THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2015/0162

IN THE MATTER OF THE COMPANIES ACT CAP. 143 OF THE REVISED LAWS OF SAINT VINCENT AND THE GRENADINES 2009

AND

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT CAP. 136 OF THE REVISED LAWS OF SAINT VINCENT AND THE GRENADINES 2009

AND

IN THE MATTER OF THE RECEIVERSHIP OF ST. CLAIR INVESTMENTS LIMITED, KFC (ST. VINCENT) LIMITED, BOYEA HOLDINGS LIMITED, AND W.J. ABBOTT AND SONS LIMITED

BETWEEN

ST. CLAIR INVESTMENTS LIMITED

FIRST CLAIMANT

and

KFC (ST. VINCENT) LIMITED

SECOND CLAIMANT

and

BOYEA HOLDINGS LIMITED

THIRD CLAIMANT

and

W.J. ABBOTT AND SONS LIMITED

FOURTH CLAIMANT

and

ORMISTON ARNOLD BOYEA

FIFTH CLAIMANT

and

DAVID HOLUKOFF

and

MARCUS WIDE

both of Grant Thornton, 171 Main Street,

Road Town, Tortola, British Virgin Islands

Receiver-Manager of the Claimants

DEFENDANTS

Appearances:

Mr. Parnel R. Campbell Q.C., Ms. Mandela Campbell with him for the claimants.
Mr. Grahame Bollers for the defendants.

2016: Nov. 2

2017: Jan. 18

JUDGMENT

BACKGROUND

[1] **Henry, J.:** This matter involves a challenge by four limited liability companies and Mr. Ormiston A. Boyea against the appointment of Mr. David Holukoff and Mr. Marcus Wide as receiver-managers of the companies. St. Clair Investments Limited, KFC (St. Vincent) Limited, Boyea Holdings Limited and W. J. Abbott and Sons Limited (collectively 'the companies') obtained certain mortgage facilities from the Bank of Nova Scotia ('the bank') between 2009 and 2011. Mr. Boyea guaranteed the loans.

[2] The companies allegedly encountered financial difficulties and they failed to service their loan commitments to the bank. Consequently on 9th March, 2015, the bank appointed Mr. Holukoff and Mr. Wide as receiver-managers in respect of St. Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited and in respect of W. J. Abbott and Sons Limited ('Abbott and Sons') on 17th March, 2015.

[3] By fixed date claim form filed on 13th October, 2015, the companies and Mr. Boyea brought this action seeking:

(1) declarations that:

(a) the appointments of Messrs. Holukoff and Wide were invalid, ineffective, null and void as they were made in breach of sections 11 and 14 (c) of the Bankruptcy and Insolvency Act[1] ('the Act'). Those sections stipulate respectively that only someone licensed as a trustee under the Act may be appointed as a receiver under a security agreement and that he must within 14 days publish notice of his appointment in one issue of a local newspaper and the *Gazette*;

(b) Messrs. Holukoff's and Wide's conduct as receiver-managers were executed in bad faith and in a commercially unreasonable manner in that they failed, neglected or refused to provide them with:

(i) any information or statement concerning their property, contrary to section 13 (e) and (f) of the Act;

(ii) any notice of disposition of their property, contrary to section 17 (1) (a) and (d) of the Act.

(2) an order directing Messrs. Holukoff and Wide to carry out their statutory duties pursuant to sections 13(a), (b), (e), (f), 14 (e) and 17 (1) (a), (d) of the Act;

(3) an order restraining Messrs. Holukoff and Wide from realizing or otherwise dealing with their property until further order;

(4) damages for breach of the referenced statutory duties; and

(5) costs.

[4] Messrs. Holukoff and Wide pleaded that the Act is not relevant to the present receiverships since

[1] Cap. 136 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

they were appointed pursuant to the provisions of the Companies Act[2] and the debenture which empowered the bank to appoint a receiver in the event of default in repayment consequent on a demand. They also contended that the Act was not in force when they were appointed receiver-managers of St. Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited. They pleaded further that the Act does not have retrospective effect and does not affect receiverships carried out pursuant to the Companies Act.

[5] Mr. Holukoff and Mr. Wide maintained that they have conducted the receivership in accordance with the provisions of the Companies Act, have provided the companies and Mr. Boyea with all relevant information regarding the disposition of assets and have not acted in bad faith or a commercially unreasonable manner. They contended that even if the court finds that their appointment as receivers of Abbott and Sons must comply with the Act, they were unable to do so because the licensing provisions could not be implemented, there being no Supervisor of Insurance in place. They argued further that Abbott and Sons has not suffered any prejudice or loss from their appointment.

[6] For the reasons outlined in this judgment, I have found that the appointments of Messrs. Holukoff and Wide as receiver-managers of Abbott and Sons although effected in violation of the applicable statutory regime were not thereby invalidated and their appointments in respect of the other companies were validly and effectively made.

ISSUES

[7] The issues are whether:

1. The appointments of Messrs. Holukoff and Wide were made in breach of sections 11 and 14 (c) the Act and are therefore invalid, ineffective, null and void?

2. Messrs. Holukoff and Wide conducted themselves as receiver-managers in bad faith and in a commercially unreasonable manner by failing, neglecting or refusing to provide the companies and Mr. Boyea with:

[2] Cap. 143 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

(i) any information or statement concerning their property, contrary to section 13 (e) and (f) of the Act; or

(ii) any notice of disposition of their property, contrary to section 17 (1) (a) and (d) of the Act?

3. To what relief, if any, are the companies and Mr. Boyea entitled?

ANALYSIS

Issue 1 – Were the appointments of Messrs. Holukoff and Wide as receiver-managers made in breach of sections 11 and 14 (c) the Act and are thereby rendered invalid, ineffective, null and void?

[8] The companies and Mr. Boyea accepted that the primary facts are not in dispute and that except for certain paragraphs, a 'fairly accurate exposition' is outlined in Mr. Holukoff's witness statement[3]. Mr. Holukoff and Mr. Boyea's witness statements were admitted as their evidence and they were not cross-examined. Mr. Wide relied on Mr. Holukoff's witness statement and did not testify. Mrs. Sharda Bollers' witness statement on behalf of Holukoff and Wide, was accepted as her evidence, her attendance having being dispensed with in writing[4] by the companies and Mr. Boyea. The parties' legal practitioners filed[5] an agreed statement of facts which recounted the major factual details.

[9] Mr. Ormiston Boyea is over 70 years old and has been an entrepreneur for over 38 years. He is a shareholder, the 'ultimate beneficial owner' and director of the companies which were respectively registered in Saint Vincent and the Grenadines between 1965 and 1995[6]. On November 20th 2009, the bank loaned the companies jointly $20 million. By further subsequent charges in 2010 and 2011[7], the bank advanced $3.6 million and $3.78 million to them. Fine Foods Limited, another corporate entity was also party to the agreements, however it is not a party in the instant case. The mortgage and charges were secured by several parcels of land at Prospect, Cane Hall, Ratho Mill and

[3] Filed on 26th October 2016.

[4] Filed on 2nd November 2016.

[5] On 31st October, 2016.

[6] W. J. Abbott and Sons Limited on 30th September, 1965; St. Clair Investments Limited – 15th September 1983, KFC (St. Vincent) Limited - 8th May, 1986 and Boyea Holdings Limited – 16th August, 1995.

[7] On 13th May, 2010 and 24th March, 2011 respectively.

Kingstown, Saint Vincent and the Grenadines and they were duly registered[8]. Mr. Boyea executed the mortgage and charges as director for and on behalf of the companies and as guarantor in his personal capacity. Mr. Boyea estimated that the properties amount in value to approximately $30 million.

[10] He testified that the companies were engaged respectively in property rental business and also operated KFC and Pizza Hut franchises. He described himself as the driving force behind those operations and attested that the companies encountered financial difficulties and were therefore unable to properly service their commitments to the bank. Mr. Holukoff testified that although the KFC and Pizza Hut franchises were terminated by the franchise owners on March 2, 2015, they remained open in violation of the cessation directives and were subsequently closed by the receivers.

[11] Under the mortgage and the charges, the parties agreed to the appointment of a receiver or receivers by the bank to among other things, take possession of any of the charged properties and sell them if the companies and the guarantor failed to repay the debt. The bank was also granted a power of sale[9] over the mortgaged properties in the event of default in repayment. It is instructive to set out the clauses containing the power of sale and provision for the appointment of receivers.

[12] Clause 3 of the mortgage contained the power of sale and provided in part:

> 'It shall be lawful for the Bank and every person for the time being entitled to receive and give discharge for the sum of … $20,000,000.00 of the balance thereof hereby secured when the same has become due and to sell or concur with any other person in selling the First Schedule Hereditaments or any part thereof whether subject to the prior charges (if any) then affecting the same or discharged therefrom and in the latter case upon such terms as to payment off of such charges as the Bank shall think fit and either together or in lots by public auction or private contract subject to such conditions respecting title or evidence of title or other matter as the Bank may think fit …

[8] Respectively by Deed of Mortgage Debenture No. 4211 of 2009, registered on the 25th November, 2009, Deed of Further Charge No. 1575 of 2010, registered on 18th May, 2010 and Second Deed No. 1015 of 2011 registered on 25th March 2011.

[9] Pursuant to clause 3 of the mortgage and the final clause in each charge.

Provided Always And It Is Hereby Agreed And Declared as follows:-

(i) The power of sale hereby conferred shall not be exercised unless and until one of the following events shall have happened namely:-

(a) Notice requiring payment of the said sum of … $20,000,000.00 or the balance due has been served on the Guarantor or any of the Companies and default has been made in payment of the sum demanded for one calendar month after such service;

(b) Some interest under these presents is in arrears and unpaid for one month after becoming due; or

(c) There has been a breach of some condition or provision contained in these presents and on part of the Guarantor or the Companies or any of them to be observed and performed other than the agreement for the payment of the sum of … $20,000,000.00 and interest as aforesaid.'

[13] Clause 8 of the mortgage made provision for the appointment of receivers. The relevant portions stated:

'At any time after the Bank shall have demanded of any money hereby secured or such money shall become payable the Bank may by writing under the hand of any director manager assistant manager acting manager or attorney for the time being of the Bank or any person authorized by any one of them in writing appoint any person or persons to be a receiver or receivers of the premises and or goods hereby charged or any part thereof and remove any receiver or receivers so appointed and appoint another or others in his or their place and a receiver or receivers so appointed shall have power:

(i) to take possession of collect and get in any property or chattels hereby charged and for that purpose to take any proceedings in the name of the Companies or any of them or otherwise as may seem expedient;

(ii) to carry on or manage … the businesses or any part thereof of the Companies or any of them…

(iii) Forthwith to sell or concur in selling any of the property hereby charged

and to carry on any such sale in the name and on behalf of any of the Companies …

(iv) …

(v) …

(vi) …

(vii) to do all such other acts and things as may be considered incidental or conducive to any of the matters or powers aforesaid and which he or they lawfully may or can do as agent for the Companies or any of them.'

[14] By clause 9, the Companies irrevocably and expressly appointed the bank and all persons deriving title from the bank, to sign, seal, deliver and otherwise perfect any Debenture, deed, assurance or act necessary to effect the sale, lease or disposition of any chattels, property or assets belonging to the Companies in accordance with any power of sale or other applicable disposition. It specifically extended such appointment to include any receiver appointed by the bank in accordance with the mortgage. The companies have not challenged the validity of the mortgage or further charges nor the irrevocable appointments. They are presumed to have acted freely and voluntarily in executing the Indenture and charges with clear knowledge of what they entailed and a corresponding intention to be bound by the terms and conditions.

[15] By letter dated 24th November, 2014, the bank demanded payment of all principal and interest owed by the companies. Three months later[10] the bank notified the companies that it intended to enforce its security and appoint receivers. Mr. Holukoff and Mr. Wide were then appointed as joint receiver-managers of the respective companies by Deeds of Appointment[11]. Mr. Holukoff is a chartered accountant, chartered professional accountant and certified fraud examiner. Mr. Wide is a chartered accountant. They are employed with Grant Thornton (British Virgin Islands Limited), based in Road Town, Tortola, Virgin Islands. They wrote to the companies notifying them of the said appointments and proceeded to execute their receivership duties in accordance with the terms of the security agreement and the Companies Act.

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[10] By letter dated 9th March 2015.

[11] Nos. 601, 602, 603 and 680 of 2015 registered respectively on 9th March, 2015 and 17th March, 2015.

[16] The companies and Mr. Boyea have challenged the legality of those appointments on the grounds that Messrs. Holukoff and Wide were not licensed as trustees under the Act when they were so appointed and that they failed to publish notice of their appointment in a local newspaper and in the *Gazette* in accordance with the Act. Of the four appointments, 3 were made before the Act came into force and one after. The parties have accepted that the timing is determinative of their validity. I will therefore consider them chronologically.

Earlier appointments - Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited

[17] The Act was passed in the House of Assembly on 2007. It was brought into force with the Regulations on 16th March, 2016[12]. Mr. Holukoff and Mr. Wide contended that it was neither intended to nor did it have retrospective effect. They submitted that the Act does not apply to their appointment as receiver-managers of St. Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited because those appointments were made 7 days before it came into force and were made pursuant to clause 8 of the Mortgage Debenture. They argued that the Companies Act was the relevant legislation at that time, and that their appointments were effected in accordance with the statutory framework prescribed by sections 293 and 295 of that Act and were therefore validly made.

[18] Mr. Holukoff and Mr. Wide submitted that it is a 'fundamental rule of law that no statute shall be construed to have retroactive operation unless such construction appears very clearly in the terms of the Act or arises by necessary and distinct operation.' They cited *Bennion on Statutory Interpretation*[13] as authority for that proposition. That statement which is a correct formulation of the referenced presumption is properly attributable to the learned author of *Maxwell on the Interpretation of Statutes*[14].

[19] Initially, Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited appeared

[12] By S. R. O. No. 9 of 2015, proclamation by His Excellency the Governor General, published in the Gazette on 13th March, 2015.

[13] (4th edn., 2002) Butterworths pg. 266.

[14] (12th edn., 1969) Sweet and Maxwell, pg. 215.

to concede (in their written submissions[15]) that Mr. Holukoff's and Mr. Wide's appointment as receivers of those companies 'are not governed by the Act but by the provisions of the Companies Act.' They indicated that they were '*ad idem*' with Mr. Holukoff and Mr. Wide on this issue and that Holukoff and Wide could only purport to have functioned under the Companies Act in relation to St. Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited but that the position of W. J. Abbott and Sons was special. They submitted then that Holukoff and Wide could not have been appointed under the Act because they were not yet licensed under its provisions and the administrative machinery for licensing of trustees was not in place. They also acknowledged that the Act contained no provisions as to retrospectivity, therefore Holukoff and Wide could not invoke the provisions of the Companies Act in respect of Abbott and Sons.

[20] Subsequently, the three companies and Mr. Boyea appeared to have departed from that position. They argued that after the Act came into force, only those persons who were appointed receivers under the Companies Act by an order of the high court could continue to function legitimately as receivers under the Companies Act. They reasoned that under the Act, a receiver appointed by court order enjoys a vastly different legal status from a receiver appointed under a debenture instrument. They argued that while a receiver appointed by court order prior to 16th March, 2015 could legally carry out his functions pursuant to the Companies Act, a receiver appointed under an instrument must comply with the licensing requirements under the Act to retain legal protection and authenticity. They contended that Messrs. Holukoff and Wide having not been appointed by order of court, acted without the cover of statutory authority, thereby rendering nugatory all acts they performed pursuant to the referenced appointments.

[21] The three companies submitted that the legislature enacted transitional provisions to protect court appointed receivers and subjected all other receivers to a licensing regime. They contended that in accordance with principles of statutory interpretation, section 268 of the Act must mean that cases falling within its parameters are to be continued under the Companies Act, while cases falling outside are subject to the Act. They argued that no other interpretation seems appropriate or possible. They added that the executive gave the receivership fraternity a period of over seven years to prepare

[15] Filed on 31st October, 2016.

themselves for this change. They argued further that Messrs. Holukoff and Wide should have secured appointments from the court to benefit from the transitional umbrella under the Act. They submitted that the 'receiver-managers' were therefore not clothed with any legal or statutory competence which would enable them to act in that capacity.

[22] They contended that several principles of statutory interpretation are to be considered in this case. They urged that it is settled law that where the words of a statute are clear and free from any ambiguity, those words must be given their plain meaning as articulated by Upjohn, LJ, in **Stephens v Cuckfield R.D.C.**[16] where he said:

> It is the duty of the court to interpret the language in which Parliament has thought fit to enact statutes and in particular to resolve verbal obscurities, ambiguities or grammatical difficulties and to explain the meaning of words and phrases. … In this case, however, there are no relevant obscurities, ambiguities or grammatical difficulties. … When Parliament uses ordinary words such as these, which are in common and general use in the English language, it seems inappropriate to try to define them further by judicial interpretation and to lay down as a rule of construction the meaning of such words unless the context requires that some special or particular meaning should be placed on such words.'[20]

[23] The companies also relied on dicta of Hariprashad-Charles J. in **Bebo Investments Limited v The Financial Secretary**[17] where she stated:

> '… it is worthy to note that the making of law is a matter for the Legislature and not for the Court. It is apposite to quote Byron CJ as he then was, in **Universal Caribbean Establishment v James Harrison** where he states:
>
> "The first principle to affirm is to recognise the separation of power between the Legislature and the Judiciary. It is the province of Parliament to make the law and for the Court to

[16] [1960] 2 All E.R. 716, 719 G-I.

[17] BVIHCV 2007/0151, paras. 21 - 24 (delivered on 17th January 2008).

> interpret, without basing its construction of the Statute on a perception of its wisdom or propriety or a view of what Parliament ought to have done." …
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> In **Charles Savarin v John Williams** Sir Floissac C.J. expressed the principles thus:
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> > "… I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention."
>
> The dominant purpose in construing a statute is to ascertain the intention of the Legislature as expressed in the statute, considering it is a whole and in its context. The intention is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand, however strongly it may be suspected that the result does not represent the real intention of Parliament. It is only where the words of the Statute are not clear and ambiguous that it is necessary to enlist aids for interpretation.'

[24] The foregoing are correct statements of some of the applicable legal principles. The companies contended further that applying these principles to the case at bar, the appointments of Messrs. Holukoff and Wide fall outside the provisions of section 268 of the Act, and accordingly, the receivership must be carried out in full compliance with the Act. In view of those submissions, the court must examine the provisions of the Companies Act and the Act to determine which of the two are applicable to the impugned 'appointments' made on 9th March, 2015 ('the initial appointments').

[25] In applying the referenced principles, the court must also have regard to an important legal presumption regarding retrospective legislation. In this regard, there is a presumption against legisla-

tive retrospectivity.[18] It is an established principle of law that nothing less than clear and unambiguous language will give retrospective effect to statute. This presumption is rebuttable only by 'express words or necessary implication.'[18] In construing legislation the courts will not ascribe implied retrospective effect to it, which results in unfairness to affected persons.[19] This posture was characterized by Staughton LJ in **Secretary of State for Social Security v Tunnicliffe** when he stated:

> 'In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears'.[20]

[26] Similarly, the Privy Council took a like stance in **Spread Trustee Co Ltd v Hutcheson and others** and refused to imply retrospectivity in the absence of express words to that effect. In delivering the Board's advice, Lord Clarke of Stone-cum-Ebony JSC said:

> 'There is nothing in the express terms of either the 1989 Law or that Law as amended that expressly provides that it prohibits reliance on a clause in a trust which was valid when made and at the time of the alleged breach of trust. If the States had intended that effect they would surely have made that clear in the Law.
>
> The 1989 Law shows that the States did so provide expressly when they thought it appropriate. …The Board agrees with the Court of Appeal that … when the States intended the Law to apply to past events it said so specifically and that the absence of any similar statement in s 34(7) makes it clear that it was not intended to apply to past events.'[21]

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[18] Halsbury's Laws of England (LexisNexis) Vol. 96 (2012), para. 1187.

[19] Bennion on Statutory Interpretation (LexisNexis), section 97.

[20] *[1991] 2 All ER 712 at 724*.

[21] [2011] UKPC 13, paras. 68 and 69; (a decision from the Court of Appeal of Guernsey).

[27] Do such express words appear in sections 11, 14 (c) and 268 (b) or are there any surrounding indicia which signify that the legislature intended them to apply retrospectively? It is important to set them out in their entirety. They provide respectively:

> '**11. Who may be a receiver**
>
> Only a person who is licensed as a trustee under this Act may be appointed a receiver under a security agreement.
>
> '**14.** A receiver shall-
>
> (a) not later than 14 days after being appointed receiver, publish a notice of his appointment in one issue of a local newspaper and the Gazette.
>
> '**268. Transitional**
>
> With effect from the commencement of this Act –
>
> (b) any winding up which is commenced or treated as having commenced before the commencement of this Act; or
>
> (c) any case in which a petition in bankruptcy was presented, or a receiving order or adjudication in bankruptcy was made before the commencement of this Act,
>
> shall be subject to the law in force before commencement of this Act.'

[28] Section 11 effectively forbids persons other than duly licensed trustees from serving as receivers pursuant to security agreements. Section 14 (c) stipulates that a receiver publish notice of his appointment within 14 days of his appointment. Section 268 itemized certain scenarios which would be governed by the laws in force before the Act became law, namely:

(1) windings up (or liquidations) begun or deemed to have begun before commencement - paragraph (a); and

(2) a petition or adjudication in bankruptcy or receiving order made before commencement - paragraph (b).

None of the referenced provisions expressly state that the licensing regime prescribed by sections 11 and 14 (c) and the regulations have retrospective effect in respect of receivers appointed by instrument before March, 2015.

[29] Prior to 16th March 2015, the provisions of the Companies Act applied in respect of receiverships of companies registered under its provisions. After that date, the Act applied except where transitional provisions provided otherwise. Section 293 of the Companies Act obligates a receiver appointed under an instrument, to act in accordance with the instrument and any directions given by the court under section 295. Section 295 empowers the court on application by a receiver or interested party to make any order it considers fit. The court may on such application make an order appointing, discharging or replacing a receiver; declaring the rights of persons; or give directions or any other order based on the justice of the case.

[30] The Act and the Bankruptcy and Insolvency Regulations ('the regulations') made under it, introduced a new regime regarding appointment of receivers after 16th March 2015. It also replaced the legislative framework in connection with bankruptcy and insolvency proceedings, rehabilitation of insolvent debtors and related matters such as receiverships. Section 11 of the Act stipulated that only trustees licensed under its provisions may be appointed as receivers under security agreements. Section 178 imposed a requirement for an intended trustee to submit to the Registrar of Insolvency an application for license in the form prescribed by the Minister. The Supervisor is also thereby empowered to conduct an investigation and issue a license if he is satisfied 'having regard to the qualifications prescribed that the applicant is qualified to obtain the licence.'

[31] While the regulations prescribed a form of application for use by corporate applicants seeking trustee licences, it contained none in respect of individual applicants like Holukoff and Wide. Likewise, neither the Act nor the regulations specified the qualifications individual applicants must possess in order to be so appointed and regarding which the Supervisor must satisfy himself.

[32] It is important to note that regulation 208 provides:

> 'Where no other provision is made by the Act or these regulations, the present law, procedure and practice <u>in bankruptcy</u> shall in so far as applicable, remain in force.' (emphasis added)

[33] 'Bankruptcy' is not defined in the Act. However, the Act provides that a debtor commits an act of bankruptcy by ceasing to meet his liabilities generally as they become due[22]. On the facts as presented, St. Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited admittedly committed an act of bankruptcy by defaulting on the repayment of their debts to the bank. Mr. Holukoff averred that they were also indebted to the Inland Revenue Department (IRD). They did not dispute this. Although strictly speaking no bankruptcy proceedings were initiated against the subject companies, having regard to the reality of the companies' acts of bankruptcy, regulation 208 may conceivably be of some applicability. In other words, it may be interpreted to apply to a receivership which was triggered by appointment of receivers pursuant to an instrument as in the case at bar. In such a case, the relevant provisions of the repealed Bankruptcy Act[23] and the Companies Act would be invoked.

[34] The Bankruptcy Act[23] expressly retained[24] aspects of the UK law and procedure relating to bankruptcy, but was silent regarding receivership. It would therefore not apply in this instance. The Companies Act would of necessity assume relevance in respect of such matters. It contains several provisions relating to appointment of receivers, including section 293. It contains no requirement for licensing of receivers or trustees. Mr. Holukoff and Mr. Wide were appointed in full compliance with section 293 of the Companies Act. Accordingly, if the reference to 'bankruptcy' in regulation 208 includes receiverships, the appointments would not be irregular or legally objectionable as they were made in accordance with the applicable receivership provisions which existed prior to March 2015, (i.e. section 293 of the Companies Act).

[35] On the other hand, if regulation 208 applies exclusively to bankruptcy proper, the companies' and Mr. Boyea's submissions' regarding retrospectivity must be examined against the requirements created by the Act and regulations. In this regard, the court must decide whether the Act contains provisions which:

(1) apply retrospectively to those appointments; or

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[22] Section 3 (1) (j).

[23] Cap. 98 of the Laws of Saint Vincent and the Grenadines, Revised Edition 1990, repealed by section 269 of the Act.

[24] Sections 2 and 4.

(2) impose on those appointments, aspects of the regulatory regime introduced by the Act?

The three companies and Mr. Boyea have contended that sections 11, 14 (c) and 268 (b) of the Act implicitly operate to bring about that result. The crux of their submissions is that those provisions apply retrospectively to receivers appointed by instrument before the Act's commencement.

[36] An examination of the pre-March 2015 procedures governing liquidation, court ordered or supervised bankruptcies and receiverships demonstrates that they are very involved and strictly regulated. It appears to me that in recognition of this, the legislature deliberately, expressly and purposefully included section 268, to remove any doubt as to whether those proceedings would be unraveled or affected by the new legislative framework. That they remained silent about receiverships previously instituted pursuant to instruments, does not without more, impose a requirement for receivers so appointed to be licensed as trustees. Applying the presumption against retrospective legislation, it follows that if the legislature intended that such receivers be so licensed, they would have stated so expressly. They made no such express provision and therefore did not intend the section 11 licensing provision to have retrospective effect.

[37] The companies have sought to link section 14 (c) with section 268 (b) in support of their submission that the Act has retrospective effect. The referenced cases and principles regarding when legislation is to be construed with retrospective effect are apt. For the reasons given in relation to section 11, I find that section 14 (c) was not intended to have retrospective effect in respect of pre-March 2015 appointments of receivers by instrument under security agreements. Mr. Holukoff's and Mr. Wide's appointments as receiver-managers of St. Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited are not subject to any such retrospective provisions, and are not rendered invalid, ineffective, null or void on this basis. They were validly made pursuant to the mortgage debenture and the applicable law. I find that sections 11, 14 (c) and 268 of the Act do not create such retrospectivity by implication as advanced by the companies and Mr. Boyea.

Appointment of Supervisor and Prescribed Trustee Application Forms

[38] Even if the Act intended to create such requirements retrospectively, several lacunae in the legislative framework essentially render them inoperable and ineffective. The gaps relate to the appointment of

a Supervisor and non-existence of prescribed forms. Mr. Holukoff and Wide submitted that even though the Act came into force in March 2015, the administrative infrastructure was not then ready to accommodate proper observance of the new legislation. They argued that strict compliance with the licensing provision was legally impossible as no Supervisor was appointed. They contended that since security enforcement must take place swiftly, the bank would have been prejudiced if it had to await the activation of those facilities in order to enforce its debenture. In those circumstances, they argued that resort to the Companies Act was a strict necessity to preserve the bank's interests. No evidence was advanced regarding any difficulties the bank encountered in seeking a court order to do just that.

[39] In any event, Mr. Wide and Mr. Holukoff submitted further that the fledgling bankruptcy regime was ill-equipped to handle any receiverships under the Act until the first trustees were licensed. They argued that consequently the Companies Act remained in place to fill any lacunae which might appear under the Act. They contended that waiting for the system to catch up with the Act was not a feasible proposition for the bank and it is unreasonable to insist on compliance with the subject provisions.

[40] Mr. Holukoff testified that he learnt that Mrs. Bollers was appointed to the post of Supervisor of Insolvency in October 2015 but no publication of her appointment was made in the *Gazette*. However, on 20th November, 2015, he and Mr. Wide submitted applications to Mrs. Bollers to be appointed as trustees and received their 'licences' on 8th December, 2015. Copies of the 'licences' were exhibited to his witness statement. The applications which Mr. Wide and he submitted were not reproduced in court. No gazetted notice of the appointment of a Supervisor of Insolvency was produced.

[41] It was not disputed that when the Act and the regulations came into force, no one had been appointed to the post of Supervisor. Mrs. Bollers explained that she was appointed to the post by Cabinet memo dated 6th May, 2015. She exhibited to her witness statement, a cabinet decision. It was not accompanied by an instrument of appointment. The decision stated:

'0589. With reference to Memorandum No. 215/15 on the captioned subject

Cabinet granted approval for Mrs. Sharda Bollers, Executive Director, Financial Services Authority to serve as Supervisor of Insolvency in accordance with the Bankruptcy and Insolvency Act Chapter 136 of the Laws of Saint Vincent & the Grenadines Revised Edition 2009.

Signed K Barnwell

Cabinet Secretary.' (emphasis provided)

[42] The office of Supervisor is created by section 174 of the Act. It specifies the qualifications of the office holder and provides that such person is responsible to the Minister for general administration of the Act. Subsection (1) provides:

> 'For the purposes of this Act, there shall be a Supervisor of Insolvency, who shall be an attorney-at-law with no less then (sic) five years experience in the field of accounting who shall be responsible to the Minister for the general administration of this Act …'.

[43] The provision does not state the mode of appointment or name the appointor. This omission activates the Governor-General's authority under section 62 of the Constitution[25] which states:

> 'Subject to the provisions of this Constitution and any other law, the Governor-General may constitute offices for Saint Vincent and the Grenadines, make appointments to any such office and terminate any such appointment.'

Section 62 of the Constitution reserves unto the Governor-General power to create offices and make appointments to them. Therefore, in the absence of express words in an Act, Cabinet does not have such capacity. Cabinet's stated constitutional remit to advise the Governor-General is outlined in section 52 of the Constitution. Presumably and historically such advice included recommendations for appointments to certain statutory offices.

[44] Based on Mrs. Bollers' testimony and the language of the referenced Cabinet decision, Cabinet did not purport to appoint her, it merely approved her appointment. The Cabinet decision was merely a recommendation that she be appointed. There is no evidence that His Excellency the Governor-

[25] Cap. 10 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

General has acted on that approval for her appointment to date. In all the circumstances, the office of Supervisor has not been legally and validly filled. Accordingly, while Mrs. Bollers might be the *de facto* Supervisor of Insolvency she is not the *de jure* office holder.

[45] She could not therefore have purported to legally receive and determine applications for trustee licences because she was never appointed. Her self-described 'appointment' if intended as such, was made in violation of the applicable constitutional provision and is therefore irregular, ineffective, unlawful, null and void. Any action Mrs. Bollers purportedly took as Supervisor is invalidated by her lack of authority. In the premises, it was impossible for any intended receiver to obtain a trustee licence under the Act, prior to March 2015 or since.

[46] The Act provides that applications for appointment of trustees be in the form prescribed by the Minister. Before licensing an applicant, the Supervisor must be satisfied that such applicant satisfies the qualifications specified by the Minister. Until the Minister prescribes the forms and qualifications, a receiver appointed by instrument cannot be licensed as a trustee. The Minister's failure to prescribe forms and qualifications must necessarily and logically have the effect of suspending the requirement to be licensed as trustees, since such a process has thereby been rendered a practical impossibility. Accordingly, the 'licences' granted to Holukoff and Wide were not validly issued.

[47] Furthermore, a licence issued without due regard to the substantive requirements would be objectionable and subject to be struck out as irregular and unlawful, on the ground that they were processed in excess of or *ultra vires* the powers vested in a duly appointed Supervisor, or contrary to the statute's express provisions.[26] More fundamentally, practitioners and the general public have a right to be properly informed of the criteria which govern the grant of such licences. Applications for licences must be determined based on transparent and known principles and benchmarks in a fair, objective and ascertainable manner. This is not possible where important features of the legislation such as forms and specified qualification criteria are missing.

[26] Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9.

[48] An insistence on trustee licences in such an instance would be contrary to public policy and impossible to legitimately achieve. The absence of essential elements of the legislative fabric would afford a complete defence to a receiver who solely for this reason is frustrated in obtaining a licence. By extension, it would be impossible for a creditor to recover his security in accordance with a security agreement which provides for the appointment of a receiver by instrument. The legislature is presumed to act always in a rational manner when enacting laws. They could not have intended such a result (i.e. the creation of a legal and practical conundrum). I find that they did not.

[49] Messrs. Holukoff and Wide submitted that they are now duly licensed and any deadline imposed for giving notice of appointment is capable of being extended *ex post facto* pursuant to section 229 of the Act which empowers the court to enlarge time to do any act which the Act or regulations mandate. There is no need for such extension in the case at bar because the licensing requirement was effectively inoperable due the gaps in the regulatory framework..

[50] In the circumstances, I hold that Mr. Holukoff's and Mr. Wide's appointments as receivers on behalf of the three companies were not subject to the licensing requirement contained in section 11 of the Act because:

(1) it did not operate retrospectively; and

(2) even if it had retrospective effect, the licensing machinery was not in place to accommodate applications for trustee licences.

I find too that sections 14 (c) and 268(b) of the Act do not have retrospective effect in relation to those appointments. Consequently, Mr. Holukoff's and Mr. Wide's appointments as receivers of St. Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited having been made in accordance with the relevant terms of the mortgage debenture and legislative mandates, are not invalidated because they had no trustee licences.

<u>Later appointment – W. J. Abbott and Sons Limited</u>

[51] What about the appointments in respect of Abbott and Sons? To be valid, Mr. Holukoff's and Mr. Wide's appointments as receiver-managers of Abbott and Sons, having been made after

commencement of the Act and regulations, must comply with the provisions of the Act. Mr. Holukoff and Mr. Wide were therefore required to:

(1) apply to be licensed as trustees; and

(2) publish notification of their appointments in a local newspaper and the *Gazette* within 14 days of being appointed;

pursuant to sections 11 and 14 (c) respectively.

[52] Mr. Holukoff testified that he believed that his and Mr. Wide's appointments were legitimate and their mandate was duly authorized by the Companies Act. He described the attempts they took to be licensed as trustees under the Act. He made no mention of publication of their appointments as stipulated in the law. I infer that they made no such publication and so find.

[53] However, Mr. Holukoff explained that he immediately informed the directors of the company of their appointments and gave directions for his attorney to inform the registrar of companies. He produced a copy of a letter sent to the directors dated 17th March 2015, notifying them of the appointment. Mr. Boyea acknowledged that Abbott and Sons was so notified. Mr. Holukoff also exhibited a copy of a notice of the appointments, addressed to the Registrar of Companies and dated 19th March, 2015. He and Mr. Wide submitted that these notifications even if they did not comply with the form, satisfy in substance all the notice requirements in the Act. I accept that both gentlemen meet the requirements to notify the debtor. They however fall short of their duty to inform the general public.

[54] Conceivably and logically, the publication requirement in section 14 (c) seeks to ensure wide publication of any ongoing receivership to place creditors on notice that a debtor might be experiencing difficulties in meeting its financial obligations. For obvious reasons, this information is especially useful to preferential creditors like the State and its satellite organs and institutions such as the Inland Revenue Department (IRD). Mr. Holukoff testified that he was contacted by the Comptroller of IRD by letter dated 8th April, 2015 in respect of amounts owed to it by Abbott and Sons (and the other companies).

[55] Notification in the newspaper and the *Gazette* are prudential stipulations which are indispensable to the proper, fair and legally regulated disposition of assets in the event of a receivership in keeping the need to protect the interests of preferential creditors. The Act makes it an offence for any person to contravene its provisions[27]. Mr. Holukoff's and Mr. Wide's failure to publish the notification is in clear violation of the legislative edict.

[56] Mr. Holukoff has indicated that although they advertised Abbott and Sons' property and building at Arnos Vale for sale, they did not conclude the sale but have leased the property and are receiving income in the form of rent, while they evaluate their strategy for disposition. Abbott and Sons did not present any contradictory testimony although it submitted that this assertion was being challenged. I accept Mr. Holukoff's account in the absence of any such challenge or contradiction. He testified that the only asset belonging to Abbott and Sons which they sold was a Lancer motor vehicle.

[57] Mr. Holukoff described the steps which were followed to secure the sale. He explained that the vehicle was advertised for sale by private treaty via sealed bids. He claimed that the sale was advertised in the local newspaper on four separate occasions. He referred to advertisements exhibited to his statement as being the subject ads. However, although one advertisement published in the Vincentian newspaper dated May 15, 2015 described a vehicle with that registration number, it did not state that it was being sold by receiver-managers of Abbott and Sons. Instead, it described the sellers as the receiver-managers of KFC (St. Vincent) Limited and St. Clair Investments Limited. Any potential buyers and the general public would have been left with the impression that the seller represented not Abbott and Sons but those companies. In this regard, the advertisement was misleading. In addition, realistically, the sale should have been advertised more to ensure that adequate notice reached other creditors and a wider cross-section of the public.

[58] Mr. Holukoff indicated that notice of the pending sale was sent to Mr. Boyea and Abbott and Sons and Mr. Boyea was advised that he could make a bid. The vehicle was valued at $45,000.00 by Joyette's Auto Collision Works. Four bids were received and it was sold to the highest bidder for $43,000.00 - a loss of $2000.00. Mr. Holukoff contends that the sale was concluded at arm's length

[27] Section 249.

at a price consistent with the appraised value and consequently Abbott and Sons has not suffered any prejudice or loss. He argued that there is no basis to interrupt, cancel or otherwise inhibit the sale of assets.

[59] Messrs. Holukoff and Wide contend that if their appointments were improperly made under the Companies Act in respect of Abbott and Sons, this was a technical defect which had no invalidating effect and which can be remedied pursuant to section 19 of the Act. Section 19 gives the court a discretion to direct a receiver to carry out a statutory duty and/or restrain him from dealing with the debtor's property until the duty has been carried out. Messrs. Holukoff and Wide submit further that any actions they took pursuant to such appointment can be ratified retroactively and that the court may excuse any such technical defects in compliance. Section 227 provides that no proceeding in bankruptcy is to be invalidated due to a formal defect or irregularity unless the court is satisfied that substantial injustice has been caused which cannot be remedied by court order.

[60] In light of the meaning of 'act of bankruptcy' in the Act, I am satisfied that the appointments of Mr. Holukoff and Mr. Wide qualify as a 'proceedings in bankruptcy'. Their failure to publish notification of their appointments in the newspaper and *Gazette* constitutes procedural irregularities. Since Holukoff and Wide did not take any steps to dispose of Abbott's and Sons' assets except for the Lancer vehicle, any loss which the company suffered as a result of their actions, appears to be limited to:

(1) the 'discounted' price at which the Lancer was sold - $2000.00 under the appraised market value; and

(2) any lost opportunity for other creditors to benefit from such sale.

I am satisfied that Abbott and Sons was notified of Mr. Holukoff's and Mr. Wide's appointments in a timely manner. Abbott and Sons was also provided in advance with information regarding the proposed sale of its assets. It therefore cannot successfully claim that it was prejudiced in any substantial way.

[61] Abbott and Sons' other creditors could justifiably claim that they were prejudiced by the receivers' failure to publish notice of their appointments in the newspaper and Gazette. They were thereby deprived of:

(1) knowledge regarding Abbott and Sons' status of being under receivership; and

(2) the opportunity to lodge or establish their claims to the company's assets.

Any related detriment to Abbott and Sons would be purely conjecture and speculative. Abbott and Sons has not submitted that there were any and I fail to perceive any. Any loss sustained by Abbott and Sons through the sale of the Lancer is insignificant compared to the debt owed to the bank. Such loss can be readily quantified and made the subject of an order for payment of compensation, if necessary.

[62] Interestingly, Abbott and Sons has not denied owing the outstanding sums or executing the mortgage debenture. Their objections to the appointments relate entirely to procedural legislative non-compliance. They have not presented any proposal for repayment in accordance with the terms of the mortgage and charges. They have implicitly acknowledged that they are unable to service the loans. I am mindful that they irrevocably appointed the bank (acting through its agent(s) or receivers or otherwise) as their lawful attorney to carry out any sale of the mortgaged property or assets and to take any number of actions under the security agreement, including lease of the subject properties. I have no doubt that at that time it must have been in Abbott and Sons' contemplation that such steps might be taken if they defaulted on repayment of their considerable indebtedness.

[63] At the other end of the spectrum, the bank (which incidentally was not made a party to the claim) is left holding the bag while its attempts to recover upwards of $20 million of its depositors' funds are suspended pending the outcome of this litigation. On the one hand is a debtor whose means are inadequate to service or satisfy the debt; on the other hand, receivers seeking to recoup as much of the sizeable debt as reasonably practicable, but whose appointments have not complied strictly with the letter of the law. The court cannot ignore the real threats which this case could pose to the bank's financial stability, the safety of depositors' monies and its knock on effects on the local economy. These are real factors which must be taken into account in determining the justice of this matter. They must have equal consideration along with the rights and obligations of the parties, the interests of other creditors, the likely prejudice to the respective parties and the effects of statutory default.

[64] In evaluating what effect non-compliance has in any given circumstances, the court is required to assess whether the requirement is directory or mandatory and whether it can be waived[28]. Publication of the notice is expressed by the mandatory 'shall'. The Act does not provide for waiver, therefore the mandate to publish the notices must be substantially or fully satisfied. Abbott and Sons would be entitled to damages for loss sustained as a result of breach of such statutory duty but it has not alleged in the pleadings or in its evidence that it suffered any such loss or damage. In fact, they have conceded in their further submissions that Messrs. Holukoff and Wide conducted themselves as receivers competently and carried out their duties as receivers in a commercially reasonable manner. In the premises, it seems to me that any prejudice occasioned to Abbott and Sons and their other creditors can be remedied by subsequent notification of the appointments in the newspaper and *Gazette*.

[65] Taking all of the foregoing matters into account, I find that the non-publication in the newspaper and *Gazette* were procedural defects which did not invalidate the bank's appointment of Messrs. Holukoff and Wide as receivers. The receivership actions they have taken have been somewhat limited in scope and do not appear to have eroded the stability or viability of the company's business or assets which remain largely intact and available to be managed and applied for the benefit of creditors and the company, in accordance with the relevant law. This is an appropriate case in which to order Messrs. Holukoff and Wide to make the statutory publications within the next 15 days, that is on or before 2nd February, 2017. All creditors and other interested persons would be thereby notified and be sufficiently placed to signal any interest to the receivers or other relevant persons. The justice of the case would be adequately met by such action coupled with an order restraining Messrs. Holukoff and Wide from engaging in any. further acts of receivership pending publication of both statutory notices.

Issue No. 2 – Did Messrs. Holukoff and Wide conducted themselves as receiver-managers in bad faith and in a commercially unreasonable manner by failing, neglecting or refusing to provide the companies and Mr. Boyea with:

[28] R v Immigration Appeal Tribunal ex parte Jeyeanthan; Ravichandran v Secretary of State for the Home Department [1999] 3 All E. R. 231.

(i) any information or statements concerning their property, contrary to section 13 (e) and (f) of the Act; or

(ii) any notice of disposition of their property, contrary to section 17 (1) (a) and (d) of the Act?

[66] St. Clair Investments Limited, KFC (St. Vincent) Limited, Boyea Holdings Limited and W. J. Abbott and Sons Limited in their further submissions withdrew their challenge to the manner in which Mr. Holukoff and Mr. Wide conducted the receivership of the four companies. They conceded that:

> 'Having regard to the nature and quality of the evidence tendered on both sides, and to the nature of the legal challenge being made to the juridical competence of the Defendants in the purported exercise of their powers as receivers, the Claimants are inclined not to pursue their challenge to the commercial manner of the exercise by the Defendants of the purported disposal mandate. Furthermore, the Claimants make no criticism of either the academic or professional competence of the Defendants.'

This concession makes it unnecessary for me to examine the substantive submissions on this issue. I therefore hold that Mr. Holukoff and Mr. Wide did not act in a commercially unreasonable manner by withholding from the companies and Mr. Boyea notices of disposition of their property or information or statements concerning their property.

Bad Faith

[67] Having found that Mr. Holukoff and Mr. Wide were legally appointed as receivers of St. Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited pursuant to the security agreements and the Companies Act, I am satisfied that they had no duty to issue notices of disposition in respect of any property or assets belonging to those companies which they sold pursuant to their appointments. Accordingly, I find that they did not act in bad faith by withholding from those companies and Mr. Boyea notices of disposition of their property or information or statements concerning their property.

[68] Having regard to the evidence adduced by Mr. Holukoff and outlined before, Mr. Boyea and Abbott and Sons were provided with a notice of disposition of the Lancer vehicle pursuant to section 17 (1)

(a) and (d) of the Act. I am satisfied that the sale was conducted in a professional and arm's length transaction. The allegations of bad faith are unfounded. Mr. Holukoff and Mr. Wide did not act in bad faith and withhold from Abbott and Sons and Mr. Boyea notices of disposition of the lancer sale, lease of the Arnos Vale property or other pertinent information or statements concerning those properties.

Issue No. 3 - To what relief, if any are the companies and Mr. Boyea entitled?

[69] The companies have alleged breach of statutory duty against the receivers Holukoff and Wide. They did not plead or establish any such loss or damage. I find that there has been none. Non-compliance with the publication requirements did not result in any damage to them since they were at all material times aware of the actions which the receivers intended to take. The general public was denied that information. The failure in that regard is remediable by subsequent publication to be effected within 15 days. Messrs. Holukoff and Wide are directed to restrain from engaging in any further acts of receivership pending publication of both statutory notices.

ORDERS

[70] It is accordingly declared and ordered:

1. Mr. Holukoff's and Mr. Wide's appointments as receivers of St. Clair Investments Limited, KFC (St. Vincent) Limited and Boyea Holdings Limited were made in accordance with the relevant legislative mandates and are not invalidated by their failure to obtain trustee licences.

2. Non-publication in the newspaper and *Gazette* of Mr. Holukoff's and Mr. Wide's appointments as receivers of Abbott and Sons Limited did not invalidate the appointments as receivers of that company.

3. Messrs. Holukoff and Wide are directed to make arrangements within the next 15 days, that is on or before 2nd February 2017, pursuant to section 14 (c) of the Bankruptcy and Insolvency Act, for publication of the statutory notices in the *Gazette* and a local newspaper of their respective appointments as receivers of Abbott and Sons Limited.

4. Mr. Holukoff and Mr. Wide did not withhold from St. Clair Investments Limited, KFC (St. Vincent) Limited, Boyea Holdings Limited, Abbott and Sons Limited and Mr. Ormiston Boyea notices of disposition of their property, or information or statements concerning their property, thereby acting in bad faith or in a commercially unreasonable manner.

5. Mr. Holukoff and Mr. Wide did not withhold from Abbott and Sons and Mr. Boyea notices of disposition of the lancer sale, lease of the Arnos Vale property or other pertinent information or statements concerning those properties thereby acting in bad faith.

6. St. Clair Investments Limited, KFC (St. Vincent) Limited, Boyea Holdings Limited Abbot and Sons Limited and Ormiston Arnold Boyea shall each pay agreed costs of $15,000.00 to David Holukoff and Marcus Wide.

[71] I wish to acknowledge and thank both counsel for their comprehensive and very helpful written submissions.

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Esco L. Henry
HIGH COURT JUDGE