depositors. The CD depositors who received the alleged wrongful payments were not entitled to payment and could not have enforced payment in a court of law, given the circumstances. They were seeking the return of investments, and interest thereon, which simply did not exist. The alleged wrongful payments were made to perpetuate the fraud and delay the application of the *pari passu* principle. They were not fair transactions such as a man might do without having any bankruptcy in mind. The common law, properly interpreted, developed and applied, can, should and does provide a remedy to fill any gap left by the IBC Act.

[116] The *Amicus* agrees with the Joint Liquidators that there exists a common law of preference in Antigua and Barbuda, but disagrees as to its application.

[117] The *Amicus* observes that historically the mischief of a fraudulent preference was not the preference itself but the fact that the debtor consciously decided to prefer one debtor over another and thereby infringed the fundamental principle of bankruptcy that creditors should be paid *pari passu*[19].

[118] Although the preference is described as "*fraudulent*"[20], fraud in a strict common law sense never needed to be proven although it may often be present[21].

[119] In **Nunes v Carter** Lord Westbury propounded the test:[22]

> *"A fraudulent preference is well known to the Bankrupt law. It arises where the Debtor, in contemplation of bankruptcy - that is, knowing his circumstances to be such as that bankruptcy must be, or will be, the probable result, though it may not be the inevitable result - does, ex mero motu[23], make a payment of money, or a delivery of property to a Creditor, not in the ordinary course of business, and without any pressure or demand on the part of the Creditor."*

[120] The onus of proving a fraudulent preference rests on the Liquidator[24].

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[19] **Dutton v Morisson** (1810) 17 Ves 194
[20] The term "fraudulent" in fact derives from its statutory description in **The Statute of Elizabeth (c 13 Eliz c 5**).
[21] **Re M Kushler** [1943] Ch 248, 252
[22] **Nunes v Carter** (1866) LR 1 PC 342, 348
[23] = "of one's own accord"
[24] **Ex parte Lancaster, Re Masden** (1883) 25 Ch D 311, 319

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[121] The *Amicus* states that the dominant question is whether the payment was voluntary[25]. This is because "preference" implies free will and there can be no free will where the act was prompted by pressure[26].

[122] Therefore, says the *Amicus*, the issue is whether or not the decision moved from the debtor to the creditor[27] and provided the decision came from the creditor, and so long as the decision was not collusive, there would be no fraudulent preference[28].

[123] Various circumstances have been held to repel the presumption of a fraudulent intention to prefer. These have included where the payment is made by the debtor:

a. In the ordinary course of business (paying bills on maturity)[29];
b. Where non-payment might affect credit generally[30];
c. In the honest but mistaken belief that he was under a legal obligation to do so[31];
d. Where the funds were impressed with a trust[32];
e. To avoid evil consequences to himself[33];
f. To make reparation for money misappropriated[34].

[124] By contrast where payments were made in the absence of a real or imagined legal obligation, the Courts found fraudulent preferences much more readily – for example where payment was motivated by a sense of moral obligation[35] or indeed honour[36].

[125] The *Amicus* then considers when an act is "in the contemplation" of bankruptcy. He refers to **Brown v Kemplin**:[37]

> *"… if the payment was made in the contemplation that a bankruptcy might take place and with the purpose and intention of giving a preference to the creditor in that event and preventing a distribution; then it would be in the contemplation of bankruptcy although the bankrupt might argue and expect that they might be able to prevent bankruptcy from taking place."*

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[25] **Thompson v Freeman** (1786) 1 Tem Rep 155
[26] **Butcher v Stead** (1875) LR 7 HL 839
[27] **Ex parte Tastet** (1831) Mon 133
[28] **Crosby v Crouch** (1809) 11 East 256, **Re Hall** (1882) 19 Ch D 580
[29] **Re Clay** (1895) 3 Mans 31
[30] **Hunt v Mortimer** (1829) 10 B & C 44
[31] **Re Vantin ex parte Saffres** [1900] 2 QB 325
[32] **Toovey v Milne** (1819) 2 B &Ald 683
[33] **Re Wilkins ex parte Stubbins** (1881) 17 Ch D 58
[34] **Re Wilkins ex parte Stubbins** (1881) 17 Ch D 58
[35] **Re Buckley's Case** [1899] Ch 725
[36] **Re Vingoe & Davies** (1894) 1 Manson 416
[37] **Brown v Kemplin** (1850) 19 LJ (CP) 169 (Hilary Term cases)

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[126] A requirement in respect of the Joint Liquidators' present application that the transactions take place within 3 months[38] or indeed 6 months[39] of the liquidation forms no part of the common law test. The time limits were a statutory substitution for the common law requirement that the preference be given "*in contemplation of bankruptcy*"[40].

[127] In **Alderson v Temple** Lord Mansfield stated[41] as a "*principle of the common law of bankruptcy*" that not merely had there to be proved an intention by the debtor to prefer a creditor, but preference over the other creditors must in fact have been achieved.

[128] The *Amicus* submits that if the Joint Liquidators were to attempt to bring a claim on the basis that SIB had made preference payments, such a claim would probably fail at common law on the basis that the payments were not "voluntary", because the payments were made at the demand of the investors, and not in the contemplation of liquidation.

[129] In reply the Joint Liquidators disagreed with the *Amicus* in relation to application of the common law of preferences to the SIB situation. In particular, the Joint Liquidators consider that the fact that creditors requested payment does not, on the facts, render payments by SIB involuntary. SIB had a choice to, and in fact should have, argue the Joint Liquidators, initiated a voluntary winding up instead of making the requested payments.

Issue (vii): In respect of what time period can a claim in common law preference affect transactions engaged in by SIB?

[130] The Joint Liquidators submit that there is no time limit under the common law. The cases speak of preferences being made on the eve of bankruptcy. The law is intended to cover payments made when insolvency is in mind. "Eve" in this sense is not temporal, it describes a state of mind of the bankrupt. The wrongful payments were made wrongfully at a time when it was known remaining assets were not sufficient to meet liabilities, given the pilfering or dissipation of some 80% of the assets of the bank.

[131] The Amicus agrees that there is no time limit under the common law.

Issue (viii): Defences

[132] At issue is whether any of the sub-paragraphs of Issue (viii) provide a defence to a claim under section 204. The Joint Liquidators contend that the short answer is no, even if they can be made out. Whether such defences could be made out in fact is unclear, as the

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[38] This was first introduced under the English **Bankruptcy Act 1869**
[39] The period was extended to 6 months under section 115(3) of the English **Companies Act 1947**
[40] **Halsbury's Laws of England, 1905 edition, page 281 note (a)**, **Butcher v Stead** (1875) LR 7 HL 839
[41] **Alderson v Temple** (1768) 4 Burr 2235, LC

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answer depends on the facts that would be alleged by the Alleged Net Winners and Alleged Preferred Creditors. These are as yet unknown.

[133] Turning to the specifics:

(a) *the investor and/or creditor was not causative of the unfair /oppressive conduct.* This is not relevant to section 204, argue the Joint Liquidators. Section 204(2) makes it clear that it is the causative conduct of the corporation and/or its directors, and the operation of the business which is relevant. This is entirely proper, and consistent with, for example, contract, trust and fiduciary duty law. The relevant conduct in all cases is the conduct of the person acting in breach of duty so as to cause the actionable loss.

(b) the investor and/or creditor received money not knowing about the unfair /oppressive conduct. This is not relevant argue the Joint Liquidators. The Joint Liquidators argue that the monies received by the investor/creditor are monies which belong to the bank, and/or which should have been retained by the bank for the benefit of all creditors. Knowledge is irrelevant to that. The payees are simply being asked to return the wrongful payments, not to pay damages or compensation on the basis of guilty knowledge. There is an analogy with equitable tracing of assets into the hands of innocent volunteers, who will then be obliged to return those assets to reverse their unjust enrichment.

The *Amicus* agrees that lack of knowledge on the part of the creditor/investor is irrelevant. The issue, as long as there was no collusion, turns on whether it was the investor's decision to seek repayment or the bank's[42].

(c) there was no intention on the part of SIB to prefer the investor and/or creditor. Section 204 is not limited to reversing preferences submit the Joint Liquidators. It deals with rectifying unfair prejudice, oppression or unfair disregard of the interests of others. There is little doubt that the wrongful payments were made, at the very least, with an unfair disregard for the interests of CD depositors whose funds were being used to pay off earlier depositors, or otherwise misappropriated. It is equally clear that the wrongful payments were unfairly prejudicial to the main body of creditors in that they undermined the *pari passu* principle at a time when the bank was insolvent. Maintaining the fiction that the bank was solvent required Mr. Stanford and his close associates to direct that a class of customers be preferred:- those who sought to redeem their CDs.

[42] **Crosby v Crouch** (1809) 11 East 256, **Re Hall** (1882) 19 Ch D 580

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The *Amicus* takes a more narrow view, submitting that an absence of an intention to prefer would be a defence to a claim to set aside a preference.

(d) *the payments were made in the ordinary course of business.* This rather begs the question, say the Joint Liquidators, what was SIB's "ordinary course of business"? It may be arguable that payments made in the ordinary course of legitimate business cannot be unfairly prejudicial, or disregard anyone's interests. However, that assumes that there is an ordinary course of business. The Joint Liquidators submit that there was no ordinary course of business, as its ordinary course of business was the furtherance of a fraud on the creditors. To define the ordinary course of business as the conduct of the fraud is against principle and public policy. However, if such a definition is applied, then any payments made in the ordinary course of the business of fraud were clearly prejudicial and unfair. While the argument risks becoming circular, the point is clear. Whether the fraud was the bank's ordinary course of business or not, the wrongful payments were prejudicial, and that is the test for section 204.

The *Amicus* submits that if payment was in the ordinary course of business this would be a defence to a claim for preference[43].

(e) *the payments were made after the investor/creditor pressed for payment*. The Joint Liquidators propose several answers to this. First, this is potentially a common law defence, and not a matter for consideration under section 204. It will be recollected that section 204(3)(h) expressly permits setting aside any contract or transaction, which must therefore include payments made on demand under contracts. The issue is fairness and prejudice, not demand. Secondly, even under the common law there is no clear-cut defence in the circumstances of these cases. As set out above, no demand could have been enforced in a court of law if the underlying circumstances were known. All demands under the CDs were demands based on instruments of fraud. To treat them as legitimate demands which the bank had no choice but to pay both legitimizes the fraud and ignores the underlying reality. Given the fraud and/or insolvency, the CD depositors had no right to payment. The demands were met not as a matter of ordinary business, and/or involuntary conduct by the bank, but as a means of perpetuating the fraud, hiding the insolvency and avoiding the application of the *pari passu* principle.

The *Amicus* submits that where payment is prompted by a demand, it would not constitute a voluntary payment and therefore could not amount to a preference[44].

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[43] **Nunes v Carter** (1866) LR 1 PC 342, 348, **Re Clay** (1895) 3 Mans 31 (paying bills on maturity)
[44] **Brown v Kemplin** (1850) 19 LJ (CP) 169 (Hilary Term cases)

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The *Amicus* does not appear to make a distinction for the possible application of section 204.

(f) *the payments were consistent with the usual way that SIB operated its business*. This is essentially a reformulation of the issues dealt with above. The fact that such behavior was "usual", say the Joint Liquidators, does not provide a defence or prevent it being unjust, unfair or prejudicial.

The *Amicus* observes that if the payment was in the ordinary course of business it would be a defence to a claim for preference[45]. He appears to restrict himself to the common law position and not in relation to section 204.

(g) *the investor/creditor had no knowledge of SIB's fraud and insolvency.* The Joint Liquidators argue that lack of knowledge on the part of the investor/creditor is irrelevant for the reasons set out above. The *Amicus* agrees.

Issue (ix): Whether the principle *ex turpi causa non oritur actio* can be deployed as a defence to either claim or otherwise.

[134] The Joint Liquidators contend that as has been said by Lord Hoffmann, the maxim *ex turpi causa non oritur actio* (from a dishonourable cause an action does not arise) "*expresses not so much a principle as a policy*" and that "*policy is not based upon a single justification but on a group of reasons, which vary in different situations*": **Gray v Thames Trains Ltd** [2009] AC 1339 at [30]. The public policy expressed by the maxim essentially seeks to ensure that a wrongdoer cannot benefit from, or rely on, his own wrongdoing to succeed in civil proceedings. However, this case does not offend against the public policy submit the Joint Liquidators.

[135] The Joint Liquidators argue that to apply the public policy in the present circumstances to deny a claim under section 204 of the IBC Act by the Joint Liquidators, whether or not the bank is characterized as a wrongdoer, would be contrary to the section itself. Public policy cannot override the statute or be inconsistent with it. The section expressly covers the situation where the corporation's business has been carried out or conducted wrongfully, or the directors' powers have been exercised wrongfully, and provides for a claim and a remedy. That precludes any reliance on *ex turpi causa* in respect of alleged wrongdoing by the bank or its controlling minds.

[136] The Joint Liquidators develop this by observing that the correctness of that position is clear, principled and sensible in that the section also allows a claim to be brought by a creditor. This is not a case of the Joint Liquidators' claim being used to fill a gap where the

[45] **Nunes v Carter** (1866) LR 1 PC 342, 348

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creditors have no cause of action. If the claim by the Joint Liquidators under section 204 were denied simply because they represent the bank which must be treated as a wrongdoer giving rise to an *ex turpi causa* defence, that does not prevent the same claim being made by every single one of the CD creditor claimants individually. Against them, the defence would not arise. It is clearly not practical, sensible, just, conducive to the proper conduct of litigation or an appropriate and proportionate use of Court resources for there to be 27,000 claims instead of one, say the Joint Liquidators, especially where there is no possibility of group litigation orders in this jurisdiction. The section recognizes that, and allows for the Joint Liquidators to bring a claim which will benefit the innocent creditors, even if the *ex turpi causa* defence could properly be raised against the bank.

[137] The *Amicus* agrees that this doctrine is a rule of public policy, but he applies it differently. To rely on the doctrine, says the *Amicus*, one must establish two elements. The first is that there is a sufficient connection between the illegality and the Joint Liquidator's claim. The second is that the unlawful conduct and state of mind of Mr. Stanford is to be attributed to SIB so as to make the fraudulent and unlawful purposes of Mr. Stanford, which are relied upon as founding the illegality, those of SIB itself.

[138] Once that is established, submits the Amicus, as the House of Lords made clear in **Stone & Rolls Ltd v Moore Stephens** [2009] 4 All ER 431, a liquidator would be in no different or better position than the Company or indeed the director to resist an *ex turpi causa* defence (where proceedings by a company's liquidator against the company's auditors in negligence and fraud were barred on the *ex turpi causa* principle).

[139] The *Amicus* explains that the modern authorities do not all speak with one voice on the nature and degree of connection required between the illegality and the claim in order for the *ex turpi causa* doctrine to be engaged.

[140] Some recent authority suggests that a more flexible approach applies at least outside the context of property rights, and that the appropriate test is of a sufficient degree of linkage (eg "inextricably linked") or of causation: **Gray v Thames Trains** [2009] 1 AC 1139 per Lord Hoffmann at 30-31 and 54.

[141] However the House of Lords in **Stone & Rolls Ltd v Moore Stephens** opined that the test to be preferred was the "reliance test" – that is to say, whether the claimant had to plead or rely on his own illegality[46].

[142] The *Amicus* submits that in this case the Joint Liquidators' claim does have at its foundation an assertion of illegality. It is not merely the occasion for the claims made by

[46] This test was preferred in **Jetivia SA and anor. v Bilta (UK) Limited (in liquidation)** [2013] EWCA Civ 968, [2013] SWTI 267 and **Madoff Securities (in liquidation) v Raven** [2013] EWHC 3147 paras 310-313

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the Joint Liquidators but the basis of them and a key ingredient of them. After all it is the assertion of the "Ponzi scheme" that founds the oppressive conduct that is needed to establish the section 204 claim. There can be no presumption of a fraudulent intention to prefer, needed for common law preference, if the CDs were merely being paid in the ordinary course of business (paying bills on maturity)[47]. Without the added ingredient of illegality the investors are not unjustly enriched but merely obtained their contractual entitlement to interest.

[143] The *Amicus* asserts that there is moreover a general principle, often called the **Hampshire Land** principle, that in a claim brought by a company for losses caused by a director's fraud or other unlawful conduct, the law will not attribute to the company the fraud or other unlawful conduct of the director when the company is itself the victim of that conduct[48]. **Stone & Rolls**, says the *Amicus*, is authority for the proposition that there is an exception to the **Hampshire Land** principle, albeit of uncertain ambit, in the case of a "one man company" where the fraudster whose conduct or knowledge is sought to be attributed to the company is the "sole actor" in the sense that there is no separate constituency of directors or shareholders who are innocent of his/their fraud. Here, significantly, says the *Amicus*, unlike with Madoff where there were independent and innocent shareholders, Mr Stanford was the sole shareholder of the bank.

[144] The *Amicus* recognizes that even in the case of such a "sole actor", the **Hampshire Land** principle remains applicable where the claim is against the delinquent directors or those associated with their wrongdoing[49]. The **Hampshire Land** principle is however not triggered, submits the *Amicus*, where the company is used as an instrument of a fraud targeted against a third party victim, resulting in loss to the company only as a secondary victim, in circumstances where the attribution is invoked by those not party to the relevant fraud. This enabled, in the Madoff case, Mr Madoff's fraudulent knowledge and conduct to be attributed to his company for the purposes of an *ex turpi causa* defence.

[145] The *Amicus* submits therefore that the *ex turpi causa* defence would be available to innocent investors to attribute Mr Stanford's fraudulent knowledge and conduct to the bank for the purposes of an *ex turpi causa* defence against the bank – and against the liquidators who now stand in the bank's shoes.

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[47] **Re Clay** (1895) 3 Mans 31

[48] **In re Hampshire Land Co** [1986] 2 Ch 743 **Stone & Rolls Ltd v Moore Stephens** [2009] AC 1391 at paras 137-156

[49] See **Jetivia v Bilta** at 75 and 78 – 82 explaining **Stone & Rolls**, and **Madoff Securities (in liquidation) v Raven** [2013] EWHC 3147 paras 314-320.

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[146] In reply the Joint Liquidators contend that it is misconceived to treat a claim by the Joint Liquidators as relying upon illegality.

[147] The Joint Liquidators refer to and adopt dicta of Popplewell J in **Madoff v Raven**, paragraph 312, that the Liquidators' "*claim is not founded on any illegality. The claim does not require* [the Liquidators] *to plead or prove any wrongdoing on the part of* [Mr. Stanford and the SIB insiders]. *The "Ponzi scheme" merely constitutes the occasion for the claim, not the basis for it, nor an ingredient of it*." Put another way, the "Ponzi scheme" merely constitutes the occasion for the liquidation. The basis of the section 204 claim is that, SIB being insolvent, payments have been made that put the alleged preference creditors in a better position than they would have been had SIB been put into liquidation at a proper time, which is unfair to the other creditors. The common law preference claim is equally based on the insolvency, not the fraud which caused the insolvency. There is no room for *ex turpi causa* – the reliance test approved by the House of Lords in **Stone & Rolls v Moore Stephens** is simply not satisfied. There is no sufficient link between the fraud and breach of duty and the claims being made.

[148] Even if there is such a link, however, the Joint Liquidators contend that it was made clear in **Stone & Rolls** that the defence can only be raised against a company where the company itself can be treated as having committed the fraud. The company must be primarily liable, not liable merely by reason of agency or vicarious liability.

[149] To establish primary liability, it has to be shown that guilty knowledge, or conduct, can be attributed to the company. This was the subject of detailed discussion in **Stone & Rolls.** However, the hurdles to be overcome were put most simply by Lord Brown (one of the majority) at Paragraphs 198 – 201. He stated that the ordinary rule is that the knowledge of a director is attributed to his company, as he is presumed to have discharged his obligation to disclose material facts to his principal. This would mean that guilty knowledge of a fraud would be attributed to the company if held by the director. However, there is an exception to that rule of attribution by way of the **Hampshire Land**[50] exception. That exception provides that where the company's agent is committing a fraud, illegality or breach of duty to his company, it would be unjust and against common sense to attribute his knowledge to that company. The **Hampshire Land** principle recognizes that agents do not disclose to their principals knowledge or information that is against their own interests, such as their own fraud, illegality or breach of duty, so no attribution of knowledge.

[150] On that basis, argue the Joint Liquidators, the knowledge of Mr Stanford or any other insider would not necessarily be attributed to SIB, and SIB would not be primarily liable for any illegality such that *ex turpi causa* could be deployed. However, where the person whose knowledge it is necessary to attribute to the company is in fact its *alter ego*, the

[50] See **Re Hampshire Land** [1896] 2 Ch. at 743

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person with sole control of its management, its sole director and shareholder, or other similar formulations, then **Hampshire Land** does not apply, and knowledge is attributed.

[151] **Stone & Rolls** was a majority 3-2 House of Lords decision in favour of attributing to the company the guilty knowledge of the man whom it was accepted was the sole directing mind and sole beneficial owner of the company, so that the liquidators could not sue the auditors of the company for failing to spot the fraud without running straight into the *ex turpi causa* defence. It is a very different case from this one. Indeed, when properly analyzed, it shows that there is no *ex turpi causa* defence to the Applicants' proposed claims.

[152] First, the sole actor exception cannot apply. Mr Stanford and the other insiders were not the sole directing mind, the one man, the sole actor for SIB. SIB had a board of directors and an Investment Committee that took management decisions and had no guilty knowledge. It must be noted that Lord Brown stated in Paragraph 202 that it was on the basis that Mr Stojecvich (in **Stone & Rolls**) was the "one-man" and on this basis alone that he concluded that the liquidator of the company could not, as against the auditor, resist the *ex turpi causa* defence.

[153] Lord Walker said the same – see paragraphs 161 and 174. His description of what a one-man company means, in paragraph 161, illustrates that SIB is not such a company: "*It may be simplest to propose a test in negative terms, on the lines of what Hobhouse J said in Berg, that is a company which has no individual concerned in its management and ownership other than those who are, or must (because of their reckless indifference) be taken to be, aware of the fraud or breach of duty with which the court is concerned*."

[154] Lord Phillips, the remaining member of the majority, decided the point on even narrower grounds, namely that the auditors had caused no loss, since the only person that they had to tell about the fraud in order to comply with their duty was the one-man who already knew all about it.

[155] Secondly, argue the Joint Liquidators, it seems clear from the speeches in the House of Lords that the majority formed the view that even if there was a controlling mind, then the exception to the **Hampshire Land** principle would not apply so as to allow the defence to be run against a company if the company was a primary victim of its directing mind's fraud. It was concluded that Stone & Rolls was not a victim because it started and ended with nothing. That analysis does not work in this case. SIB is itself a victim of the fraud and indeed has sued Mr Stanford for recovery of sums dissipated from it. The monies deposited with it by the creditors were its assets, in accordance with standard banking principles. Title passed to SIB. Those assets were then stolen from SIB, leaving SIB with no assets, and no means of meeting its liabilities to its creditors. SIB is a primary victim, and thus there is no *ex turpi causa* defence.

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[156] Thirdly, it was accepted by the House of Lords, and set out expressly by Lord Walker, that the question of attribution and the one-man exception is a triable issue, not susceptible to summary determination in the absence of a concession. The factor which made **Stone & Rolls** unusual, possibly unique, and which may explain what many have seen as an odd result, was that the liquidators expressly based their claim against the auditors on the fact that Mr Stojevich was the sole actor who had infected the company with his moral turpitude to the extent that the company had been held liable in other proceedings for his actions, on the basis his knowledge had been attributed to the company. The claim sought to recover that liability from the auditors. Thus the company was at one and the same time basing its claim on the attribution of knowledge, and denying that there could be attribution of that knowledge for the purposes of the *ex turpi causa* defence.

[157] Finally, the majority of the House concluded that the auditors could not be held liable to the liquidators claiming on behalf of the true victims, the creditors, because the auditors owed no duties to the creditors. The duties were owed to the company and the body of shareholders, and since there were no innocent shareholders and knowledge was attributed to the company, there was an *ex turpi causa* defence. That is an important, indeed crucial, distinguishing feature from this case, say the Joint Liquidators. Here the claims are being brought because the liquidators owe duties to the creditors, and because (SIB being insolvent, or teetering on the brink of insolvency at all relevant times) the directors of SIB owed duties to the creditors. It is the breach of those duties that forms the basis of all the claims, duties owed to the primary victims of the fraud. There is no room for an *ex turpi causa* defence in respect of claims arising from the breach of duties owed to the primary victims of the fraud.

Issue (x): Whether there is a defence, or should relief be given, on the basis that valuable consideration has been given in good faith, for example, in terms of the time use of money.

[158] The Joint Liquidators submit that any defence based upon valuable consideration, or taking account of the time value of money deposited pursuant to a CD, is not significant, relevant or appropriate, given the circumstances of this case. The operation of the "Ponzi scheme" was such that SIB did not engage in any legitimate investment of funds whether in accordance with the promises made to CD investors or otherwise, and there were no, or no significant, legitimate investments to return to investors. Further or alternatively, sums which were received by CD purchasers were not returns on sums invested so as to preserve capital or generate interest, they were proceeds of the fraud. The genuine investments were insufficient even to repay the capital invested, let alone any interest thereon. To regard the arrangements as giving the Alleged Preferred Creditors or Alleged Net Winners a contractual entitlement to repayment on the terms of the CDs on any basis is to ignore the commercial realities, the rights and interests of the remainder of the CD depositors and the underlying fraud. The recipients of wrongful payments, assuming no relevant knowledge, "simply got lucky" say the Joint Liquidators. It is unjust, unprincipled

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and illegitimate to allow them to retain the proceeds of such luck at the expense of other victims. To do so on the basis of alleged valuable consideration provided by the recipients would be to legitimize the underlying fraud. After all, all CD investors acted in the same way. The recipients of wrongful payments provided no value or consideration not provided by the other, less fortunate, CD investors. In truth, say the Joint Liquidators, no consideration was provided by the recipients of wrongful payments that justifies them retaining such payments at the expense of, or to the detriment or prejudice of, other CD investors.

[159] The Joint Liquidators submit that the reality is that in the last six months of the operation of the bank, and almost certainly for considerably longer, there ought properly to have been a moratorium on transactions to allow for the *pari passu* distribution of funds to creditors of the bank. Investors who received payments during this run on the bank, and indeed earlier, did so not as a result of any legitimate expectation or contractual entitlement brought about by consideration provided by them, but as a matter of expediency and luck, to the prejudice of the majority of SIB's creditors. The wrongful payments were made purportedly pursuant to agreements which were no more than props in the self-evident overall "Ponzi scheme". The artificial imposition of a contractual entitlement to retain wrongful payments, whether of capital or interest, simply perpetuates this fraud in circumstances where the reality is that no interest could have been generated on investments, and capital had been dissipated and/or misappropriated. Ultimately, if allowed to stand, the wrongful payments inure to the benefit of a minority at the expense of a majority of creditors, in breach of the *pari passu* principle and in breach of the legitimate expectations of the creditors, and in perpetuation of the fraud. The concept of time value of money, or valuable consideration, does not assist in circumstances where no real investment income was being generated and capital had been misapplied.

[160] The Joint Liquidators submit therefore that by virtue of the ordinary interpretation of section 204 of the IBC Act and in the context of this particular liquidation, the Joint Liquidators ought properly to be able to (i) withhold payments to and recover sums from creditors who received any extraordinary payment in the six month period prior to SIB being intervened and (ii) pursue and recover wrongful payments made to Alleged Preferred Creditors and Alleged Net Winners.

[161] The *Amicus* disagrees. The *Amicus* submits that the essence of this issue is whether the investors have an entitlement to notional interest on their monies which might be set off against a claim for the recovery of the interest.

[162] If the investments (as the Liquidators suggest) were a sham, the interest they earned is money by which the gaining creditors were "unjustly enriched". It could be argued that they had no entitlement to "real" interest as there was no "real" investment upon which

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"real interest" might accrue. In its barest legal terms, says the *Amicus*, the interest was money which they received under the mistake of fact that it represented a return whereas it merely represented a diversion of another investor's capital.

[163] To find in favour of a claim for unjust enrichment the court must first ask itself four questions when faced with such a claim, which are as follows[51]:

a. Has the defendant been enriched?
b. Was the enrichment at the claimant's expense?
c. Was the enrichment unjust?
d. Are there any defences available to the defendant?[52]

[164] The *Amicus* asks whether, even if they had no entitlement to "contractual" interest, would the investors still have an alternative claim to some kind of "notional interest" to compensate the investors for the use of their money? All the bank's investors, says the *Amicus – whether they received interest or not* - enjoyed free standing claims against the bank in unjust enrichment not merely for the money they lost but also for the benefit the bank unjustly obtained at their expense.

[165] Thus in **Sempra Metals v IRC** the tax payer was able to recover interest on the sums it had paid to the Revenue by way of unlawfully levied advance corporation tax as the money paid to the Inland Revenue Commissioners otherwise amounted to a "*massive interest free loan*" for which the tax payer deserved restitution and payment for use of the money.[53]

[166] The *Amicus* submits that the benefit the bank received was the use of the money – that is to say the cost saving the bank enjoyed by not having to borrow that money commercially itself[54].

[167] In **Sempra Metals**, the claimant did not recover the market interest rate on the sums it had paid because the government was able to borrow money at lower rates than the market rate. The amount saved by the government was thus less than that which would have been saved by a commercial entity borrowing the same sums of money[55]. The Amicus thus suggests that the Court therefore needs to look here to the market rate available to the bank for borrowing[56] rather than the retail market rate.

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[51] **Banque Financière de la Cité v Parc (Battersea) Ltd** [1999] 1 AC 221 at 227 per Lord Steyn; **Investment Trust Companies v Revenue and Customs Comrs** [2012] EWHC (Ch) 348 at [38] per Henderson J.
[52] For example the defence of change of position: **Kleinwort Benson v Lincoln City Council** [1998] 2 AC 349 at 382
[53] **Sempra Metals v IRC** [2008] AC 561
[54] **Sempra Metals v IRC** [2008] AC 561
[55] **Goff and Jones** at para 4–07
[56] i.e. LIBOR or its equivalent

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[168] The *Amicus* urges that it seems clear upon English law authority that the investors could argue that the interest to which they should be entitled would be compound interest.[57]

[169] The fundamental problem with these submissions, argue the Joint Liquidators in reply, is that any such award of interest, or compensation for the time value of money, would mean subtracting this from other investors' capital investment, thereby perpetuating the "Ponzi scheme" and breaching the *pari passu* principle.

[170] The Joint Liquidators make other legal points in reply which need not be set out here.

[171] Issues (xi) and (xii) essentially pick up on the argumentation advanced in relation to the other issues. The Joint Liquidators answer them in the positive and the *Amicus* in the negative.

[172] Other submissions of the Joint Liquidators and the *Amicus* are also pertinent.

[173] The *Amicus* introduced his argument by observing that the objections communicated display common themes. These are:

a. SIB's customers used a range of services offered by the bank including CDs, credit cards and current and deposit accounts;
b. Their dealings with the bank were in good faith and in the course of the ordinary business of the bank;
c. Where they received interest it was in line with the bank's advertised rates and the contractual terms they had with the bank;
d. Their capital drawings were not motivated by a fear about the future of the bank and they had no forewarning of the bank's collapse or the alleged fraud;
e. Where they did make drawings they were made in the ordinary operation of their account or because their investments had matured and / or they needed *some* of their investment to meet some pressing expense;
f. The bank took pains to reassure investors until the very end that it was "business as usual" and that the bank was as safe or safer than other major financial institutions, many of whom were also subject to regulatory enquiry at the time;
g. Had they truly known the position at the bank, they would have drawn all their investment and not left the greater part in the bank;
h. They consider themselves to be "net losers";

[57] **Sempra Metals v IRC** [2008] AC 561

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i. If they are ascribed "net winner status" some complain that this is because in calculating drawings the Joint Liquidators have included monies transferred between their accounts and money borrowed through using their credit cards.

j. They are concerned that their claims are also being dealt with under the United States receivership and may have been compromised already.

[174] In addition to the primary issues identified above, the Amicus listed a number of secondary and tertiary issues:

SECONDARY ISSUES

i. Whether the manner in which payment was made may amount to a defence / affect the relief? For example:
   a. Cashing of CDs
   b. Payment of interest
   c. Transfers between accounts
   d. Payment by way of credit card
   e. Repayment of debts due to SIB from another SIB account
ii. Whether there is a defence on the basis that the payment was in respect of money held on trust for the respondent?
iii. Whether there should be a *de minimis* cut off from claims? And if so should this be court-imposed?
iv. What is the impact on the claims if the respondent is a net loser?
v. Whether there is a defence under the constitutional law of Antigua?
vi. Whether there is a defence under the Human Rights law of Antigua?
vii. What is the impact on the claim of the acts of the receivers / decisions of the Court in the US Receivership?
viii. What is the impact on the claim of SEC against SIB?
ix. Whether SIB was insolvent at the time?

TERTIARY ISSUES

x. Whether payment was made at all?
xi. Whether the claim is subject to a compromise agreement?
xii. Whether the claim is barred under Canadian law?
xiii. Whether the liquidators are estopped from bringing the claim on the basis of their previous representations or conduct?
xiv. Whether the claim is barred under Mexican law?
xv. Whether the Court has jurisdiction to entertain the claim against investors and creditors outside the jurisdiction?

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xvi. Whether it is a defence to either claim that the respondent did not intend to be preferred?

xvii. Whether there is a defence under the constitutional law of any other country?

xviii. Whether there is a defence under the Human Rights law of any other country?

xix. Whether there is a defence under section 44 of the Antiguan Bankruptcy Act?

[175] The *Amicus* suggested that certain of the issues may be better dealt with outside the scope of this directions application – particularly those where the issue raised is fact-specific to the individual investor (e.g. complaints of infringement under human rights or constitutional law) or where defences are raised under the investor's national law (e.g Canadian or Mexican law or where jurisdictional issues are taken).

[176] The *Amicus* invited the Court to make no finding and allow the investors to reserve their position on those issues until any eventual enforcement claims.

[177] The Joint Liquidators agree that these issues, such as they may be, appropriately fall outside the scope of this application.

Section 204 of the IBC Act

[178] The *Amicus* looks to jurisprudence from other Commonwealth jurisdictions to construe section 204. He identifies the following countries that have statutory provisions which he says mirrors section 204:

Canada	S 241(2)(c) Canada Business Corporations Act RSC 1985
Trinidad and Tobago	S 242 Companies Act
Saint Lucia	S 241 Companies Act
New Zealand	S 174 Companies Act 1993
South Africa	S 163 Companies Act 71 of 2008
Barbados	S 228 Companies Act

[179] The *Amicus* observes that it is quickly apparent from a perusal of these countries' case law that the section derives from the English legislation on "unfair prejudice". Indeed citation of English authorities on unfair prejudice has been a common theme in many Commonwealth cases for the national equivalent of the text of section 204.

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[180] Hammond J explained the legal position from the standpoint of the Court of Appeal in New Zealand[58] in this way:

> ***"The law Evolution***
> *The oppression remedy originated in Britain in s210 of the Companies Act 1948 (UK), as an alternative to winding up on the just and equitable ground. The argument was that winding up was much too drastic a remedy to utilise in many cases, and that it would be desirable to give courts wider powers to intervene to set matters to right, whether by ordering one party to buy the other out or otherwise regulating the affairs of a company. …New Zealand adopted like reforms. ….This section has counterparts (with some local variations) not only in the United Kingdom, but in many parts of the British Commonwealth, including Australia, and Canada, and in 37 American States ….*
>
> ***The development of the legal tests for oppression***
> *The most difficult issue in relation to this important new remedy in company law was always going to be what should be sufficient to ground oppression or unfair prejudice.*
>
> *The early British cases took a narrow line. The remedy was confined to cover only conduct which was "burdensome, harsh and wrongful" or showed "a lack of probity and fair dealing" (see for instance Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324 at 342 and 364). From those early beginnings, the section has been applied much more widely, both in Britain, and throughout the common law world.*
>
> *Categorisation is not always useful or even appropriate (because it can obscure underlying principle), but by way of a general indication it can be said that a large number of the decided cases in the British Commonwealth fall broadly into three groups. First, there are the cases in which those in control of a company have, by some means or another, treated the company's assets as very much their own, to the detriment of other shareholders. Secondly (and in keeping with the jurisprudence under the older just and equitable ground), the oppression remedy has been used to deal with disputes within quasi-partnership companies. Then there is a third group of cases which have been primarily concerned with the abuse (in one way or another) of minority rights in the course of the restructuring or amalgamation of companies.*

[58] **Latimer Holdings v Powell**, case CA 214/03 15th September 2004, [2005] 2 NZLR 328

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That said, the remedy does cut across many of the older distinctions in company law, and other rules of law. Effectively, British Commonwealth courts built on the original British reform to assert a general jurisdiction to deal effectively and more cheaply with abuses of corporate power. This was thought to be appropriate because the complexity and expense of litigation attendant on the older ways of dealing with problems of that character had left too many matters, for too long, in practice irremediable. The jurisdiction has, in the main, been as beneficial as its propounders had hoped for, and that alone should caution against any undue curtailment of the breadth of the provision. That is not to say there have not been problems with these provisions, and it is to these we now turn.

There was always going to be a distinct problem for courts in evolving a principled approach to this section. On the one hand, the section was of a remedial and enabling variety: the jurisdiction was deliberately designed to transcend the limitations of the former law. At the same time, it is appropriate that there be a principled approach to the section, against which the commercial world, and its advisors, can measure conduct."

The English law perspective

[181] Under English law, observes the *Amicus*, the present equivalent provision is found under section 994(1) **Companies Act 2006**[59] which provides for appropriate relief, such as an order requiring the other shareholders to purchase a member's shares, and, alternatively, for a winding-up order.

> "*An application under this section can be made by a member on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or some part of its members (including at least himself) or that any actual or proposed act or omission of the company, including an act or omission on its behalf, is or would be so prejudicial*"[60].

[182] The English statutory equivalent is more restricted in its scope than section 204. Most obviously it is restricted to "*unfair prejudice*" to members; indeed it does not afford equivalent relief to creditors and contains no equivalent provision for failing to have regard to the interests of creditors. Section 994 also does not afford relief on the two alternative

[59] Previous incarnations include s 459 of the English **Companies Act 1985** and section 210 of the English **Companies Act 1948**

[60] S 994(1) English **Companies Act 2006**

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heads of "*oppressive*" conduct and conduct which "*unfairly disregards the interests"* of members, creditors and others.

[183] The *Amicus* submits that the test for determining what amounts to unfairly prejudicial conduct is objective, and is "*whether a reasonable bystander observing the consequences of the conduct would regard it as having unfairly prejudiced the petitioner's interests"*[61].

[184] The prejudice must be real, rather than merely technical or trivial[62]. Bad faith or intent to cause harm on the part of the respondent is not an essential requirement[63]. A mere infringement of the petitioner's rights under the company's articles is not sufficient; rather it must be shown that the infringement itself constitutes conduct which is unfairly prejudicial[64].

[185] Typical allegations under this heading, suggests the *Amicus*, will be of breaches of directors' duties (usually involving misappropriation of corporate assets, improper allotments of shares and allegations of mismanagement); breaches of the articles and breaches of the Companies Act (often involving allegations regarding meetings, accounts and disclosure).

[186] The provision has been held to have limited application to insolvent companies; Arden LJ noted[65] that the English **Companies Act 2006**, s 994, requires the petitioner to show that the respondent's wrongful acts have caused him "prejudice" in his capacity as a member; so, if the company is insolvent, generally this means that the petitioner must show that his shares would have had a value but for the wrongdoing of the respondents.

[187] However Arden LJ noted that where the company is insolvent, the court has to be flexible in its approach:

> *"This is because there is the complication that the petitioner may not be able to show that he obviously has some interest in the company meriting relief because his sole interest constitutes shares which at the moment of trial are valueless because no relief has yet been given in respect of the matters of which he complains. The court has to do what is necessary in that situation to achieve a just and fair result"*[66].

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[61] **Re RA Noble & Son (Clothing) Ltd** [1983] BCLC 273, citing Slade J in **Re Bovey Hotel Ventures Ltd** (31 July 1981, unreported)
[62] **Re Saul D Harrison & Sons plc** [1995] 1 BCLC 14, CA
[63] **Re RA Noble & Son (Clothing) Ltd** [1983] BCLC 273
[64] **Re Carrington Viyella plc** (1983) 1 BCC 98, 951
[65] **Re Tobian Properties Ltd, Maidment v Attwood** [2012] EWCACiv 998
[66] **Re Tobian Properties Ltd, Maidment v Attwood** [2012] EWCACiv 998 at [46]

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[188] Importantly, says the *Amicus*, the Courts have recognized that the drafting of the section (which, although more limited, reflects part of the wording of s 204) renders it possible to afford relief against persons other than the company, its past and present shareholders and directors actually involved in the unfairly prejudicial conduct. However, submits the *Amicus*, this will only occur where the "third party" respondent was sufficiently implicated to warrant relief being granted[67]. Charles Aldous QC, sitting as a deputy high court judge, put it this way:[68]

> "*In Re Little Olympian Each-Ways Ltd Lindsay J, after reviewing the language of ss 459 and 461, as well as their legislative history, stated (at 424):*
>
> > *'The impression given both in the sections and in the rules is that the greatest possible flexibility was intended by the legislature to be given to the courts. Thus s 459 does not, for example, require that it is by a respondent or by the respondents to the petition that the company's affairs are being or have been conducted in the manner complained of. It does not require that the respondent to the petition should be limited to members of the company or to its directors or to those conducting its affairs . . .'*
>
> *Lindsay J, after reviewing the relevant authorities (including the decision of Hoffmann J), concluded that as a matter of jurisdiction the language of s 461(1), which states that the court 'may make such order as it thinks fit for giving relief in respect of the matters complained of' confers a very wide jurisdiction. I agree. I shall not repeat his analysis leading to such conclusion. In my judgment, where for example the unfairly prejudicial conduct involves the diversion of company funds, a petitioner is entitled as a matter of jurisdiction to seek an order under s 461 for payment to the company itself not only against members, former members or directors allegedly involved in the unlawful diversion, but also against third parties who have knowingly received or improperly assisted in the wrongful diversion.*

The New Zealand law perspective

[189] The current New Zealand law provision is section 174 of the **Companies Act 1993** and is wider in reach than the English law provision, and closer to the Antigua and Barbudan section 204, although creditors are not specifically mentioned:

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[67] **F & C Alternative Investments (Holdings) Ltd v Barthelemy** [2012] 3 WLR 10, **Apex Global Management v Fi Call Ltd** [2013] EWHC 1652 (where the third parties were responsible for the unfairly prejudicial conduct).
[68] **Lowe v Fahey** [1996] 1 BCLC 262

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"*174 Prejudiced shareholders*

*(1) A shareholder or former shareholder of a company, or any other entitled person**,** who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the Court for an order under this section.*

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order -

(a) ...

(h) Setting aside action taken by the company or the board in breach of this Act or the constitution of the company."

[190] In a leading judgment for the Court of Appeal of New Zealand[69], Hammond J stated:

"[65] In New Zealand, in Thomas v H W Thomas Ltd [1984] 1 NZLR 686 (CA), Richardson J made the following observations on the interpretation of s209 of the Companies Act 1955 (as the comparable New Zealand section then was):

"I do not read the subsection as referring to three distinct alternatives which are to be considered separately in watertight compartments. The three expressions overlap, each in a sense helps to explain the other, and read together they reflect the underlying concern of the subsection that conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for a complaint under s209. The statutory concern is directed to instances or courses of conduct amounting to an unjust detriment to the interests of a member or members of the company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company (at 693)."

[69]**Latimer Holdings v Powell**, case CA 214/03 15th September 2004, [2005] 2 NZLR 328

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This Court held that fairness is not to be assessed in a vacuum, or from the point of view of one member of a company, and that all the interests involved must be balanced against each other, including the policies underlying the Act and those underlying s174. For unfairness in this broad sense to be grounded, there must be a "visible departure" from the standards of fair dealing, "viewed in the light of the history and structure of the particular company, and the reasonable expectations of [its] members" (at 695)…..

…. I cannot put elastic adjectives like "unfair", "oppressive" or "prejudicial" into watertight compartments. In my view, this repetition of overlapping ideas is only an expression of anxiety by Parliament that one or the other might be given a restrictive meaning. …

….Those general observations aside, three principles are very well established.

First, errors of judgment by management, inefficiencies, and poor business management without distinct elements of bad faith or self-interest cannot amount to oppression. …

Secondly, in any event, Judges are ill-equipped to evaluate business strategies, and have accordingly exercised self-restraint. … This is sometimes called the "business judgment" rule. Judges, on the other hand do have training and expertise in dealing, for instance, with fraud, illegality, or conflicts of interest.

Thirdly, the remedy is not (without more) appropriate for the facilitation of exit from a company where there are straight out disagreements over company strategy.

[191] The *Amicus* submits that in assessing whether oppression had occurred, the Court should have regard to assessing what had occurred against the "reasonable expectations" of the stakeholder – though this factor is not in and of itself necessarily determinative - and those expectations are not necessarily restricted to purely "internal" or "formal" expectations[70]. Hammond J explained that those expectations might be elicited from the relationship the stakeholder had with the company:

"In settling expectations and understandings for the purpose of this section Judges will necessarily have to focus on the formal nexus of understandings in the firm which the parties have themselves established. These might be termed the

[70] **Latimer Holdings v Powell**, case CA 214/03 15th September 2004, [2005] 2 NZLR 328

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"formal" or "internal" understandings. But sometimes courts (in our view legitimately) focus also on external standards in identifying reasonable expectations and understandings …. However in settling reasonable expectations, Chancery Judges have not strayed into the quagmire of attempting to imply terms into more formal expectations."

The Canadian law perspective

[192] Section 241(2) of the **Canada Business Corporations Act RSC 1985** is even closer to equivalency with section 204. It provides that a court may make an order to rectify the matters complained of where:

> *"(a) any act or omission of the corporation or any of its affiliates affects a result, the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer...."*

[193] Section 241 envisages relief for creditors as well as shareholders.

[194] The *Amicus* observes that "*oppressive conduct*" is judged to a more rigorous standard than "*unfair prejudice*"[71] and may require an element of coercion to be shown[72] and certainly a lack of probity and fair dealing to the stakeholder in the matter of his proprietary rights as such[73]. "*Unfair prejudice*" is less culpable but still has unfair consequences. The "*unfairly disregards*" head under section 241 has been defined as meaning "*unjustly and without cause pay no attention, to ignore or treat as of no importance, contrary to the stakeholder's reasonable expectations*"[74], for example "*favouring a director by failing to prosecute claims, improperly reducing a shareholder's dividend or failing to deliver property belonging to a claimant*". As in New Zealand, the categories are not watertight and are considered as intermingling. Conduct need not be deliberately wrongful to sustain a complaint[75].

[195] As to the approach the Court should take when considering the facts of a case, the Supreme Court of Canada[76] indicated this:

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[71] **Re Mason & Intercity Properties** (1987) 5 ROR (2nd) 631, CA
[72] **Fraser & Stewart Company Law of Canada**, *6th Edition* (1993) p 720
[73] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 293
[74] **BCE Inc v 1976 Debenture holders** [2008] 3 SCJ 560 paras 67, 93, 94
[75] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 293
[76] **BCE Inc. v. 1976 Debenture holders** [2008] S.C.J. No. 37, 301 D.L.R. (4th) 80

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> ***"56*** *In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.*
>
> ***57*** *We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.*
>
> ***58*** *First, oppression is an equitable remedy. It seeks to ensure fairness - what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair…. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: Scottish Co-operative Wholesale Society, at p. 343.*
>
> ***59*** *Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another**…..***
>
> ***62*** *As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations…..*
>
> ***72*** *Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders."*

[196] The *Amicus* states that what needs to be shown is a misuse of power with a view to confer a benefit on some creditors or shareholders and not others[77]. The Court would intervene where the conduct shows unequal treatment[78].

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[77] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 293
[78] **Callaner v Eveline Holdings** (1987) 48 Mon R (2d) 308

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[197] As with Antiguan law, Canadian law does not give creditors and liquidators a direct right of action. To pursue a claim, the Court's discretionary permission must be invoked to allow him to pursue the claim as a "proper claimant". To bring any claim, the applicant must show that he has suffered detriment in his capacity as a complainant and a failure to do so will not merely be fatal to the exercise of the discretion but to the claim itself[79].

[198] It seems clear, suggests the *Amicus*, that the discretion may, in certain circumstances, extend to creditors[80]. Where the claimant is a creditor, the creditor must not merely show that he has not been paid but also that there is some additional element that shows unfair prejudice or unfair disregard for his rights[81]. Creditors may sue where there is an additional feature of the wrong which makes recourse to oppression a practical necessity so that justice is done on the facts of the case[82]. Oppression may be available as a remedy to a creditor where the directors or controlling shareholders misconduct the affairs of the company so as to render it impossible or exceedingly unlikely for the corporation to be able to perform its contractual obligations[83].

The South African law perspective

[199] In South Africa, Section 163 of the **Companies Act 71 of 2008** provides a remedy against any oppressive or unfairly prejudicial acts or omissions of a company or related person that unfairly disregard the interests of a director or shareholder. It provides no remedy for creditors.

[200] Petse JA giving the leading judgement of the Supreme Court of Appeal in **Grancy Property Limited v Manala**[84], explained that a similar approach to that taken under English law in relation to the meaning of oppressive and unfair prejudice is taken by the South African courts, with the addition that in the governing Afrikaans linguistic context "unfairly" prejudicial includes "unreasonably" prejudicial.

[201] Petse JA added a note of caution[85] concerning the breadth of the Court's discretion:

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[79] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 307
[80] **Bank of Montreal v Dome Petroleum** [1987] AJ No 1401, 54 Alta LR (2d) 289
[81] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 303
[82] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 303, citing **Hurley v Slate Ventures Inc** [1996] NJ 203
[83] **Halsbury's Laws of Canada, Business Corporations, 1st Edition, 2013**, para 303, citing **SCI Systems v Gornitzki Thompson & Little** [1997] OJ No 2175, 147 DLR (4th) 300
[84] **Grancy Property Limited v Manala** (665/12) [2013] ZASCA 57 (10 May 2013)
[85] **Grancy Property Limited v Manala** (665/12) [2013] ZASCA 57 (10 May 2013)

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"[32] But MS Blackman in Commentary on the Companies Act vol 2 (2002) at 9-4 cautioned that:

> *'The very wide jurisdiction and discretion [s 252] confers on the court must, however, be carefully controlled in order to prevent the section from itself being used as a means of oppression.'"*

The Saint Lucian law perspective

[202] The *Amicus* explains that the equivalent provision in St Lucia is found at section 241 of the **Companies Act 1996**. In **Devaux v Deboulay** the Court of Appeal in St Lucia recognized that:[86]

> "*[7] … The court has extremely wide powers in this regard*[87] [to rectify matters complained of through use of this section]…. .
>
> *[8] The oppression remedy is a most flexible device given by Parliament to the court in order to protect the interests of minority shareholders. Since this remedy is a peculiar creature of statute, the court must, before resorting to it, ensure that certain essential elements are present*[88]*. The court must also engage in a fine balancing act. On the one hand it must protect the legitimate interests of the minority shareholder. But at the same time it must take care not to usurp the function of the board of directors."*

The Trinidad and Tobago law perspective

[203] The equivalent provision in Trinidad and Tobago is section 242 of the **Companies Act Chapter 81:01**, and is in identical terms to section 204.

[204] In **In re Supermix Feeds (Trinidad) Ltd, Ramkissoon v Ramkissoon**, Stollmeyer J[89], deriving particular assistance from the Canadian jurisprudence, observed:

> *"The potential protection* [the section]*, offers corporate stakeholders is awesome. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the corporation against the ability of management to conduct business in an efficient manner. The remedy is*

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[86] **Devaux v Deboulay**, *Appeal 32 of 2003*,28 February 2005
[87] See: section 241(3) of the **Companies Act 1996**
[88] See: Butterworths "**Shareholder Remedies in Canada**", at Para 18.21
[89] **In re Supermix Feeds (Trinidad) Ltd, Ramkissoon v Ramkissoon**, Case H.C.A. Cv. 427 OF 2004, 28th February 2005

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appropriate only where as a result of corporate activity, there is some discrimination or unfair dealing amongst corporate shareholders, a breach of a legal or equitable right, or appropriation of corporate property". (see Dennis H. Petersen: Shareholder Remedies in Canada, para. 18.1). …

It serves "…as a judicial brake against abuse of corporate powers, particularly, but not exclusively, by those in control of a corporation and in a position to force the will of the majority on the minority… [it] enables the Court to intercede in the affairs and operation of a corporation and to effectively override the decisions of those charged with the responsibility of corporate governance" (see Doherty JA in Budd at paragraph 32)."

[205] The Joint Liquidators submit that the exercise carried out by the *Amicus* of comparing statutory regimes similar to section 204 of the IBC Act fails to take into account various differences. Of the six jurisdictions examined, only Canada and Trinidad and Tobago expressly protect *creditors* against behaviour that is either "oppressive", "unfairly prejudicial" or "unfairly disregards" their interests – as opposed to protecting them from preferences (which are inherently prejudicial to creditors) or allowing them their own winding up remedy. The Joint Liquidators therefore urge the Court to treat the case law pronouncements referred to by the *Amicus* with caution.

[206] The Joint Liquidators point out that in the various statutes examined by the *Amicus,* in every case voidable preference provisions are expressly included either in the relevant statute which was examined or alternatively, in other legislation which applies to corporate entities governed by the statute examined. That is not the case with Antigua and Barbuda.

[207] The jurisdiction which has the most far reaching unfair prejudice and preference legislation, say the Joint Liquidators, is Canada. Whilst the **Canada Business Corporations Act (RSC) 1985** itself does not contain preference provisions, Canada's **Bankruptcy and Insolvency Act RSC** (at section 95) and the **Winding Up and Restructuring Act**[90] (at sections 100 and 101) both have preference avoidance provisions.

[208] The Joint Liquidators state that in Canada, the legislative framework is such that all of the payments made in the final month of the bank's existence may be strictly recoverable.

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[90] One of the primary differences between these two statues is that under the **Bankruptcy and Insolvency Act**, the Company's property vests in the Trustee in Bankruptcy whilst under the **Winding Up and Restructuring Act**, company property remains with the Company, although a liquidator assumes control.

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[209] The inclusion of preference legislation in the Canadian framework therefore makes it likely on balance that there would be no need for Canadian jurisprudence to ascribe to section 241 (2) of the **Canada Business Corporations Act (RSC) 1985** the meaning which it is capable of bearing, given the ordinary interpretation of the words "oppressive" "unfairly prejudicial" and "unfairly disregards". The same can be said of other jurisdictions (unlike Antigua) which have dedicated preference avoidance legislation.

[210] The presence of this alternative mechanism, say the Joint Liquidators, ought to be considered when the Court treats with the language of section 204 of the IBC Act.

[211] The Joint Liquidators contend that section 371 of the IBC Act is particularly important in guiding the Court in interpreting section 204 of the legislation. No other legislative framework referred to by the *Amicus* includes similar objectives/purposes as set out in the IBC Act – or such a wide gap for the equivalent to section to 204 to fill. Further, very few of the other jurisdictions referred to by the *Amicus* provide the sort of interpretive discretion that section 371 provides[91].

[212] The *Amicus* submits that the Joint Liquidators would have to show that there was a disparity of treatment which was inconsistent with the investors' reasonable expectations. Rather, says the *Amicus*, the evidence presently indicates that the alleged actions of the director(s) of SIB were not selective amongst the investors. In other words, if any creditor, whose CD matured, so wished, he was paid his contractual interest and was allowed to redeem his CD. If any creditor requested a cancellation of his CD and the return of his money, he was repaid his money. This is not conduct inconsistent with the stakeholders' reasonable expectations, needed to show oppression or unfair prejudice or unfair disregard for the interests of other creditors. Rather, by honouring the contractual expectations, whilst this activity subsisted, it shows equal treatment of the creditors consistent with their reasonable contractual expectations.

[213] Against this, the Joint Liquidators argue that such reasonable contractual expectations must take into account disclaimers and risk disclosure statements SIB had made to investors, which in essence, warned that investors might lose the entire value of their investment.

Who are Net Winners? The Risk of Double Recovery.

[214] The *Amicus* submits that in calculating whether investors are "net winners" or "net losers", it appears from the creditor objections that in reaching that calculation, the Joint Liquidators have not merely counted cashed CDs but a variety of other payments and transfers.

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[91] Canada comes closest, albeit that the discretion is in a separate statute.

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[215] The *Amicus* observes that care must be taken to avoid double recovery. A clear indication from the Court as to what type of transaction should be subject to recovery, if the court rules in favour of the Applicant, would plainly be of considerable assistance to the parties.

[216] One example raised by the *Amicus* is that it has been suggested that transfers between accounts have fallen into the calculation of whether investors are "net winners" or "net losers". The *Amicus* submits that transfers between Stanford accounts should be ignored as they are cash neutral to both the bank and investor.

[217] A further example that has been cited by investors is credit card payments to merchants and others. Such credit card payments should not fall within the calculation, suggests the *Amicus*. This is because the credit card payment creates a debt owed by the card holder to the bank. To count this also as a transfer exposes the investor to potential double recovery.

[218] The Joint Liquidators suggest that the double recovery issues raised by the *Amicus* are fact specific and not an issue for this application. They agree that care must be taken to avoid double recovery. I intend to treat these issues as fact specific and not requiring further treatment on this application.

Are monies paid to the bank trust monies?

[219] The *Amicus* raises a subsidiary issue whether and if so, to what extent, the investors were indeed "creditors" at the time the alleged preferential payment occurred. Under normal principles of banking law, observes the *Amicus*, the holder of an account in credit is a creditor of the bank, and the money is the bank's money.

[220] However, here significant parts of the money, according to the Joint Liquidators' case, were held as CDs ostensibly in "funds" which were to be invested by the bank. The issues are therefore

a. are the funds the bank's money or the investor's?
b. whether those funds were held on trust for investors?
c. whether some kind of resulting or constructive trust arose when the purpose for which the money was entrusted to the bank was not carried out?

[221] The *Amicus* observes that this is not an unimportant issue, since if the monies fall within a trust they fall to be dealt with outside the liquidation estate.

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[222] The Supreme Court in **Re Lehman Brothers International (Europe) (No 2)**[92] found that a statutory trust arose on receipt of funds by an investment firm irrespective of the account into which the firm put the money and that a "client money account of the firm" covered any account of the firm into which client money was paid and was not restricted to segregated client money accounts.

[223] In the present case, on the Joint Liquidator's case, says the *Amicus*, the issue is more likely to turn on whether a trust has arisen through the manner in which the CD funds were applied. Where money paid to be applied to an investment has not been applied to that investment a **Quistclose** trust[93] *may* arise[94].

[224] The *Amicus* suggests that the answer is that such a trust does not arise, on the basis that the moment express contractual arrangements come into play between the investing partners, there will be no longer any room to impose a **Quistclose** trust as the contractual rights will supplant this[95]. The Amicus submits that the answer to this question is likely to turn on the terms under which the CDs were entered into and the material by which they were promoted.

[225] The Joint Liquidators agree with the *Amicus* that if the ownership of the monies paid to SIB for CDs remained with the investor creditors, then there may be trust issues. If that is the case, then SIB held the monies as trustee, and paid them out to the proposed respondents in breach of trust, as the respondents were paid from the monies paid over by later purchasers of CDs. It would therefore be the responsibility of the Joint Liquidators to recover the trust assets from the respondents.

[226] However, the Joint Liquidators take the view that this is not the proper interpretation of events. As the *Amicus* points out, under normal principles of banking law the monies paid over to SIB became SIB's monies, and the CD holders, depositors, or account holders, or whatever other nomenclature is used, were in reality no more than creditors of SIB. There was no retention of title by SIB's creditors. The only basis for a trust argument is that rather than using deposits to make loans on interest to other parties as is more normal banking practice, SIB in fact made investments which were supposed to grow and thus meet the interest expectations of SIB's creditors. However, it did not invest, or purport to invest, in the name of the creditors or on their behalf. There were no trust funds, as such. Even had the funds loaned to SIB been invested in accordance with the creditors' expectations, those investments would have been made in SIB's name and the creditors

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[92] [2012] UKSC 6
[93] In the sense of **Barclays Bank Ltd v Quistclose Investments** [1970] as explained in **Twinsectra Ltd v Yardley** [2002]
[94] **Andrew Brown v Innovatorone plc** [2012] EWCA Civ 1587
[95] **Andrew Brown v Innovatorone plc** [2012] EWCA Civ 1587

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would not have expected to be able to call for those investments to be made over to them. All they could call for was a return of their money as a creditor.

[227] Consequently, observe the Joint Liquidators, this is simply not a case where a constructive trust, or a **Quistclose** purpose trust, arose. There is nothing to take this case out of the ordinary relationship of banker and customer. The Joint Liquidators rely upon **Westdeutsche Landesbank Girozentrale v Islington London Borough Council** [1996] A.C. 669.

Defence of de minimis

[228] The *Amicus* submits that it would be open to the Court to apply a *de minimis* cut-off in respect of any recovery attempts by the Joint Liquidators.

[229] The *Amicus* cites the formulation of the principle in **Halsbury's Laws of England**[96]:

> ***"De minimis principle.***
>
> *Unless the contrary intention appears, an enactment by implication imports the principle of legal policy expressed in the maxim de minimis non curat lex (the law does not concern itself with trifling matters); so if an enactment is expressed to apply to matters of a certain description it will not apply where the description is satisfied only to a very small extent.*
>
> *… However the principle looks to the substance, so that if a matter at first sight trifling proves to embody a point of substance, the principle does not apply….*
>
> *The de minimis principle applies to departures from the wording of prescribed forms. It is sometimes recognised by the insertion of provisions in Acts making express what it would otherwise have been open to the court to infer."*

[230] The *Amicus* submits that the Court does have a residual right to curtail remedies where an infraction is trifling, in circumstances where common sense and practicality have failed to intervene.

Section 44 of the Bankruptcy Act

[231] The *Amicus* raised, for the Court's attention, that one of the investor objections mooted whether section 44 of the Antiguan **Bankruptcy Act, Cap. 41** of the Laws of Antigua and Barbuda, might found a defence to the Joint Liquidators' proposed claims.

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[96] **Halsbury's Laws of England, Statutes and Legislative Process, vol 93 (2012)** paragraph 1143

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[232] This section sets out a statutory cause of action for preference subject to a defence that the transaction was undertaken in good faith and for valuable consideration.

[233] The *Amicus* has confirmed however that he does not adopt this argument, as it is clear that the Bankruptcy Act applies to natural persons only and not to corporations.

Limits to Court's discretion in relation to s.204.

[234] During the hearing I asked the parties to address the Court on the limits to the ambit of the discretion conferred by section 204. I asked to what extent the Court should project itself into the position of the creditors who might be ordered to repay money. How should the Court deal with a situation in which such repayment might cause such a creditor greater financial loss (for instance if he would have to sell an asset bought with the money he had received from SIB, at an undervalue or on account of tax obligations arising upon such sale) or even to become insolvent?

[235] The Joint Liquidators answer that the immediate limit is that the discretion must not be exercised capriciously. The **Wednesbury**[97] unreasonableness principle applies – the discretion cannot be exercised perversely, such that no reasonable body, properly directing itself as to the law to be applied, could have reached such a decision[98]. The discretion is wide and not to be trammeled or cut down, but it must operate on a principled basis. The exercise of the discretion is limited to making orders which rectify the matters complained of.

[236] The Joint Liquidators draw an analogy with equitable proprietary estoppel. In that case there is a wide discretion to make any order which will rectify the matters complained of. The Courts have had no difficulty in applying the discretion and tailoring the remedy to make the minimum award necessary to do justice[99]. Thereby the interests of all parties are properly balanced, and there is no risk that the party against whom the remedy is granted will himself suffer an injustice. The oppression remedy can thus not itself be used to oppress.

[237] However, the Joint Liquidators submit that the personal interests of individual creditors must be subordinated to the greater good of the creditors as a whole.

[238] The *Amicus* answers this question as follows, with reference to authorities he previously relied upon.

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[97] **Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223
[98] Indeed the same requirements apply to the Joint Liquidators when exercising their powers – see **ANUHCV2009/0149 Velasquez, Gainoulline vs Stanford international Bank (in Liquidation)**
[99] Lord Walker, Paragraph 37, **Stack v Dowden** [2007] 2 A.C. 432

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[239] The limits of the Court's discretion under section 204 are constrained by the following considerations:

(i) The statutory purpose of section 204 is to rectify a breach of the reasonable expectations of the stakeholders which has led to an oppressive outcome. The remedy should seek to achieve an outcome which, to the extent it remains possible, gives effect to that reasonable expectation.

(ii) The remedy chosen by the Joint Liquidators should not lead to a result which of itself is oppressive to stakeholders other than the Claimant.

(iii) The Court must seek to do equity between the competing stakeholders.

[240] The *Amicus* submits that a creditor should not be required to sell his assets acquired with his payment from SIB, nor declare himself bankrupt.

[241] The *Amicus* cited in argument the following dicta of Lord Hoffman in **O'Neill v Phillips**[100]

> *"5. "Unfairly prejudicial"*
>
> *In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in In re Saul D. Harrison & Sons Plc. [1995] 1 B.C.L.C. 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in In re J. E. Cade & Son Ltd. [1992] B.C.L.C. 213, 227: "The court . . . has a very wide discretion, but it does not sit under a palm tree.""*

[242] The *Amicus* submits that the payments made by SIB in its final six months were payments that all creditors reasonably expected that SIB could make and they could receive. However, once SIB went into liquidation the creditors' reasonable expectations changed. At this point they have a reasonable expectation to share what sums are left in SIB but not necessarily that they will recover the full debt owed to them by SIB. By contrast they do not have a reasonable expectation that all dealings by SIB -whether by paying trade creditors or indeed themselves - will be unwound to enhance or reduce the recovery of the

[100] [1999] UKHL 24

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money they loaned. They reasonably expect that their losses (or gains) lie where they fall in the liquidation.

[243] The *Amicus* further relies upon the following dicta of Lord Sumption in **Fairfield Sentry Limited (in Liquidation) v Migani and others**[101] to argue that creditors who had received what they had understood to be their contractual due should not be required to make repayment:

> "*17 The availability of a claim for restitution arising out of a transaction governed by the Articles of the Fund is governed by the same law which governs the Articles themselves, namely the law of the British Virgin Islands. In every relevant respect, the principles of the law of the British Virgin Islands governing the construction of the Articles and any associated common law right to restitution are the same as those of English law.*
>
> *18 The basic principle is not in dispute. The payee of money "cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him": Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 at 408B (Lord Hope). Or, as Professor Burrows has put it in his Restatement of the English Law of Unjust Enrichment (2012) at §3(6), "in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation." Therefore, to the extent that a payment made under a mistake discharges a contractual debt of the payee, it cannot be recovered, unless (which is not suggested) the mistake is such as to avoid the contract: Barclays Bank Ltd v W.J Simms Son & Cooke (Southern) Ltd [1980] QB 677, 695. So far as the payment exceeds the debt properly due, then the payer is in principle entitled to recover the excess.*
>
> *19. It follows that the Fund's claim to recover the redemption payments depends on whether it was bound by the redemption terms to make the payments which it did make. That in turn depends on whether the effect of those terms is that the Fund was obliged upon redemption to pay (i) the true NAV per share, ascertained in the light of information which subsequently became available about Madoffs frauds, or (ii) the NAV per share which was determined by the Directors at the time of redemption. If (ii) is correct then, the shares having been surrendered in exchange for the amount properly due under the Articles, the redemption payments are irrecoverable."*

[101] [2014] UKPC 9

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[244] The Joint Liquidators consider that section 204 confers a wider discretion upon the Court to make orders to put matters right than *Fairfield Sentry* suggests. They agree that reasonable expectations are a driver under section 204, although they do not agree the nature of the relevant expectations. They say that assessing reasonable expectations objectively, in context and with regard to the relationships in play in this case, requires looking at the *realities* of the situation, not the false basis on which most of the parties were operating. The relationships to be considered are those between: (1) the guilty insiders and the innocent board members, management and creditors and/or (2) all the creditors in an insolvency, not as between an individual creditor and a fictional functioning bank.

[245] Given that SIB was in fact insolvent at all material times, and the victim itself of a "Ponzi scheme" which saw its assets entrusted to the Group and then apparently "plundered", the Joint Liquidators contend that legal, common sense and practical expectations all coincide. They say that as a matter of law, creditors expect, and it is regarded as fair, that in an insolvency any available funds will be distributed *pari passu* among relevant classes. As a matter of practicality and common sense, it is a reasonable expectation that all creditors should share the pain, and no-one would be allowed to take advantage (however innocently) at the expense of other victims.

[246] It is not a reasonable expectation, say the Joint Liquidators, that a creditor should be allowed to retain a windfall received because he was lucky enough to be paid in the run on the bank at the expense of all the other innocent creditors. If there is a conflict between those who received nothing and those who wish to retain a windfall benefit, that is not a conflict that should fairly be resolved in favour of the Alleged Net Winners or the alleged preferred payees.

[247] The Joint Liquidators submit that while it may well be the case that the maxim "do as you would be done by" has not been adopted by the common law as such, the section actively encourages the Court to consider that issue, at least when dealing with creditors, in assessing unfair prejudice and disregard. Further, the fact that section 204 gives the Court a "*broad equitable jurisdiction to enforce not just what is legal, but what is fair*" is an invitation to consider the ethics of reciprocity in assessing fairness, which must be a wider concept than legal rights and obligations. SIB contends that section 204 and equivalent oppression remedies were enacted precisely so that ethical or fairness issues could be considered even when the general law would not so admit.

[248] Addressing a further question whether there is a difference in reasonable expectations between capital payments and interest payments, the Joint Liquidators submit there is not. They argue that had the creditors been asked when they deposited their money what they

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would expect in the event of SIB's insolvency, it can be assumed that the investors would have expected to share both capital and interest losses and recoveries.

[249] The Joint Liquidators point out however that interest did not in reality exist at all and therefore that there can be no reasonable expectation of recovery of non-existent interest. The Joint Liquidators submit that this disposes of any "time value for money" arguments.

Discussion

[250] By the **Common Law (Declaration of Application) Act, Chapter 92** of the Laws of Antigua and Barbuda, enacted on 20 June 1705, and still in force, it was declared:

> "*That the Common Law of England, as far as it stands unaltered by any written Laws of these Islands, or some of them… or by some Act or Acts of Parliament of the Kingdom of England, extending to these Islands, is in force in each of these your Majesty's Leeward Charibbee Islands, and is the certain Rule whereby the Rights and Properties of your Majesty's good Subjects inhabiting these Islands, are and ought to be determined; and that all Customs or pretended Customs, or Usages, contradictory thereunto, are illegal, null and void*."

[251] Against this well-embedded but still perfectly effective backdrop, Antigua and Barbuda has its own **International Business Corporations Act, Chapter 222**. Whilst borrowing heavily from English statutory reform and Commonwealth legal development, the IBC Act has apparently unique features which have yet to be interpreted by this Court.

[252] This Act, or at least those parts that deal with an International Business Corporation's insolvency, are to be read together with the **United Kingdom 1986 Insolvency Rules** in relation to practice and procedure provided for therein.[102]

[253] The essence of this application is for the Court to approve legal action by the Joint Liquidators of SIB under a number of heads of claim. By obtaining such approval, the Joint Liquidators would deflect criticism which seems inevitable from one or other quarter and obtain a degree of protection from liability for costs in the event that this Court should later hold that such actions were misconceived.

[254] It appears to me that such approval would not confer complete protection from adverse costs orders, as much would still depend upon the manner in which the Joint Liquidators were to conduct the litigation they propose to pursue.

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[102] See: **Alexander M. Fundora v Stanford International Bank Limited ANUHCV2009/0126** and **In re Stanford International Bank Limited (in Receivership) ANUHCV2009/0149**, per Harris J, paragraph 2.

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[255] I am skeptical whether the Joint Liquidators would be able to persuade the Court to impose constructive trusts upon CD Defendants who innocently assumed they were being paid by SIB only what they were contractually entitled to receive. Similarly, I have doubts whether claims for unjust enrichment, or claims under the common law of preferences, would succeed if taken to trial. I do not have sufficient information to form a view whether the Joint Liquidators can avail themselves of tracing procedures, as they seek to do. I am therefore not prepared to approve claims grounded under these heads, but will not disapprove of them either. I will leave the decision whether or not to pursue these heads, and the attendant risk, with the Joint Liquidators.

[256] As part of my decision making process I have considered the English Common Law and equitable grounds and doctrines which permit a party to recover money from a third party. It is immediately apparent that the circumstances in which such recovery can be made are very limited, and many restrictions insulate such a third party in the majority of cases from having to repay money.

[257] I will deal with the heads invoked by the Joint Liquidators, but they themselves appear to anticipate these difficulties by pitching their arguments primarily in relation to the hitherto untested application of section 204 of the IBC Act.

Constructive Trust and Unjust Enrichment

[258] The Joint Liquidators propose to seek a declaration that those of SIB's creditors who received allegedly wrongful payments hold those payments on trust for SIB.

[259] Unless I misapprehend the Joint Liquidators' case, I understand that the type of trust the Joint Liquidators have in mind is a constructive trust in accordance with the principle in **Hussey v Palmer**[103] that "*It is a trust imposed by law wherever justice and good conscience require it. It is a liberal process, founded on large principle of equity…. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution*."

[260] This type of trust has been described (in the 1970's) as a "new model" which "*opens up the possibility of finding a constructive trust in any situation in which the established rules lead to a result which would appear to be inconsistent with equity, justice and good conscience. "It is possible to read into recent decisions a rule that in cases in which the plaintiff ought to win, but has no legal doctrine or authority to support him, a constructive trust in his favour will do the trick*.""[104]

[103] [1972] 1 WLR 1286
[104] Hanbury & Maudsley, **Modern Equity**, 13th ed. Page 310.

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[261] As the authors of Hanbury & Maudsley, **Modern Equity**, 13th edition, observe[105], the "new model" "*seems to have declined since the retirement of Lord Denning M.R.*"**.** This appears to have been due, at least in part, to unease at far reaching unintended consequences that can arise if the analysis is taken to its logical conclusion.

[262] It also appears to me to run contrary to the rule of equity that "equity is equality" to impose a constructive trust upon some CD creditors, but not others.

[263] The authors of Hanbury & Maudsley explain that a constructive trust has more recently been described as a remedy to prevent unjust enrichment, and that it is not itself the basis of the claim. They explain that whilst unjust enrichment had been regarded in England as too vague a principle to be of any practical value, this is no longer so and the law of unjust enrichment lays down with reasonable clarity when an action will lie.[106]

[264] They observe that more recent decisions favour a return to more orthodox principles of property law, and that in the Commonwealth it has been said that "*the legitimacy of the new model is at least suspect; at best it is a mutant from which further breeding should be discouraged*."[107]

[265] The question of whether a resulting trust can be imposed upon CD Defendants who received wrongful payments was effectively answered in the negative by the House of Lords in **Westdeutsche Landesbank Girozentrale v Islington LBC[108].** The CD Defendants' conscience would have had to have been affected at the time they received the money for a resulting trust to arise. At that time, it is probable that most, and possibly all, CD Defendants who received wrongful payments had no reason to believe that SIB was acting improperly.

[266] The Joint Liquidators may have a claim against such CD Defendants for money had and received. Such a claim is not founded on any wrong by the CD Defendants. This is a common law action which arises where a person who "had" money seeks to have it returned from someone else who has "received" it without any justification.

[267] This is a wide ranging and powerful remedy which may avail the Joint Liquidators here. It is not an equitable remedy. As stated by Lord Goff in **Lipkin Gorman v Karpnale Ltd** [109]

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[105] Ditto, page 310
[106] Ditto, pages 315 and 316
[107] Ditto, page 316, citing **Allen v Snyder** [1977] 2 NSWLR 685 at 701
[108] [1996] UKHL 12
[109] [1991] 2 AC 548

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"*The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.*"

[268] A defence to a claim for money had and received is that the recovery defendant has changed his position.

[269] In **Phillip Collins Ltd v Davis**[110] the English High Court identified four main legal principles to the defence of change of a recovery defendant's position. There, the recovery defendants had increased their outgoings after receiving, mistakenly it turned out, royalty payments in excess of their entitlements. These principles were formulated with respect to the facts of that case, but appear to have wider significance:

(a) The evidential burden is on the defendant to make good a defence of change of position, although the standard to be applied should not be too strict;

(b) To amount to a change of position there must be something more than mere expenditure of the money sought to be recovered, "because the expenditure might in any event have been incurred … in the ordinary course of things".

(c) There must be a causal link between the change of position and the overpayment;

(d) The defence of change of position is not an "all or nothing" defence: it is available only to the extent that the change of position renders recovery unjust.

[270] In the present case there is currently no evidence before the Court whether or not CD creditors who received wrongful payments did change their position but the Court must retain an open mind that they may well have done so.

[271] A further aspect in relation to a claim for money had and received, and in unjust enrichment more generally, which causes me reluctance expressly to approve claims by the Joint Liquidators under these heads, is that the CD Defendants may be found to have been justified in receiving the money.

[272] The Privy Council decision in **Fairfield Sentry Limited (in Liquidation) v Migani and others**[111] suggests this is a proper concern.

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[110] [2000] 3 All ER 808
[111] [2014] UKPC 9

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[273] As Lord Sumption stated at paragraph 18, "*The payee of money "cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him"… " in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation."*

[274] Lord Sumption then suggested that recovery pursuant to a mistake that was sufficient to avoid the contract would be an exception.

[275] In our present case, it seems to me that the Joint Liquidators cannot pray in their aid the law of mistake (and they do not attempt to). A reason for this is that although, apparently, the vast majority of directors, officers and employees of SIB, were labouring under a mistake in believing that SIB was operating as a bona fide bank (assuming the Joint Liquidators' evidence for this is correct for present purposes), the directing mind[112] of SIB, Mr Stanford, and a small number of his close associates, appear to have been aware that it was not. No mistake can therefore be imputed to SIB.

[276] In the present case the creditors the Court is presently concerned with are those who purchased CDs. Under the terms of these CDs, the creditors became contractually entitled to reclaim the amount of the sum that they had paid over, which, for convenience can be called the "principal", together with a stated amount of ostensible "interest". Upon a strict legal analysis, it appears that depositors were not lending money to SIB, nor were they constituting SIB as trustees of their money. Rather, they were purchasing a prospective entitlement, upon terms, to repayment of their "principal", plus "interest".

[277] Prior to the discovery by liquidators (whether through enquiries already made by the US Receiver or through their own efforts) that SIB appears to have been operated as a "Ponzi scheme", there can be little doubt that the vast majority, if not all, of the CD Defendants honestly and innocently believed that when their requests for payment to SIB were honoured that they were receiving merely what they were contractually entitled to.

[278] What is more, until those CD contracts are set aside on grounds of fraud or other grounds those contracts represent the CD Defendants' contractual entitlements.

[279] Applying Lord Sumption's reasoning at paragraph 18 of **Fairfield Sentry,** restitution by way of recovering payments from such CD Defendants would seem to be ruled out under the doctrine of unjust enrichment, even where the underlying reality is that such contractual entitlements are artificially and falsely created by the perpetrators of a "Ponzi scheme".

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[112] In the sense of **Tesco Supermarkets Ltd v Nattrass** [1971] UKHL 1

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[280] A difficulty with this interpretation is that this Court may well be compelled to find that the contracts reflected in the CDs are void if it is found that SIB was operated as a fraud. At that point it may be said that it would no longer be justifiable for the CD Defendants to retain the money. However, other considerations could then come into play, such as whether SIB can be heard to rely upon its own previous fraud to defeat the CD Defendants' innocent and reasonable contractual expectations.

[281] These are matters which would require to be treated more fully.

[282] This reasoning does not in my view apply to distribution of monies still in the liquidation estate, for a number of reasons.

[283] First, the money is still in SIB's hands, and the CD Defendants have not yet received it. Ordinarily, when money is deposited with a bank it becomes the property of the bank and the bank does not become a trustee of it[113].

[284] The Second Respondent sought to argue otherwise, but unfortunately he did not supply authorities for the contrary proposition, nor did he demonstrate why the CDs were to be construed as declarations of trust rather than contractual obligations.

[285] Secondly, the fact that SIB was placed in liquidation has the legal consequence that all claims against SIB are stayed. The CD creditors are therefore unable to enforce what they might believe to be their contractual entitlements without the leave of the Court.

[286] Thirdly, discovery that the company appears to have been a fraudulent "Ponzi scheme" after it entered into liquidation raises the prospect of the liquidators taking steps to stop and unwind the fraud. There is no need for me to explore here the extent to which liquidators have duties, either as liquidators or as being repositories of powers of the directors and shareholders[114], to terminate fraudulent contracts and fraudulent trading more generally.

Tracing

[287] Tracing was not an issue explored in any depth in submissions. I understand the type of tracing envisaged to be tracing in equity, and not the proprietary remedy of tracing at common law. Tracing is a procedure for identifying property in the hands of another, it is

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[113] **Foley v Hill** [1848] 2 HL Cas 28, and **Joachimson v Swiss Bank Corporation** [1921] 3 KB 110 at 127, CA per Atkin LJ

[114] Under the IBC Act, under section 305

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not in itself a basis for recovering it. The Court would still need to determine which remedy to apply.

[288] Tracing in equity is an area of some complexity and controversy, but is a more powerful concept than its common law counterpart, as equity permits following and tracing assets which have been mixed with other assets of a recipient.

[289] The claimant – here SIB through the Joint Liquidators – would need to establish an equitable interest in the funds paid to CD Defendants. The Court would also have to find that a fiduciary relationship exists between SIB and CD Defendants, although there has been a tendency in the authorities for the English courts to be both creative and generous in finding fiduciary relationships.

[290] The right to trace may be lost if the property no longer exists or cannot be found. Tracing may be denied where an innocent defendant's position has changed to an extent that he will suffer an injustice if called upon to repay or repay in full, and the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution[115].

[291] The issue of tracing is likely to be an area of considerable argument (and thus costs) upon any claims to recover money from CD creditors. Whilst I have not had the benefit of sufficient argument to form a view whether or not to approve use of the procedure, that is no reason to disallow it.

Common law of preferences

[292] It is common ground between the parties that the IBC Act differs from other Antigua and Barbuda insolvency legislation in not making statutory provision for setting aside wrongful preferences.

[293] It has been suggested, and I accept, that this omission was deliberate on the part of the legislature.

[294] The Joint Liquidators approach this by submitting that section 204 of the IBC Act should be read as sufficiently broad to cover the setting aside of wrongful preferences, in light of the purposes of the Act expressed in section 371, in particular to "*encourage the development of Antigua and Barbuda as a responsible off-shore financial, trade and business centre*".

[295] It is inconsistent with this purpose, they say, and I agree, if section 204 were required to be read down to exclude setting aside wrongful preferences with the result that one is thrown

[115] **Lipkin Gorman v Karpnale** [1988] UKHL 12 per Lord Goff

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back onto the English common law, the development of which was truncated and overtaken by statute well over a century ago.

[296] In the most general terms, the reason the common law of preferences was overtaken by statute was because it was incapable of adequately addressing the realities of insolvency situations. Whilst common sense and a basic appreciation of fallen human nature let one understand that what an insolvent was often really doing was manipulating payments to his advantage in anticipation of, or preparation for, his imminent financial demise, proving it to the necessary legal standard was a different matter. Judicial adjustments could only adapt the vehicle so far. Imposition by the legislature of various deeming provisions overcame the problems of proof and removed uncertainties, such as in relation to defining the "eve" or, more modernly expressed, "zone" of insolvency.

[297] The Joint Liquidators therefore seek to fall back upon the common law in relation to preferences in case this Court should be of the view that section 204 does not avail them.

[298] The Joint Liquidators argue that the allegedly wrongful payments should be treated as void acts to defraud creditors and the public laws of the land, and not in the ordinary course of business, because they were pursuant to a fraudulent "Ponzi scheme". A number of other arguments advanced by the Joint Liquidators flow from this.

[299] The difficulty with this, for the purposes of this application, is that this Court has not yet definitively found as a fact that SIB was a "Ponzi scheme". I cannot at this point proceed from that assumption.

[300] The difficulty whether SIB should be taken to have had a legitimate "ordinary course of business" or should be treated completely as a fraud, or perhaps as a combination of both, for different purposes, infects the whole exercise of unwinding the affairs of SIB.

[301] The *Amicus* treats the fundamental question in relation to the common law of preferences as whether or not the payments by SIB were voluntary. He argues that because the payments were made as a result of requests by CD Defendants, they were not voluntary. The Joint Liquidators argue that SIB could, and should, have chosen not to pay and instead put the bank into voluntary liquidation. They add that given the fraudulent nature of the CDs, they should be treated as void and thus not instruments that the CD Defendants can sue on.

[302] At this point, and without closing my mind to alternative possibilities, I am inclined to approach this aspect on the basis that at least up until the discovery that SIB was apparently a "Ponzi scheme", the CD Defendants were entitled to assume that SIB was what it purported to be, namely a legitimate and properly regulated bank. This could entail

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that the payments should be regarded as having been made in the ordinary course of business[116]. Also, the payments may not be treated as inherently void.

[303] However, it seems to me that the directors of SIB (or at least those with real knowledge of SIB's financial position) had a choice and indeed a duty not to accede to requests for payment where the result would be that certain creditors were preferred over others.

[304] In short, I can see that the Joint Liquidators might be able to establish that payments by SIB in a period prior to its compulsory closure amounted to common law preferences. However the arguments for and against do not suggest a straight-forward outcome that I can readily predict at this point.

Section 204

[305] The first issue that I must decide is not one that was treated as controversial by the parties. It is whether section 204 can be invoked after a company has been placed in liquidation.

[306] This is a preliminary issue to whether a liquidator can be a "complainant" pursuant to section 200 (iv) as a "proper person" who can make an application under Part J of the IBC Act, including section 204.

[307] The stated purpose in the IBC Act for section 204 is "Restraining Oppression". The section derives from the English statutory oppression remedy which was introduced in the English **Companies Act 1948**, by section 210. This statutory remedy was intended as an alternative to winding up a company. The legislature considered that there were circumstances in which a situation could be rectified short of terminating the life of a company. The provision was introduced as a response to the rule in **Foss v Harbottle**,[117] which held that where a company's actions are ratified by a majority of the shareholders, the courts will not generally interfere.

[308] The current position under English law remains relatively narrow. Section 994(1) of the English **Companies Act 2006** concerns "unfair prejudice" to "members" of a company.

[309] The English law provision was clearly intended to be used prior to the winding up of a company[118].

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[116] Even if there was none, in a similar way to the manner in which the Privy Council treated fictional and fraudulent Net Asset Value statements as operative in **Fairfield Sentry** (passim).
[117] (1843) 67 ER 189
[118] Whether or not the English statutory remedy can be used during liquidation was not addressed by the parties in submissions. If it can be, the circumstances must be rare.

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[310] In the Commonwealth, the oppression remedy has evolved differently. Section 204 of the IBC Act resembles Section 241(2) of the **Canada Business Corporations Act RSC 1985** closely.

[311] As the *Amicus* observed, both section 204 and section 241(2) of the **Canadian Business Corporations Act** are aimed at rectifying conduct that is "*oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer....".*

[312] Section 241 of the **Canadian Business Corporations Act** is materially identical to section 248 of the **Ontario Business Corporations Act**.

[313] In Canada, it was held by the Ontario Supreme Court in **Olympia & York Developments Ltd. (Trustee of) v Olympia & York Realty Corp.**[119] at paragraph [30] that a trustee in bankruptcy of an insolvent corporation is allowed to bring a representative oppression action under section 248 of the **Ontario Business Corporations Act** in a proper case.

[314] The Ontario Supreme Court's rationale was that "[s]*ince it would seem that a creditor could bring such an oppression action, then it would seem to me that the Margaritis*[120] *characterization of the trustee in bankruptcy as the creditors' representative should be recognized as allowing the trustee in bankruptcy*" to do so.

[315] The case law in Ontario and Canada in relation to a creditor's ability to bring an "oppression" action has since evolved[121] but I am not aware of any authority which prevents a trustee in bankruptcy from using the oppression remedy, although the point appears to be one which remains arguable in Canada[122].

[316] The appointment of a trustee in bankruptcy presupposes the completion of an insolvency procedure which entailed the trustee's appointment. So too does the appointment of a liquidator.

[317] As with the Canadian trustee in bankruptcy, a liquidator owes duties to creditors.

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[119] Docket: 93-CQ-38609, 98-CL-1034

[120] "*Similarly, in this case, if it were necessary, I would hold that the respondent, by virtue of his appointment as trustee in bankruptcy, represents creditors and has the necessary status to maintain these proceedings to have the appellant's chattel mortgage declared null and void.*" - **Margaritis, Re** *(1977), 23 C.B.R. (N.S.) 150 (Ont. C.A.).*

[121] E.g. **Piller Sausages & Delicatessens Limited v Cobb International Corporation et al.** Docket 60/99 and **Apotex Inc. v Fournier Pharma Inc. et al.** Docket 06-CV-314931PD3

[122] E.g. **Richter & Partners Inc., in its capacity as trustee in bankruptcy of Dylex Limited v William Anderson et al**. Court file no. 02-CL-4651

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[318] As stated in **In re Contract Corporation, Gooch's Case**[123]: "*In truth, it is of the utmost importance that the liquidator should, as the officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding up. He should have no leaning for or against any individual whatever. It is his duty to the whole body of shareholders, and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court. And it is for the Judge to see that he does his duty in this respect*."

[319] A liquidator's duty goes further than this. A liquidator's function is to collect in and realize the company's assets, and to distribute the proceeds to the company's creditors and, if there is a surplus, to its shareholders (section 307*, IBC Act*).

[320] I see no material difference between the position of a Canadian trustee in bankruptcy and a liquidator appointed pursuant to the IBC Act in this regard. In particular, a Canadian trustee in bankruptcy is an officer of the Court, whose responsibilities include protecting the rights of creditors, and administering insolvencies.

[321] Consequently I consider section 204 is capable of being used after a company has been placed in liquidation.

[322] **Olympia & York** also provides guidance on whether a trustee in bankruptcy (and by analogy a liquidator) can be treated as a "complainant" with standing to invoke section 204. That case decided that issue in the affirmative, by dint of the trustee in bankruptcy's capacity as representing the interests of a company's creditors.

[323] Again, I see no material difference on this point between a liquidator under the IBC Act and a Canadian trustee in bankruptcy.

[324] It is no answer in my view to say that the IBC Act does not explicitly provide that a liquidator can be a complainant. "Complainant" in section 200 (b) is an open and broad category of persons. By section 200 (b) (ii) it includes "*a director or an officer or former director or officer of the corporation or any of its affiliates*" and by 200 (b)(iv) "*any other person who, in the discretion of the court, is a proper person to make an application under this Part*". The clear intention of the legislature is to be pragmatic, and to include in the definition those persons who either have a direct interest that needs to be protected (such

[123] [1871] 12 LR Ch App 207, p 211 per Sir James J

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as security holders) or who have the legal power to steer the affairs of a company to see that the interests of stakeholders are safeguarded.

[325] By section 305(1)(b) of the IBC Act the powers of the directors and shareholders cease and are vested in the liquidator, except as specifically authorized by the court.

[326] The latter exception is important. Each liquidation is different. In some cases it may not be necessary, or appropriate, for the court to vest a liquidator with the powers of a director or shareholder. In such a case, there may be others who can more appropriately be treated as a "complainant", so a liquidator would not necessarily always be treated as a "complainant".

[327] There is a further factor which, to a considerable extent[124], converges the duties of a liquidator with those of a director. In **Rubin vs Cobalt Pictures Ltd**[125] the English High Court reaffirmed a principle that had been gathering traction for some time, that in the arena of borderline insolvency the directors of a company must have paramount regard for the interests of creditors and when deciding to enter into a transaction on behalf of the company, they "*have a duty to give consideration to the separate interests of the Company and its creditors*."

[328] The relative novelty of **Rubin vs Cobalt Pictures** was that the interests of creditors should be treated as paramount. It was already well settled that liquidators should have regard to the interests of a company's creditors. In **Re Farrow's Bank**[126] Lord Sterndale MR said:

> " [A court appointed liquidator] *is put there to do the acts which the directors of the company did before their powers ceased; with this restriction, or course, that in all that he does he must have regard to the interests of the creditors of the company.*"

[329] To exclude liquidators from being "complainants" altogether seems illogical, and indeed, given the interests of creditors that they are supposed to protect they would seem to be precisely the type of persons who can and should be permitted to act as complainants. The IBC Act does not say that a liquidator shall have the powers of a director, but not the right to invoke the oppression remedy. I see no basis for such a distinction.

[330] Any such distinction breaks down even further when it is seen that a liquidator is (at least in certain respects) a *de facto* officer of a company, by virtue of the definition of "officer" at section 2 (1) (j) of the IBC Act as including "*any other individual*" who performs functions for the company similar to those normally performed by the chairman, deputy chairman,

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[124] But not entirely, as English law does not yet go so far as to deem a director to owe duties directly to creditors.
[125] [2010] EWHC 2240
[126] [1921] 2 Ch 164

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president, vice president, managing director, general manager, comptroller, secretary, or treasurer. "Officers" are deemed to be "complainants" by virtue of section 200 (b) (ii) of the IBC Act. It is important to bear in mind however that the office of liquidator is unusual, in that a liquidator is partly a trustee, partly an agent and partly an officer of the company for the purpose of winding-up its affairs and terminating its existence and yet he is none of these things in the fullest sense of the words[127]. Historically, in the English company law context, a liquidator was not included in the definition of "officer" in section 455 of the **Companies Act 1948**, but he is treated alongside promoters, managers and directors for the purposes of misfeasance summonses pursuant to section 333 of the 1948 Act. By section 143(7) of the 1948 Act, a liquidator was deemed to be an officer for the purposes of section 143(5) and (6), which imposed penalties for failure to lodge resolutions and agreements. On the other hand, the Court's power to relieve an officer from liability where he has acted honestly and reasonably and ought fairly to be excused pursuant to section 448 of the 1948 Act appears not to have extended to liquidators.[128]

[331] I do not read section 204 or 200 as requiring a complainant himself to have suffered any oppression, unfairly prejudicial conduct or that which unfairly disregards the interests of a shareholder, debenture holder, creditor, director or officer of the corporation. It suffices, upon my reading of the very specific wording of those sections, for someone whose ordinary duty it is to have regard to the interests of those persons to seek to fulfil such a duty by applying to the court to have such a state of affairs rectified. I am therefore satisfied that a liquidator can be a "complainant".

[332] However, should the Court in this case exercise its discretion to deem the joint liquidators as a proper person to be a "complainant"?

[333] In this case the Joint Liquidators propose, in effect, to bring a representative action, in the interests of the body of creditors as a whole, on behalf of those CD creditors who lost out either because SIB had used the proceeds of their investment to pay principal and interest to other creditors or because SIB had dissipated funds at a time in its last six months when its controlling minds knew or ought to have known that it was insolvent.

[334] Canadian case law jurisprudence in relation to equivalent provisions to section 204 is clear that a creditor complainant has to be an existing creditor at the time of the alleged oppressive conduct and that it is not enough that the creditor should become a creditor as a result of the conduct complained of[129]. This seems to be a sound limitation on the provision and I have no hesitation adopting it.

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[127] Cf Loose on **Liquidators**, 1972, Chapter 2 pages 11 to 12.
[128] Cf Loose on **Liquidators**, 1972, Chapter 2 page 14
[129] **Apotex Inc. v Fournier Pharma Inc. et al**. Docket 06-CV-314931PD3 at paragraphs 38 to 43

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[335] In the present case, although CD creditors came to be creditors of SIB at differing times during its period of operation as a bank, and came to lose out because of the particular way in which its business was conducted, they were creditors on account of the contractual entitlements reflected in their CD contracts. Their *entitlement as creditors* arose by reason of contractual terms. Their *loss as unsatisfied creditors* was caused by the manner in which the business was conducted. It was not the allegedly oppressive conduct by SIB that caused the CD creditors to become creditors. The CD creditors are therefore properly creditors in whose favour section 204 relief can be exercised.

[336] I am satisfied that the Joint Liquidators are in this case, in the discretion of the Court, proper persons to make an application under section 204, in the exercise of their powers of directors or officers of SIB in the interests of SIB's body of creditors as a whole.

[337] The next question is then whether a claim can be sustained pursuant to section 204.

[338] I agree with the Joint Liquidators that section 204, on its face, vests the Court with the authority to rectify any act of a corporation which *"effects a result"* which is oppressive or unfairly prejudicial to any creditor, or which unfairly disregards his interests. The Court may further rectify any oppression, prejudice or unfair disregard brought about by the conduct of the business or the exercise of the directors' powers. The plain words of the section are apt to cover the present situation.

[339] There is no requirement under section 204 that the persons who would be required to obey an order which the court might make "as it thinks fit" should themselves have caused the conduct complained of. As section 204 (2) provides, the orders the court may make are those that "rectify the matters complained of". In section 204(3)(h) the court is expressly empowered to make orders varying or setting aside transactions or contracts to which a corporation is a party. No requirement is expressed that the corporation's counterpart must also be implicated in the oppressive conduct, whether by being causative of it, nor indeed with knowledge of it.

[340] There are however safeguards in the nature of the Court's discretion for such innocent counterparts. In this case the Joint Liquidators would seek to establish in their claims that Mr Stanford is liable for such conduct, and ask the Court to make orders wide enough to rectify it as best as possible in the interests of all creditors. I see nothing wrong with that approach as a starting point.

[341] The *Amicus* cites **Thomson v Quality Mechanical Services Inc**[130] as a Canadian authority for a proposition that a claim against a stranger to the corporation would require

[130] [2001] OJ No 3987, 18 BLR (3d) 99, 56 OR (3d) 234

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an element of direct culpability for the oppressive conduct on the part of the stranger to the corporation. I do not read that case that way. There, an intended personal claimant sought to sue the company's bank directly for a breach of duty allegedly owed to the claimant by the bank and on account of oppressive conduct. It is not clear whether the claimant alleged that the bank had committed such oppressive conduct. The court rejected the claim on the bases that the injury complained of by the claimant was incidental to the injury to the corporation and that there was insufficient proximity between the claimant and the bank to establish that the bank owed a duty to the claimant. The court noted that the claimant had not obtained leave to commence a derivative action on behalf of the company.

[342] It suffices in my view if the conduct complained of comes within the plain meaning of the words of the section. The section is broader than the common law of preferences and there is no need to fit conduct into the mould of what constitutes a remediable preference at common law in order for the Court to grant relief under the section.

[343] There are limits upon the application of the section. As the *Amicus* rightly submitted in my view, with reference to oppression statutory remedies in other jurisdictions, the prejudice must be real, rather than merely technical or trivial. Bad faith or intent to cause harm on the part of the perpetrator of the conduct is not an essential requirement.

[344] The three expressions, of "oppressive" or "unfairly prejudicial" conduct, or that which "unfairly disregards the interests" of the persons stated in the section, I accept, overlap and need to be read together to reflect the underlying concern of the section.

[345] The term "unfair", I further accept, is used in a broad sense, and means a "visible departure" from the standards of fair dealing, viewed in the light of the history and structure of the particular company, and the reasonable expectations of, not just its members in Antigua and Barbuda, but also its creditors.

[346] I also agree with the *Amicus* that, as in Canada, "*oppressive conduct*" is to be judged by a more rigorous standard than "*unfair prejudice*" and may require an element of coercion to be shown and certainly a lack of probity and fair dealing to the stakeholder in the matter of his proprietary rights as such. "*Unfair prejudice*" is less culpable but still has unfair consequences. Also, I agree that "*unfairly disregards*" means "*unjustly and without cause pay no attention, to ignore or treat as of no importance, contrary to the stakeholder's reasonable expectations*".

[347] To apply this in practice, I agree with the *Amicus* that one should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard".

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[348] I also entirely accept that "*First, oppression is an equitable remedy. It seeks to ensure fairness - what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair.*"[131]

[349] An important check on the use of the oppression remedy is, as observed by Petse JA in South Africa: "*The very wide jurisdiction and discretion* [the section] *confers on the court must, however, be carefully controlled in order to prevent the section from itself being used as a means of oppression.*"[132]

[350] In relation to the exercise of weighing reasonable expectations, I draw particular guidance from the following dicta in **BCE Inc. v. 1976 Debenture holders**[133]:

> *"As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations….."*

[351] Applying these concepts and principles, if the affidavit evidence is made out at the hearing of the claims proposed by the Joint Liquidators, there is a reasonable prospect of this Court being satisfied that the requirements of section 204(2) (a), (b) and (c) would be fulfilled.

[352] Conduct that would do so would be both the operation of SIB as a "Ponzi scheme", and, even if that aspect were not to be made out, the apparent failure of SIB's directors to cease trading in the final period before it was forcibly shut.

[353] The conduct (if proven at trial), of paying creditors in circumstances where SIB's insolvency meant that the *pari passu* principle would be violated, would appear to be both unfairly prejudicial to the interests of creditors and unfairly disregarding their interests, if possibly not oppressive.

[354] Reasonable expectations of creditors must first of all include that SIB as a regulated bank was not a "Ponzi scheme".

[355] Then, that the representations made to them as to SIB's financial status and *modus operandi*, either through SIB written statements, including annual reports and disclosure statements, or other representations, were true.

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131 **BCE Inc. v. 1976 Debenture holders** [2008] S.C.J. No. 37, 301 D.L.R. (4th) 80
132 **Grancy Property Limited v Manala** (665/12) [2013] ZASCA 57 (10 May 2013)
133 [2008] S.C.J. No. 37, 301 D.L.R. (4th) 80

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[356] Customers of SIB were also entitled reasonably to expect that the terms of their CD contracts would be honoured, including that they should become entitled to be paid contractual interest.

[357] Their reasonable expectations in this regard must include what was represented in SIB's "Disclosure Statements". The Court has been shown a Disclosure Statement related to SIB's "U.S. Accredited Investor Certificate of Deposit Program". This stated, in properly legible capital letters, that participation in the Program involves "substantial risk" to potential depositors. It continues that CD deposits made as part of the Program were not registered under the U.S. Federal Securities Act 1933 as amended, or otherwise officially approved or endorsed, and that the deposits were not covered by investor protection or insurance laws of any jurisdiction. An ensuing "Securities Investment Statement" stated that the CD deposits were ordinary deposit obligations of SIB. A further risk statement warned that SIB's management offered no assurance that its decisions would continue to yield profitable results for SIB or cause the investments of depositors to produce returns sufficient to fund the payment of CD obligations. That document then continued in the clearest possible terms:

> "***Investment Risk***
>
> *You may lose your entire investment (principal and interest) under circumstances where we may be financially unable to repay these amounts.*"

[358] It remains to be proven at trial to what extent the creditors' relationship with SIB should be affected by such statements documents. However, the reasonable expectations of the depositors will most probably have been a mixture of the rosy assurances of SIB's solidity published by SIB and the stark risk warnings given in SIB's product offering documentation.

[359] Whilst it seems plausible that many depositors had placed a very significant proportion of their savings in SIB, as the *Amicus* suggested, the profile of the depositors' reasonable expectations would be incomplete if the Court were to ignore the fact that risk warnings are a normal feature of investment offerings and advertisements by financial institutions, such that it would be surprising indeed if the vast majority of SIB's CD depositors were not already well apprised of the fact that there are risks of loss when investing. Similarly, the depositors' decision to buy SIB CDs will, also for the vast majority of the depositors, have entailed a free choice on their part to place their money with an off-shore bank. It is readily understandable that the depositors should feel very sore at apparently having had their trust betrayed and their money lost, but part of the reasonable expectations, at least of the majority of investors, must have been that their desire for gain could backfire. This is all the more so if depositors did not diversify their investments prudently.

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[360] The CD creditors could also reasonably expect that the directors of SIB would cease trading when it should have become reasonably clear to the directors that SIB became unable to pay its debts as they fell due.

[361] It is also plausible to consider, in my view, that the CD creditors would reasonably expect that upon discovery that SIB appears to have been a "Ponzi scheme", care should be taken by the Joint Liquidators not to perpetuate the fiction by making payments that represented interest from the deposits of other creditors, or payments of "principal" that would result in some creditors receiving more than others, contrary to the "*pari passu*" principle. Other reasonable expectations also come into play.

Proposed specific defences

[362] This application for directions was not a plenary trial of the issues. It was also not a forum at which defences could be fully explored and applied to established facts. The level of review was for the various possible grounds for relief and various possible defences to be considered in principle, to determine whether any of these defences are sufficiently certain to exclude steps proposed by the Joint Liquidators. Where steps are not excluded, it is open for defendants to raise these and any other defences for further consideration at trial.

Ex turpi causa.

[363] The most difficult question in relation to this proposed defence is whether the alleged unlawful conduct and state of mind of Mr. Stanford is to be attributed to SIB to make his alleged fraudulent and unlawful purposes those of SIB itself.

[364] The *Amicus* submits that if that is the case, the House of Lords decision in **Stone & Rolls Ltd v Moore Stephens** [2009] 4 All ER 431 entails that a liquidator would be in no different or better position than the company to resist an *ex turpi causa* defence. That case however concerns "one man companies". In SIB's case, however, many other persons were involved, whether as directors, officers or managers, even though only a very small number apparently knew the company's true position. SIB was run as a large organization, but, so it would appear on the evidence so far adduced, was managed very similarly to a one man company. Mr Stanford was its sole shareholder. It is difficult to assess at this stage how SIB should in fact be categorized.

[365] The **Hampshire Land** principle however provides an exception, in that the law will not attribute to the company the fraud or other unlawful conduct of the director when the company is itself the victim of that conduct.

[366] The *Amicus* submits that this principle is not triggered where the company is used as an instrument of a fraud targeted against a third party victim, resulting in loss to the company

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only as a secondary victim, where the attribution is invoked by those not party to the relevant fraud.

[367] The Joint Liquidators answer, that SIB was in fact the primary victim, because it was deprived of its money by Mr Stanford's other companies before they could be paid out to the CD Defendants, is arguable, but presupposes that the "guilty" conduct and knowledge of Mr Stanford and his close associates is not to be attributed to SIB.

[368] The Joint Liquidators' argument that the SIB "Ponzi scheme" merely constitutes the occasion for the liquidation, not the basis for it, nor an ingredient of it, is not one that I easily follow. I can however see that a distinction can be made between treating a company as insolvent, and therefore putting it in liquidation, and then having regard to the question whether or not it was a "Ponzi scheme" for the purposes of most equitably and fairly administering the liquidation, to the extent of the Court's discretion to do so. We would however have to look back at the grounds cited to the Court for the winding up petition to see whether the alleged fact that SIB was a "Ponzi scheme" did form the basis or an ingredient of its liquidation.

[369] The Joint Liquidators' best point appears to be that a claim by the Joint Liquidators pursuant to section 204 would in essence be a representative claim on behalf of the whole body of creditors, and that if the individual creditors were to have brought claims then, apart from an obviously undesirable multiplicity of actions, an *ex turpi causa* defence could not be raised against them. Whilst it is true that a liquidator stands in the shoes of a company, a claim pursuant to section 204 is not brought by the company but an individual. A liquidator also stands in the shoes of a director and of an officer of the company. It would appear contrary to the wide remedial purposes of section 204 to disqualify a liquidator from using those capacities to rectify oppressive conduct merely because he also represents the company whose conduct he is trying to remedy. Put differently, and going back to the origins of the oppression remedy, the legislature displaced the rule in **Foss v Harbottle** by permitting an individual – a member of a company in that case – to trump the actions of a company. For the Joint Liquidators to do no differently now, as individuals clothed with the powers of directors and officers of SIB to trump the actions of SIB, is entirely congruent with the original structure of the remedy.

[370] I am not at present persuaded that CD Defendants would succeed with an *ex turpi causa* defence to an action by the Joint Liquidators pursuant to section 204. I will therefore not refuse to permit the Joint Liquidators from pursuing their proposed claims on that ground.

Consideration and the time use of money.

[371] This Court gives due cognizance to the fact that Courts elsewhere, and in particular in the United States, have adopted and developed sophisticated grounds for denying "claw-back"

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claims on the basis of finding an exchange of consideration between an investor and a "Ponzi scheme" entity.

[372] In the present case the *Amicus* posits that the issue is whether the investors can raise a defence that they have an entitlement to notional interest on their monies which could be set off against a claim for the recovery of the interest.

[373] It appears to me, at least pending further argument, that such a defence does not avail the CD Defendants.

[374] Irrespective of the legal context in which a defence of this nature is applied in other jurisdictions, we must consider whether it arises *in the context of an order for a recovery made pursuant to section 204* in a liquidation.

[375] The analysis would, I think, go like this. Upon this Court making an order that a CD Defendant should repay sums received by him[134], the creditor would seek to defeat a recovery by claiming that he is in fact owed an equivalent or greater amount of notional interest as consideration for having lent SIB his money. However, this creditor (a "net winner") cannot be taken in isolation. Assuming that the creditor can establish such an entitlement to notional interest, and that its quantum is equivalent to or greater than the amount of the recovery claimed, the Court is then bound to consider that other CD Defendants, including those whose capital deposit was used to pay other investors ("net losers"), also have an equivalent entitlement to notional interest. Net losers too lent SIB money upon a similar exchange. They would be in no different a position. Finding an entitlement to notional interest merely adds a layer of "entitlements" across the body of CD Defendants, which does nothing to differentiate the respective financial positions between CD depositors. It can, and in my view should, simply be disregarded.

[376] It could be said that the notional interest would only be applied to off-set a recovery claim, and thus that no actual payment by SIB would be required. However, if a "net winner" has an additional or alternative entitlement to notional interest, so does a "net loser". Both net winners and net losers stand equally before the Joint Liquidators in this regard[135]. The wrongful or unfairly prejudicial distribution of money to SIB's creditors created an imbalance which section 204 can be used to rectify. The reality of the position would remain that the "net winner" gained real, as opposed to notional, money to the unfair prejudice of the "net loser".

[377] I am not presently persuaded that English Common Law would indeed recognize an alleged entitlement to notional interest. When CD creditors deposited money with SIB the exchange was very simple. In consideration for the investor depositing his money, SIB

[134] Or give credit for such sums against a future distribution.
[135] At least proportionately in accordance with their respective amounts invested if not mathematically equal.

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promised to repay him the amount of his deposit together with interest at an agreed rate and at an agreed time. There seems no strict necessity to imply terms into this arrangement that SIB should pay the investor an alternative or additional notional amount of interest in order to give effect to the reasonable expectations of the parties[136]. The contrary intention appears more likely, as the parties have already expressly agreed how much interest the investor should contractually be paid, thereby negating any suggestion that an alternative or additional amount should become due.

[378] Similarly there seems no need to imply a collateral contract.

[379] **Sempra Metals v IRC** is distinguishable. In that case the IRC had received money by unlawfully levying advanced corporation tax. A parallel with SIB can be drawn, if SIB received money by unlawfully (fraudulently) soliciting deposits or was otherwise unjustly enriched. In **Sempra Metals**, the fundamental question was not whether the tax payer ought to be repaid, but how much. The same might be said for SIB, if it is found to have been a "Ponzi scheme". However the comparison between SIB and the IRC stops there. The IRC can call upon other funds, lawfully collected, or other state cash assets, to repay taxes unlawfully collected plus interest. If SIB was a "Ponzi scheme" with insufficient assets of its own from legitimate commercial activity, it would not have such other funds. Any repayment would have to come from the deposits of other investors, which would breach the *pari passu* principle and perpetuate the "Ponzi scheme". Even if SIB is treated as an insolvent company (not a "Ponzi scheme"), its unsecured creditors would only be entitled to a *pari passu* share in the distribution of any surplus assets and not to full compensation for SIB's unjust enrichment.

The *de minimis* principle

[380] It would, in my view, not be possible for me to determine at this stage whether or not the *de minimis* principle would rule out recovery from particular investors. Much would depend upon the position of each investor. It must largely be a question of proportion and common sense how much of the liquidation estate's resources the Joint Liquidators should apply to the eventual recovery from each investor.

[381] It would be inappropriate for this Court to trespass upon the realm of public policy formulation by setting a figure for what should be regarded as a *de minimis* amount that should not be recovered.

The Second Respondent's submissions

[382] The Second Respondent submitted the following.

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[136] See **Paragon Finance plc v Nash** [2001] EWCA Civ 1466 and **The Moorcock** (1889) 14 PD 64 line of authorities in relation to the business efficacy test more generally.

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[383] By way of a Primary Express Account #122783 the Second Respondent's father, Mr Emir Gainoulline, deposited a sum of US$92,117.00 into SIB and received a CD. Sometime thereafter Mr Gainoulline fell ill and required medical surgery. As a result, he submitted a request to the bank to withdraw a sum of US$25,198.12. . This was done on 8th January 2009, leaving US$66,919.53 on the account at SIB. Mr. Gainoulline had no knowledge of the financial position of the bank or of its inner workings.

[384] The bank subsequently went into liquidation and by letter dated 26 January 2014 the Joint Liquidators wrote to Mr Gainoulline stating that: *"we consider that these payments were unfairly prejudicial to the other creditors of the Company under Section 204 of the Antigua and Barbuda International Business Corporation Act and thus preferential (Preference Payments). In order to re-balance the creditor position, we are initiating a clawback process through the Courts against creditors who have received Preference Payments .... Failure to repay the Preference Payment will result in the estate withholding dividends until sufficient funds are held back to offset the full amount of the Preference Payment you received; at which point, you will be eligible to receive future dividends. Failure to repay may also result in the estate seeking judgement against you and to collect the Preference amount. The Court has approved this decision to adjust your entitlement to any distribution in the future".*

[385] The Second Respondent's first argument is that the Court cannot make an order under Subsection (3) (h) of Section 204 varying or setting aside a transaction or contract to which a corporation is a party, when the creditor has done no wrong.

[386] For the reasons set out above, I do not agree with this submission. There is no requirement under that section that a creditor, or any other recovery defendant, should have committed any wrongdoing, nor indeed that a creditor from whom a recovery is sought should have any knowledge of wrongdoing on the part of the company whatsoever.

[387] The Second Respondent then argues that the absence in section 204 of reference to "Preference Payments", and the fact that the word "preference" is not used for any purpose within the section, means that a creditor who demands a payment or withdrawal of his own funds cannot be treated as having received a preference.

[388] I cannot agree with this proposition. Section 204 looks at the effect of corporate conduct, and its wording is wide enough to cover what would be classed as "preference payments" without any need to mention the actual words.

[389] The Second Respondent submits that the Joint Liquidators have never contended that the payments received by Mr Gainoulline were unlawful.

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[390] Section 204 is also wide enough to permit rectification of conduct which is not unlawful.

[391] The Second Respondent then submits that none of the duties of a liquidator imposed by Section 307 of the IBC Act require property of the creditors to be redelivered to the liquidator. He submits that the liquidator can only deal with property belonging to the corporation under section 307(c). Therefore, the court has no power to require any creditor who has received payments of their own monies so deposited with the bank to repay these monies.

[392] I respectfully do not accept this limitation. As I have explained earlier, I consider that a liquidator can be a proper person to be a "complainant" under section 204, by virtue of being clothed with the powers of the directors and officers of a corporation. Section 307 does not exclude the use of section 204, or indeed any other statutory or common law remedy by a liquidator.

[393] The Second Respondent then argues that when Mr Emir Gainoulline deposited/invested his funds with the bank and was given a CD, the funds deposited were and at all material times remained the property of Mr. Gainoulline as "the creditor". At no time did it become the property of the bank.

[394] The Certificate of Deposit, said the Second Respondent, is evidence of the amount of funds "the creditor owns" and it is the creditor alone who has the sole right to his property and not the bank. It is the creditor who determines when he should make either a withdrawal of his property or a deposit.

[395] These submissions appear to confuse a proprietary claim with a contractual claim. I have already also dealt with the status of the monies paid to SIB. The better view, it seems to me, is that the standard position of a banking relationship existed in the case of SIB, whereby SIB became the beneficial owner of the depositors' money, and that SIB owed depositors obligations to repay, with interest, in contract as ordinary unsecured creditors.

[396] The Second Respondent submits that in respect to the common law of preferences the Court must be satisfied that bankruptcy was within the contemplation of the corporation. The Second Respondent's Counsel submits that the evidence on affidavit before the court has not demonstrated this.

[397] Whilst the evidence indicates that the ordinary staff and majority of the Board of Directors probably did not know that SIB was insolvent, a select minority of key persons did or should have known. It remains debatable to what extent their knowledge should be imputed to SIB as a company, and this will turn, to an extent, upon factual determinations at trial.

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[398] The Second Respondent argues that the procedure adopted by this Court in relation to this application for directions was defective, in that the deponents were not cross-examined upon their Affidavit evidence.

[399] His Counsel argued that the court has the power under the **Civil Procedure Rules, Part 30.1 (3)**, to require a deponent to attend Court for cross-examination, and if a deponent does not attend as required, the affidavit may not be used as evidence unless the Court permits. He contends that where the creditor's property is at stake the deponents must attend court to be cross examined upon the affidavit evidence they provide to the court and upon which evidence the Court seeks to rely before making a decision. He urges that cross examination assists the court in determining how much weight is to be attached to the evidence of any particular deponent's affidavit evidence, and submits that in the present instance the Court has been deprived of this valuable tool in assessing the evidence that was put before the court.

[400] By **CPR Part 11.9**, evidence in support of an application must be contained in an affidavit unless a court order, practice direction or rule otherwise provides.

[401] **CPR Part 29.2(1)** provides that there is a general rule that "*any fact which needs to be proved by evidence of witnesses is to be proved at (a) trial by their oral evidence given in public; and (b) any other hearing by affidavit*".

[402] By **CPR Part 30.1(3)**, a party is permitted to apply to the Court for an order requiring a deponent to attend Court for cross examination.

[403] In this case, the application before the Court was for directions. It was not a trial. In principle therefore, the evidence in support of the application could properly be given by Affidavit alone.

[404] In this case, none of the parties applied to have the deponents cross-examined.

[405] There was also no affidavit evidence filed by the parties to contradict any of the evidence relied upon by the Applicants, which might have suggested that cross-examination could have been useful.

[406] In line with the interlocutory nature of the orders sought, and absent any application for the deponents to be cross-examined and any contrary authority adverted to by the Second Respondent's Counsel in support of his contentions, I am entirely satisfied that the Court could properly proceed to determine the application on the basis of the Affidavit evidence alone.

[407] The Second Respondent submitted that the 6 month period adopted by the Joint Liquidators as a period in which preference payments were made is not in accordance with section 204, which sets no time limit. He argues that to impose a time limit can be

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considered as prejudicial to the creditors rather than the corporation and the unfairness of this outweighs any benefit to the corporation which would not have lost anything, as the monies paid were the property of the creditors.

[408] Both the Joint Liquidators and the *Amicus* agreed that no time period applies for the operation of section 204. The point, as I understand the Joint Liquidators' case to be, is that it should have become apparent to SIB's Board of Directors at least six months before it was forcibly shut that it was trading insolvent, and they should have imposed a moratorium upon further payments to investors (and otherwise convoked a voluntary winding-up meeting, or invited a receivership) but they did not. No one is seeking to impose a six month period as suggested.

[409] A further argument advanced on behalf of the Second Respondent was that the bank was created by a statutory instrument, it was governed by statute and the obligation to pay upon demand is a contractual obligation between the creditors, the holder of the funds and the bank. I confess I do not understand the point the Second Respondent was making here.

[410] The Second Respondent further argued that in circumstances where it is common ground that the creditors would not receive hundred percent of their deposit, any order for the CD Defendants to repay their own monies to the bank will not benefit the creditors but the corporation since no creditor can receive the return of their full deposit. ·An order to repay monies will serve no useful purpose and only delay the process of distribution of the remaining funds.

[411] I also found these submissions somewhat difficult to follow. To the extent that I understand them correctly, they do not appear to weigh against permitting the Joint Liquidators to seek recovery of monies paid out to CD Defendants pursuant to section 204, by way of deduction from any further distributions. A recovery of monies would serve a useful purpose, as it would increase the available cash assets for distribution to the creditors as a whole. Also, the claims envisaged by the Joint Liquidators would appear not necessarily to delay or hinder a further interim distribution.

"Equi ty is e qual ity"

[412] A recurring theme of the Joint Liquidators' submissions was that the Court should apply the equitable principle that "equity is equality". They seek to apply it in a number of ways, not least as a basis for "sharing the misery". I ought therefore to consider the meaning and application of this principle.

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[413] I agree with the Joint Liquidators that the starting point in the Court's exercise of discretion pursuant to section 204 of the IBC Act in a liquidation is that a distribution of the company's available assets amongst unsecured creditors is to be on a *pari passu* basis. I also agree with them that the IBC Act embraces this principle, as is evident from section 289(3). This, suggest the Joint Liquidators, is an application of the principle that "equity is equality". They say that anything else is unfair and prejudicial, especially to victims of a fraud.

[414] "Equity is equality" is one of the dozen or so maxims of equity. In recent modern times the debate as to what this maxim entails has revolved around the question whether an estate should be distributed proportionately between beneficiaries according to their respective entitlements, or with mathematical equality[137].

[415] It has also been treated as a principle to be applied when exercising a residual discretion. In **Jones v Maynard**[138], for example, Vaisy J observed: "*I think that the principle* [i.e. "equity is equality"] *that applies here is Plato's definition of equality as a "sort of justice": If you cannot find any other, equality is the proper basis.*"

[416] Plato identified two types of "equality": "equality determined by measure, weight and number" to give "even results in the distributions" of goods and honours, "giving due measure to each according to nature", and thereby to do "political justice", and secondly, "modified equality" to avoid discord on account of "discontent of the masses". Plato notes that using "modified equality" in order to be "reasonable and considerate" is an "infringement of the perfect and exact", and therefore "contrary to strict justice"[139].

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[137] E.g. **Re Steel** [1979] Ch. 218, **Burrough v Philcox** (1840) 5 My & Cr 72, **McPhail v Doulton** [1970] UKHL 1.
[138] [1951] Ch. 572 at 575
[139] Plato's *Laws*, Book 6, Page 757, 328 to 348BC, translated by R.G. Bury, Cambridge, MA, USA, Harvard University Press, 1967-1968: "*There is an old and true saying that "equality produces amity," which is right well and fitly spoken; but what the equality is which is capable of doing this is a very troublesome question, since it is very far from being clear. [757b] For there are two kinds of equality which, though identical in name, are often almost opposites in their practical results. The one of these any State or lawgiver is competent to apply in the assignment of honors,—namely, the equality determined by measure, weight and number,—by simply employing the lot to give even results in the distributions; but the truest and best form of equality is not an easy thing for everyone to discern. It is the judgment of Zeus, and men it never assists save in small measure, but in so far as it does assist either States or individuals, [757c] it produces all things good; for it dispenses more to the greater and less to the smaller, giving due measure to each according to nature; and with regard to honors also, by granting the greater to those that are greater in goodness, and the less to those of the opposite character in respect of goodness and education, it assigns in proportion what is fitting to each. Indeed, it is precisely this which constitutes for us "political justice," which is the object we must strive for, Clinias; this equality is what we must aim at, now that we are settling the State [757d] that is being planted. And whoever founds a State elsewhere at any time must make this same object the aim of his legislation,—not the advantage of a few tyrants, or of one, or of some form of democracy, but justice always; and this consists in what we have just stated, namely, the natural equality given on each occasion to things unequal. None the less, it is necessary for every State at times to employ even this equality in a modified degree, if it is to avoid involving itself in intestine discord, in one section or another,—for the reasonable and considerate, [757e] wherever employed, is an infringement of the perfect and exact, as being contrary to strict justice; for the same reason it is necessary to make use also of the equality of the lot, on account of the discontent of the masses, and in doing so to pray, calling upon God and Good*

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[417] Hudson[140] observes that Vaisy J's comment, with its reference to Plato, is in common with Aristotle's view of justice and equity.

[418] Aristotle, a pupil of Plato, took Plato's thinking further.

[419] Aristotle treated law and equity as separate. The nature of equity, for him, is "*a correction of law, where law falls short because of its universality*."[141]

[420] He described equity as follows:

> "*The second kind* [of justice] *makes up for the defects of a community's written code of law. This is what we call equity; people regard it as just; it is, in fact, the sort of justice which goes beyond the written law. Its existence partly is and partly is not intended by legislators; not intended, where they have noticed no defect in the law; intended, where they find themselves unable to define things exactly, and are obliged to legislate as if that held good always which in fact only holds good usually; or where it is not easy to be complete owing to the endless possible cases presented, such as the kinds and sizes of weapons that may be used to inflict wounds -- a lifetime would be too short to make out a complete list of these. If, then, a precise statement is impossible and yet legislation is necessary, the law must be expressed in wide terms.*"**[142].**

[421] These concepts of what equity is, and where judicial discretion come in, are instantly recognizable to lawyers brought up in the English legal tradition. This is because these concepts are part of that tradition, having been infused into it in medieval times when the practice arose of litigants being able to appeal directly to the King's conscience in cases where the law, strictly applied, would yield an unfair result. The King's "conscience" came to be administered by his Chancellor, originally a senior clergyman[143]. His "conscience"

Luck to guide for them the lot aright towards the highest justice. Thus it is that necessity compels us to employ both forms of equality."

[140] **Equity & Trusts**, 4th Ed., Ch. 1.4.8, page 27

[141] Aristotle, *Nicomachean Ethics*, Book 5, Ch. 10, 350B.C., Trans. W.D. Ross

[142] Aristotle, *Ars Rhetorica*, Book 1, 1374 at 25, Trans. W Rhys Roberts

[143] Up until 1529, with the appointment of Sir Thomas More, a lawyer. All Chancellors subsequently have been lawyers. Sir Thomas More's most well-known (fictional) work, *Utopia* (1516) drew upon Aristotle, in particular the latter's notion of a "golden mean", and of St Thomas Aquinas' insistence upon having regard to "the diversity of things", as in the following passage: "*Extreme justice is an extreme injury: for we ought not to approve of those terrible laws that make the smallest offences capital, nor of that opinion of the Stoics that makes all crimes equal; as if there were no difference to be made between the killing a man and the taking his purse, between which, if we examine things impartially, there is no likeness nor proportion.*" — *Utopia*, Book 1., 1901 edition, republished by The Floating Press, 2008.

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was originally "kept" in accordance with classical and Christian teaching, and then subsequently by the Courts of Chancery.

[422] The manner in which the IBC Act makes provision for residual discretion follows very closely this definition of equity. This is seen particularly with the express inclusion of section 371.

[423] Aristotle considered two types of equitable justice: *distributive* justice and rectificative, or *commutative* justice.

[424] In relation to distributive justice, where there is to be a distribution out of an insufficient fund, he considered that equals are to be treated equally and unequals unequally[144]. The distribution is affected according to the recipient's merit, as merit might be defined in a particular society[145], therefore proportionately[146].

[425] In relation to commutative justice, Aristotle observed that this concerns the rectification of an imbalance of resources between an offender who has gained something at the expense of a victim. With such rectification, the gain is taken away from the offender and given to the victim, until the balance has been restored. The merit of the victim is irrelevant. This form of justice is performed blindly, and the distribution is performed with mathematical equality, and not proportionately[147].

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[144] Aristotle, *Nichomachean Ethics*, Book V, Ch. 3, Trans. W.D. Ross: "*And the same equality will exist between the persons and between the things concerned; for as the latter the things concerned-are related, so are the former; if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints-when either equals have and are awarded unequal shares, or unequals equal shares*."

[145] Ditto: "*Further, this is plain from the fact that awards should be 'according to merit'; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence*."

[146] Ditto: "*The just, then, is a species of the proportionate (proportion being not a property only of the kind of number which consists of abstract units, but of number in general)*."

[147] Aristotle, *Nichomachean Ethics*, Book V, Ch. 4, Trans. W.D. Ross: "*The remaining one is the rectificatory, which arises in connexion with transactions both voluntary and involuntary. This form of the just has a different specific character from the former. For the justice which distributes common possessions is always in accordance with the kind of proportion mentioned above (for in the case also in which the distribution is made from the common funds of a partnership it will be according to the same ratio which the funds put into the business by the partners bear to one another); and the injustice opposed to this kind of justice is that which violates the proportion. But the justice in transactions between man and man is a sort of equality indeed, and the injustice a sort of inequality; not according to that kind of proportion, however, but according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it*."

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[426] St Thomas Aquinas[148] adopted and developed these concepts in the context of the practical application of Christianity. He considered that in the case of commutative justice, the person from whom the gain is to be taken need not be an "offender", as assumed by Aristotle[149]. Furthermore, St Thomas Aquinas expressly recognized that finding the equitable or "mean" solution involves taking into account all material circumstances, or "the diversity of things"[150]. An element of this was that he recognized that the interests of the individual should, in appropriate cases, be subordinated to the common good[151].

[427] Aristotle-Thomist thinking undoubtedly influenced the development of the English practice of equity, or exercise of the court's discretion.

[428] Their principles of distributive justice are most typically still seen in action today in cases of division of marital assets in family law cases[152]. The distribution of an estate in liquidation is also an instance of distributive justice. In relation to distributions from an insolvent estate, Aristotelian-Thomist proportionate distribution has been adjusted by statute to be effected in accordance with the *pari passu* principle, reflecting modern public policy in this area of law.

[429] The exercise which concerns us presently is an example of commutative, not distributive justice. Here, the Joint Liquidators propose to obtain orders which would take gains from parties who are not offenders (CD Defendants) to restore them to the liquidation estate.

[430] Applying the Thomist interpretation, the Court could take the CD Defendants' gain and restore it to the estate, *if all the circumstances point to this as the equitable or "mean" solution*. Applying the earlier, Aristotelian, approach, the Court could take the CD Defendants' gain and restore it to the state, *without regard for the effect this could have upon their personal situations.* The principle that section 204 must not be used as an instrument of oppression is congruent with Thomist interpretation, but it is not congruent with the Aristotelian approach.

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[148] Tommaso d'Aquino, OP (1225 –1274)

[149] St Thomas Aquinas, *Summa Theologica*, Question 61, Art. 2: "*On the other hand in commutations something is paid to an individual on account of something of his that has been received, as may be seen chiefly in selling and buying, where the notion of commutation is found primarily. Hence it is necessary to equalize thing with thing, so that the one person should pay back to the other just so much as he has become richer out of that which belonged to the other. The result of this will be equality according to the "arithmetical mean" which is gauged according to equal excess in quantity*."

[150] Ditto:"[W]*herefore the mean, in justice, depends on the diversity of things*."

[151] St Thomas Aquinas, *Summa Theologica*, Question 90, Art. 2: "*Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness.*"

[152] E.g. **Re Steel**, *supra*.

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[431] Whilst Aristotle and St Thomas Aquinas concerned themselves with taking something from one person and giving it to another to restore an imbalance of resources, they do not treat the question whether justice is served by sharing misery, and if so, how this should be done. Rather, as I understand them, Aristotle suggests that in commutative justice the fact that taking a gain away from someone who ought not to have it causes him misery is not a relevant consideration, but St Thomas Aquinas does treat this as relevant.

[432] The Joint Liquidators' proposal that the Court should order CD Defendants to repay money paid out to them, and thereby to "share the misery" is more consistent with the "blind" Aristotelian approach to commutative justice than with the Thomist approach, which requires "the diversity of things" to be taken into account. The maxim "equity is equality" is to be used, it appears to me, in cases of commutative justice in a manner which takes into consideration all relevant factors and disregards irrelevant matters, and not by imposing a presumption of equality where there may be none. It is, after all, merely one of the principles of equity designed to achieve a fair result – other principles and factors may affect what is most fair overall. Where the Court has to consider what is fair and equitable, this inevitably involves having regard to how each individual is likely to be affected by an order. The position is different where there is a statute which decrees what is to happen in a given situation. For instance, with preference avoidance legislation, if a statute decrees that all payments within a certain period prior to a winding up order shall be reversed, the Court need not – should not – consider what the effect of this statute will be on individual subjects. All will stand equally before the statute. For those who would be hurt by its application, the classic response is *dura lex, sed lex*[153].

[433] "Sharing the misery" appears to be a novel concept for our Courts and no authority on the point has been produced. It raises the difficulty that there are different kinds of misery, and different intensities. For example only, one CD defendant, who might be required to pay back a sum of money, might be discontented because this is a set-back in his grasping for greater wealth. Some may dismiss this as hardly meriting sympathy. For another CD defendant, required to repay the same amount, his misery may be the deep anxiety caused by a cash short-fall preventing him from meeting day-to-day family bills. The Court is no stranger to either of these types of person and many other situations can readily be postulated. The monetary sums required to be repaid may be the same (for the sake of this illustration), but the degrees of misery are incomparable. Although both suffer, in their own way, and at that superficial level "misery" is "shared", the misery is shared far from equally, and thus inequitably.

[434] I am therefore most reluctant to trigger such a "misery sharing" exercise. Whilst not venturing into that domain would carry with it the unfortunate consequence that those who

[153]= "The law is tough, but it is the law."

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could afford to repay the money without difficulty would be allowed to keep their "windfall", I must also have regard to the most vulnerable in this equation. I would stress however, that there is currently no evidence before the Court which would enable me to ascertain in what manner and to what extent misery would be caused, and therefore to what extent the interests of one person ought to be subordinated to those of the common good of the body of creditors as a whole.

[435] The "equity is equality" principle cannot be applied in isolation. Other principles also affect the way this Court should exercise its discretion.

[436] In exercising discretion the court must take into account all matters which ought to be taken into account and leave out of account all matters which ought not to be taken into account.[154]

[437] A set of principles which I must apply are those which concern section 204 of the IBC Act. That section concerns, as we have seen, rectification of a result or conduct of a company which oppresses, unfairly prejudices or unfairly disregards the interests of stakeholders, including creditors. The section may not itself be used as an instrument of oppression.

[438] It is axiomatic that one of the Court's powers and functions is to visit consequences upon people. Where possible, such consequences must be intended. In considering what consequences are appropriate in any given situation, the Court must also consider whether its orders are likely to have unintended undesirable consequences. Although there is no evidence before the Court of this at the moment (the *Amicus* has however indicated that numerous CD Defendants are relatively impecunious), it can readily be expected that some CD Defendants, who are not well endowed with funds, will not be financially able to mount defences, even if viable. It would be burdensome, harsh and wrongful for their gains to be taken from them by force of law, where, but for their impecuniosity, they might be able to set up good defences. That would be a case of using section 204 as an instrument of oppression, as well as an unintended, undesirable, consequence.

[439] The absence of evidence currently of this scenario means that whilst its possibility makes me hesitate to permit such an outcome, such a mere possibility is not a sufficient reason not to permit claw-back claims to recover monies paid out to CD creditors.

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[154] **Amerinvest International Forestry Group Company Limited v Kwok Ka Yik BVIHCMAP2014/0033**, citing and applying **Nilon Ltd and another v Royal Westminster Investments SA and others** [2015] UKPC 2

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[440] A set of matters which I must without any doubt take into consideration (before the Court can move to considering whether SIB has caused unfair prejudice, or shown unfair disregard for the interests of creditors, or oppression), and which are, in my view, decisive in this case, are the reasonable expectations of the CD Defendants. I can, and on balance should, permit what accords with the CD Defendants' reasonable expectations. Conversely, I should not permit what does not, unless there is a good countervailing reason for doing so.

[441] Although there are many possible reasonable expectations in play in this case – and maybe more than already specifically mentioned – in the exercise of the Court's discretion, I believe the correct balance between the predominant expectations is that the CD Defendants were reasonably entitled to expect that because SIB was a regulated bank, when they received payment from SIB they could keep the money. This is all the more so because no statutory provisions apply to deem payments to be reversible preferences within a certain period prior to an IBC Act company's cessation to trade.

[442] The same expectation does not apply to funds which had not yet been paid out but remain in the liquidation estate. It was part of the CD Defendants' reasonable expectations that their investment in the bank carried serious risks and that they might lose the entirety of their investments. Allowing a recovery against that part of their investments still within the estate will accord with this expectation and not be unconscionable. Nor will it be burdensome, harsh, or wrongful, as no CD Defendant would lose out more than he or she was prepared to risk anyway.

[443] I understand that there are some 4,000 proposed CD Defendants, all with differing circumstances, in a great number of jurisdictions. The prospects of protracted and costly litigation, with differing outcomes, are obvious, particularly where enforcement overseas of possible repayment orders would be concerned.

[444] For these reasons, and in the interests of certainty and the economic use of the estate's limited resources, I believe it is appropriate in this case to rule that a possible recovery pursuant to orders that might be made under section 204 will be permitted against undistributed funds within the estate, but it will not be permitted against funds or assets already in the hands of CD Defendants.

[445] This will mean that there will be no need to enforce orders in jurisdictions other than where the funds of the SIB liquidation estate are maintained.

[446] It will also mean that no consideration will need to be given on a case by case basis whether or not a CD Defendant has changed his position to his detriment by reason of payment to him, or other reasons why he should not be required to pay money back.

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[447] The effect of restricting eventual recoveries in this manner will be that where a CD depositor has already received part of what he understood to be his contractual entitlement to principal and/or interest, he will not be entitled to receive a further distribution until the amount of any eventual repayment order made pursuant to section 204 has been off-set in full against his anticipated further distribution.

[448] This will apply to both Alleged Net Winners and Alleged Preference Creditors.

[449] Finally, I should address the question, touched upon by the Joint Liquidators in their submissions, of the extent to which an ethic of reciprocity ("do as you would be done by") forms part of the considerations the Court must take into account. In other words, should the judge project him or herself into the shoes of CD Defendants, including those who would lose out most by having to repay monies received, and make orders that he or she would want to have apply to him or herself? Without in any way detracting from the extraordinary value of the ethic of reciprocity as a principle which prevents disputes and assists in their settlement, as far as the Court's function is concerned the answer appears to be well established. The Court is to take the role of a reasonably objective bystander, detached from, but sensitive to, all sides, applying the law and legal and equitable principles.

[450] Given the novelty and complexity of many of these issues and facts under the laws of Antigua and Barbuda, and consequently the great scope for error or omission, as well as the wider importance of these matters, I have given the parties leave to appeal. I have however reserved the question of funding for any appeal for further application(s). This is because it would be appropriate for the terms of any appeal to be considered before permission is granted for the estate's funds to be expended. I would not exclude, at this point, any of the parties from being able to apply for such funding.

[451] Although the Second Respondent was not successful in blocking the permission sought by the Joint Liquidators, I have not applied the principle that costs follow the event. The Second Respondent's intervention did not add significantly to the overall cost of the application, and he was entitled to make legal representations through the proper channels upon this application.

[452]. Finally, the Court expresses its gratitude to the parties' legal teams, as well as the Court Staff, for their assistance. I apologize for the delay in completing this judgment, which was

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due to the volume of submissions and authorities which required consideration.

Gerhard Wallbank
High Court Judge (Acting)

20 November 2015

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