EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2015/0039

BETWEEN:

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

Appellants

and

[1] AMICUS CURIAE
[2] TIMOUR GAINOULLINE

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Malcolm Arthurs, with him, Ms. Nicole Sandells and Ms. Nicolette Doherty for the Appellant Liquidators
Mr. Mark Watson-Gandy, with him, Mr. Lenworth Johnson and Ms. Latoya Letlow appearing Amicus Curiae
Mr. Lawrence Daniels for the Second Respondent

2016**:** October 27;
2017: September 22.

Interlocutory appeal – Unfair prejudice legislation – s. 204 of the International Business Corporations Act (as amended) – Interpretation of s. 204 – Whether s. 204 remedy can only be used pre-liquidation or whether section is also post-liquidation remedy – Whether section can be used by liquidator to claim back monies from one class of creditors on behalf of other creditors

The appellants are the joint liquidators ("the JLs") of Stanford International Bank Limited ("SIB"). SIB went into liquidation in April 2009. The bank was incorporated in Antigua and Barbuda pursuant to the International Business Corporations Act (as amended) ("the IBC

Act").[1] Apart from providing regular banking services such as credit cards and personal and business current and deposit accounts, SIB's main product was the Certificate of Deposit ("CD"). The CD was marketed as a low-risk investment option that would provide very favourable returns. In the year leading up to SIB's collapse in February 2009, CD sales decreased and CD redemptions increased until eventually, SIB's liquid assets became insufficient to meet redemptions.

The JLs alleged that certain creditors had received preference payments in the final 6 months before SIB ceased trading in February 2009. They contended: that SIB was insolvent well before the monies had been paid out during these final 6 months; that these pay-outs were made to the detriment of the majority of SIB's creditors; and that the pay-outs were in contravention of section 204 of the IBC Act as they were oppressive, unfairly prejudicial to, or unfairly disregarded the interests of other creditors.

Pursuant to an application made by the JLs in May 2014, an Amicus was appointed for the purpose of independently analysing, formulating and presenting arguments against the JLs' proposed course of action. By the same May 2014 application, the JLs sought directions on a proposal to claim back alleged excess payments made to two classes of creditors: (i) those who received payments from SIB during the 6 month period before the bank's collapse, which payments were in excess of the sums that they would have received as dividends in the liquidation had SIB ceased making payments during this period, and (ii) persons who received more from SIB than their original capital investment having been paid, in addition to the capital, the interest that they would have been entitled to had SIB in fact been operated in the manner which had been represented to the creditors.

The learned judge who heard the application gave only limited permission to the JLs to pursue the claims against the CD holders pursuant to section 204 of the IBC Act. Paragraph 2 of his order permitted them to pursue claims for ancillary orders against CD holders who received payments, but any recovery from the CD holders was only to be effected by adjusting further distribution to them from funds held within the SIB liquidation estate. The JLs appealed this paragraph of the judge's order, complaining that he erred in specifying the extent of the recoveries that could be made from CD holders. The Amicus cross appealed the same paragraph of the judge's order, arguing that section 204 of the IBC Act could not be used at all in the manner that the JLs were seeking to use it. The Amicus contended that section 204 could not be applied to reverse alleged preference payments made to 'strangers' to SIB (i.e. investors and depositors of the bank) when there was no evidence to support their culpability. The Amicus also raised the issue of whether the JLs had any standing to bring such claims pursuant to section 204.

Held: dismissing the JLs' appeal against paragraph 2 of the judge's order; setting aside the judge's order granting the JLs limited permission to pursue claims against alleged preference creditors; allowing the Amicus' cross appeal; and making no order as to costs, that:

[1] Cap. 222, Revised Laws of Antigua and Barbuda 1992.

Section 204 of the IBC Act is meant to be utilised to bring an unfair prejudice action against a corporation on behalf of its creditors and shareholders prior to the commencement of liquidation. Accordingly, this section is not a suitable legal basis for the JLs to bring preference claims post-liquidation against one body of creditors on behalf of another. The JLs do not have standing under section 204 to proceed with their claims against the alleged preference creditors.

Olympia & York Developments Ltd. (Trustee of) v Olympia v York Realty Corp. 2001 CanLII 28269 (ON SC) distinguished.

JUDGMENT

[1] **PEREIRA CJ**: The appellants are the joint liquidators ("JLs") of Stanford International Bank Limited ("SIB"), incorporated in Antigua and Barbuda pursuant to the **International Business Corporations Act (as amended)**.[2] SIB went into liquidation in April 2009, and the JLs subsequently sought the court's permission to pursue claims against alleged preferential creditors who had managed to get at least some of their money out of the bank before its demise. This appeal arises from the court's determination of the permission application.

Background

[2] The extensive background facts were very helpfully set out by the judge below in his written judgment. I shall take the liberty of reproducing those facts that are related to the present appeal. It should be noted that the judge indicated that his purpose for setting them out was merely to present the context of the JLs' application, and that they were not findings of fact.

[3] SIB was part of a wider group of entities referred to by the learned judge below as "the Stanford Group". The sole beneficial owner of this group was one Allen Stanford ("Mr. Stanford"). Apart from providing regular banking services such as credit cards and personal and business current and deposit accounts, SIB's main product was the Certificate of Deposit ("CD"). The CD was marketed as being an effective low-risk investment option that would provide very favourable returns.

[2] Cap. 222, Revised Laws of Antigua and Barbuda 1992.

Approximately $10 billion in CDs were sold to more than 21,000 creditors/investors in approximately 113 countries.

[4] The JLs alleged that contrary to representations made for or on behalf of SIB, approximately 81% 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. SIB used its assets to make highly speculative investments, many of which were illiquid, including real estate in Antigua and Barbuda.

[5] SIB collapsed in February 2009. In the year leading up to the collapse, CD sales decreased and CD redemptions increased until eventually, SIB's liquid assets became insufficient to meet redemptions. SIB was placed into liquidation by order of the court in Antigua and Barbuda in April 2009.

[6] Subsequent investigations both by a US Receiver (initially appointed over the assets of SIB and some of its affiliates, directors or insiders) and the JLs, indicated that SIB was heavily insolvent. There was also evidence that the Stanford Group, including SIB, had not been operating as a legitimate financial institution, but rather, as a "Ponzi scheme" from at least 1999, with SIB at its centre.

[7] The JLs alleged that certain creditors had received preference payments in the final 6 months before SIB ceased trading in February 2009. They contended that SIB was insolvent well before the monies had been paid out during these final 6 months. They contended that these pay-outs occurred to the detriment of the majority of SIB's creditors 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. The JLs argued, in particular, that the cash outflows took place in contravention of section 204 of the **International Business Corporations Act (as amended)** ("the IBC Act") as they were oppressive, unfairly prejudicial to, or unfairly disregarded

the interests of other creditors. They contended that payments made to these alleged preferred creditors, who would include persons who had received payments of capital and interest, should be treated as wrongful payments.

[8] The JLs made an ex parte application for directions in October 2013, following which the Court made an order permitting them to adjust claims of the alleged preferential creditors. The order required that all funds withheld from the adjusted claims be set aside in a separate account for 120 days pending any challenge from any alleged preference creditor to the JLs' decision to make this adjustment. In the event that no alleged preference creditor challenged the JLs' decision, the "ring fenced" funds pertaining to them would revert to the liquidation estate.

[9] The JLs made yet another application to the Court in May 2014 seeking directions for the appointment of an Amicus who could independently analyse, formulate and present arguments against the Joint Liquidators' proposed course of action. By their May 2014 application, the JLs also sought directions on a proposal to claim back alleged excess payments made to the following two classes of creditors: (i) those who received payments from SIB during the 6 month period before the bank's collapse, which payments were in excess of the sums that they would have received as dividends in the liquidation had SIB ceased making payments during this period, and (ii) persons who received more from SIB than their original capital investment having been paid, in addition to the capital, the interest that they would have been entitled to had SIB in fact been operated in the proper manner, that is, the manner which had been represented to creditors. These recovery claims would be brought pursuant to section 204 of the IBC Act. They asserted that they owed a duty to achieve, so far as possible, fairness between the victims of the alleged fraud.

[10] The court approved the appointment of an amicus curiae ("the Amicus"), who became the first respondent to the appeal. The second respondent is the only

objecting creditor who participated in the proceedings. He was represented by counsel at the hearing.

[11] The learned judge gave limited permission to the JLs to pursue the claims against the CD holders pursuant to section 204 of the IBC Act. The relevant paragraph of his order (i.e. the only part that was appealed and also cross appealed) states as follows:

> "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."

The judge's order also gave all parties leave to appeal.

The Issues

[12] The appellants appealed, citing 43 specific grounds of appeal. The gravamen of their complaint is that the learned judge went too far in making a determination on their application for permission to bring claims against certain CD holders, by specifying the extent of the recoveries that could be made. The main issue raised by the JLs' appeal is therefore:

Whether the court below, in addition to allowing the Joint Liquidators to bring claims against certain Certificate of Deposit holders, should place any limits on what may be recovered by the claims from these Certificate of Deposit holders.

[13] The Amicus cross appealed the same paragraph of the learned judge's order. The principal issue raised in the cross appeal is whether section 204 of the IBC Act could be applied at all to reverse alleged preference payments made to 'strangers' to SIB (i.e. investors and depositors of the bank), when there was no evidence to support their culpability.

[14] There is significant overlap in the arguments put forward by the JLs and the Amicus for the appeal and cross appeal. The issues which arise in the two of them are indeed linked – the basis of the JLs' appeal and response to the cross appeal is that there is good reason not to fetter the permission to pursue claims under section 204 against the alleged preference creditors, while the Amicus' primary position is that the JLs should not be allowed to proceed at all under section 204. However, if the court was to find that proceeding under section 204 was not improper, then the Amicus' alternative position is that the JLs should proceed with the limitation that the judge imposed. Therefore, the issues in the appeal and cross appeal may be dealt with together.

[15] The issue of locus standi was raised by the Amicus in its cross appeal and it also came up during oral submissions at the appeal hearing. Given the nature of section 204, it being a provision which contains remedies which would ordinarily be enforced pre-liquidation, the question is whether it can be used at all at this post-liquidation stage in order for the JLs to commence the claims against the alleged preference creditors. This issue is of paramount importance, as, depending on how it is decided, it would determine whether other issues raised on appeal need to be dealt with at all. The issue on standing can therefore be worded as follows: whether section 204 of the IBC Act is a provision which generally only operates pre-liquidation, or whether it can operate post-liquidation as well.

[16] If the answer to the above question is that it can only be used pre-liquidation, this will mean that the JLs will be prevented from now using this section as a legal basis for bringing claims against alleged preference creditors of SIB. Essentially, the question that needs to be answered is: what is the proper construction of section 204? This is a matter of statutory interpretation.

[17] This is the very first time that the interpretation and application of section 204 of the IBC Act of Antigua and Barbuda has come up before the courts. Accordingly,

this ruling is significant in that it will set the stage for cases to follow in this jurisdiction.

Principal Issue: Whether Section 204 only operates Pre-Liquidation, or whether it can operate Post-Liquidation as well

The Law

[18] Subsections (1), (2) and (3) of section 204 of the IBC Act state as follows:

> **"RESTRAINING OPPRESSION**
>
> (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.
>
> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit, including without limiting the generality of the foregoing –
>
> (a) an order restraining the conduct complained of;
>
> (b) an order appointing a receiver or receiver-manager;
>
> (c) an order to regulate a corporation's affairs by amending its articles or by-laws or creating or amending a unanimous shareholder agreement;
>
> (d) an order directing an issue or exchange of securities;
>
> (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
>
> (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase shares or debentures of a holder thereof;
>
> (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for his securities;

(h) 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.
(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 142 or an accounting in such other form as the court may determine;
(j) an order compensating an aggrieved person;
(k) an order directing rectification of the registers or other records of a corporation under section 207;
(l) an order liquidating and dissolving the corporation; or
(m) an order requiring the trial of any issue."

[19] Accordingly, in order to engage section 204, it is necessary for a 'complainant' to demonstrate that the conduct being complained of in respect of a corporation is either oppressive, unfairly prejudicial, or that it unfairly disregards the interests of any shareholder, debenture holder, creditor or officer of the corporation.

[20] The word 'complainant' used in section 204(1) is defined in section 200(b) of the IBC Act:

"(b) 'complainant' means, in relation to a corporation –
(i) a security holder, or a former holder of a security of the corporation or any of its affiliates;
(ii) a director or an officer or former director or officer of the corporation or any of its affiliates;
(iii) the Director; or
(iv) **any person who, in the discretion of the court, is a proper person** to make an application under this part." (Emphasis added).

The Judge's Decision – Standing in Relation to Section 204

[21] The learned judge, at paragraph 305 of the judgment, examined the issue of whether section 204 can be invoked after a company has been placed in liquidation. He stated that this issue ought to be determined even before considering whether a liquidator may be considered a complainant under section 200(b)(iv) as a "proper person" who can make an application under section 204. The judge observed that section 204 derives from the English statutory oppression remedy which was introduced in the English **Companies Act 1948**, by section

210. This section from the English legislation was entitled "Alternative remedy to winding up in cases of oppression" and it was clearly intended to be used prior to the winding up of a company.

[22] The judge then went on however, to examine 'the oppression remedy' in the jurisdiction of Canada, where the unfair prejudice provisions are essentially identical to those of Antigua and Barbuda and where the jurisprudence on this area has developed quite significantly over the years. The JLs had pointed out in the court below that this was the jurisdiction which had been found to have 'the most far reaching unfair prejudice and preference legislation'.[3]

[23] The judge referred to a decision of the Ontario Supreme Court, **Olympia & York Developments Ltd. (Trustee of) v Olympia v York Realty Corp.**[4] in which a trustee in bankruptcy of an insolvent corporation was allowed to bring a representative oppression action under section 248 of the **Ontario Business Corporations Act**, which is materially identical to section 241 of the **Canada Business Corporations Act**. Section 241 of the **Canada Business Corporations Act** closely resembles section 204 of the IBC Act. Indeed, both section 241 and section 204 of the respective Acts are aimed at rectifying conduct that is 'oppressive or unfairly prejudicial to or that unfairly disregards the interests of' any security holder / shareholder or debenture holder, creditor, director or officer …' The judge then went on to state:

> "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.
>
> …
>
> "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.

[3] See para. 207 of judgment below.
[4] 2001 CanLII 28269 (ON SC).

> "Consequently I consider section 204 is capable of being used after a company has been placed in liquidation."[5]

[24] Having made this determination, the learned judge then went on to consider whether 'a trustee in bankruptcy (and by analogy a liquidator) can be treated as a "complainant" with standing to invoke section 204'. He subsequently concluded that a liquidator could be a "complainant" for the purposes of section 204.

Discussion

[25] Subsection (3) of section 204 lists a total of 13 possible orders that the court can make in connection with an application under the section.[6] It is clear from the nature of the orders set out there, that these would be sought while a company is still solvent as they are aimed at putting the company "back on a good footing". None of the orders listed in subsection (3), perhaps with the unlikely exception of items (a) and (j)[7] in the list would be applicable if the company in relation to which the section 204 application is being made, is already in liquidation. The orders at (a) and (j) would be unlikely because in respect of (a), at that stage, any such conduct is subsumed under the conduct leading to the appointment of the liquidators who are charged with proceeding with the winding up of the company. In respect of (j), the making of a compensation order to an aggrieved person is even less likely after liquidators are appointed. An aggrieved person is presumably just another unsecured creditor with a claim that may or may not have crystalised. A payment to such a person could constitute a breach of the pari passu rule. This in no way should be understood as saying that a liquidation judge cannot make any of these two orders, only that they are unlikely in the context of a liquidation and do not suggest to me that section 204(3) has anything to do with liquidation. In particular, 204(3)(l) states that the court may make 'an order liquidating and dissolving the corporation'. Furthermore, section 204(7)

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[5] Paras. 316, 320 and 321.
[6] See para. 18 above.
[7] 204(3)(a) states: "an order restraining the conduct complained of"; and 204(3)(j) states: "an order compensating an aggrieved person".

states that an applicant under section 204 may apply in the alternative for an order under section 301, subsections (1) and (2) of which state that:

> "(1) The court may order the liquidation and dissolution of corporation [sic] or any of its affiliated corporations upon the application of a shareholder –
>
> (a) if the court is satisfied that, in respect of a corporation or any of its affiliates –
> (i) any act or omission of the corporation or any of its affiliates effects a result;
> (ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or
> (iii) 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 interest of any security holder, creditor, director or officer; or
>
> (b) if the court is satisfied that –
> (i) any unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred; or
> (ii) it is just and equitable that the corporation be liquidated and dissolved.
>
> (2) Upon an application under this section, the court may make such order under this section or section 204 as it thinks fit."

[26] The interpretation of the unfair prejudice legislation in Antigua and Barbuda not having previously come up for consideration by our courts, it is necessary to turn to jurisdictions in which the equivalent of the section 204 oppression remedy was examined by the courts. As mentioned above, Canada is one of the jurisdictions in which the unfair prejudice legislation is most developed. There, the leading authorities[8] which offer guidance on how the oppression remedy operates, indeed

[8] See BCE Inc v 1976 Debenture holders [2008] 3 SCR 560; Johnny Mennillo v Intramondial inc [2016] 2 SCR 438.

involved solvent companies in which a member of the corporation involved brought an action pursuant to the equivalent of section 204 in that jurisdiction. It is significant that in these authorities, the unfair prejudice actions were brought pursuant to section 204 before liquidation had commenced. Moreover, the fact that this Court was not referred to, and nor have we come across any authority save for **Olympia** discussed below, where section 204 was engaged post-liquidation, tends to suggest that an action pursuant to this section contemplates a claim being brought before a liquidation is ordered by the court. Furthermore, the very fact that the provision anticipates that one of the remedies that the court can give is placing the corporation into liquidation, and there is another section (section 301) that deals with putting the corporation into liquidation based on the conduct contemplated by section 204(1), strongly supports the notion that the section 204 unfair prejudice remedy is not meant to be sought post-liquidation. Finally, it may not be a coincidence that section 204 falls under Part I Division J (sections 200-212) of the Act dealing with "Civil Remedies" and not under Part IV (sections 284-315) dealing with "Winding up Corporations".

[27] At paragraph 292 of **Halsbury's Laws of Canada**[9] the purpose of the oppression remedy as set out in section 241 of the **Canada Business Corporations Act** is stated to be as follows:

> **Purpose.** The basic intent behind s. 241 and its equivalents across Canada … is to provide the sort of relief formerly provided for in applications for the winding up of the corporation without the necessity of proving that the circumstances are such that it would be just and equitable to order a winding-up, but with the power to the court, if it thinks it appropriate, to include within the relief that can then be ordered, an order for winding-up.[12] [*Diligenti v. RWMD Operations Kelowna Ltd., [1976] B.C.J. No. 38, 1 B.C.L.R. 36 at 42 (B.C.S.C)*]

[28] Additionally, in referring to the jurisdiction of the court to grant relief under the oppression remedy, paragraph 292 states:

> "All competing interests within the corporation must be respected and safeguarded by the court, not merely the interests of the complainant.

[9] Halsbury's Laws of Canada (1st edn., LexisNexis Canada).

> Business decisions that were honestly made will not be second-guessed by the courts or subjected to microscopic examination under the oppression remedy. The court is not justified in granting relief under the oppression provisions merely because the management of a corporation came to a different decision than the judge might have reached in the same circumstances. It is not sufficient for the complainant to show prejudice or disregard of his or her interests. In assessing what is fair and unfair, it is necessary to consider the objects of the corporation, and whether what is complained of was necessary or incidental to the advancement of one or more of those objects. *Prima facie*, it is for the directors and not for the court to decide whether the furthering of a corporate object which is inimical to a member's interests should prevail over those interests or whether some balance should be struck between them."

[29] The above passages further support the notion that the oppression remedy was envisaged as one that would be sought *before* the winding up of a corporation rather than after it, with the court analysing and assessing the 'competing interests within the corporation' and deciding whether the behaviour complained of in the proceedings was necessary or incidental to the advancement of one or more objects of the corporation. Winding-up would be the ultimate remedy which can be ordered by the court. As previously mentioned, this is expressly stated as a remedy which could be given on an oppression or unfair prejudice action under section 204 of the IBC Act.

[30] The learned judge cited the case of **Olympia & York Developments Ltd.** in his analysis of whether section 204 may operate post-liquidation and arrived at the conclusion that it could have, comparing a liquidator to a trustee in bankruptcy. However, this, in my view, is not an authority which can be used to support the making of the general statement that a liquidator has locus standi to bring an action under section 204, far less on the basis of an oppression action aimed at recovery, not from the corporation but on behalf of the corporation, from non-culpable third parties on the basis of oppression alleged as against a director which is sought to be argued by the JLs as not being attributed to the

corporation.[10] At its highest, this authority can be taken to show that there may be specific cases in an insolvency situation in which it may be necessary and most effective to use the oppression remedy, as opposed to some other, in order to achieve a just result. It is significant, and must be noted, that the circumstances in **Olympia & York Developments Ltd.** were not identical to those of the case at bar. In **Olympia**, the action was being brought pursuant to the oppression remedy legislation on behalf of the body of creditors of the bankrupt company, collectively. In the present case, the liquidators seek to use the oppression remedy to bring actions against a selected class of creditors – the alleged preference creditors against whom no wrongdoing is alleged – on behalf of other creditors. That is a significant difference. I note also that the preference creditors / defendants (OYRC and OYSF[11]) were affiliates of the debtor / plaintiff (OYDL[12]) and this factor weighed in the court's decision.[13] Further, it is a first instance decision which is contrary to and had to be distinguished from the conclusion reached by Houlden JA in **Canada (Attorney General) v Standard Trust Co**.[14] **Olympia** may be said to be a decision which turned on its peculiar facts and is clearly distinguishable from the case at bar.

Preference Legislation

[31] The liquidators appear to be straining the meaning of the legislative provision to bring themselves within its ambit to achieve their goal of finding a way of pursuing alleged preference creditors of SIB. In my view, the circumstances of the current situation with SIB do not permit them to use section 204 of the IBC Act to achieve their objective.

[32] The Amicus, in making the point that the court ought to be careful not to apply its discretion to afford relief under section 204 so widely that a new remedy is

[10] A discussion on attribution may be found in the judgments of the UK Supreme Court in Jetivia SA and Another v Bilta (UK) Ltd. (in Liquidation) and Others [2015] UKSC 23.
[11] Olympia & York Realty Corp. and Olympia & York SF Holdings Corporation.
[12] Olympia & York Developments Ltd.
[13] See para. 31.
[14] (1991), 5 OR (3d) 660 (Ont. Gen. Div.).

fashioned in an area where Parliament has chosen not to do so, cited a passage from **Bennion on Statutory Interpretation**[15] which, in my view is very relevant:

> "(1) It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. …
>
> "(2) The court … should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves accepting that Parliament contravened the principle."

[33] The Amicus submitted in its cross appeal, that the application brought by the JLs required a construction of section 204 of the IBC Act that is far removed from its natural or intended use, which is as an internal remedy for minority shareholders against majority oppression. The Amicus argues that the Court ought to be slow to enlarge section 204 to an undefined insolvency remedy to reverse preferences. I agree. The most appropriate provision for the JLs in the circumstances would be one that deals with preferences. That is, after all, the nub of this entire matter – preferential treatment prior to the demise of SIB. However, the challenge faced by the JLs is that a specific statutory remedy for preference has not been afforded by Parliament to companies governed by the IBC Act.[16]

[34] This decision by Parliament appears to have been deliberate, since preference provisions were included in the **Bankruptcy Act** (in section 44) of Antigua and Barbuda and also their **Companies Act** (in section 458). The Amicus, quite rightly in my view, pointed out that the absence of preference legislation in section 204 would not mean that the JLs would have been left without a remedy for preferences. The JLs could have availed themselves of the existing common law remedy in this area. To try to begin to apply the principles of the section 204 oppression remedy to a situation which calls for the application of preference legislation would, quite frankly, have an undesirable result.

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[15] Oliver Jones: Bennion on Statutory Interpretation (6th edn., LexisNexis) para. 269, pp. 741-742.
[16] At the hearing of this appeal it was brought to the court's notice that Parliament has now amended the relevant legislation to provide for preferences.

[35] I find it necessary to go no further in the examination of the issues raised on appeal. It is clear, for the above reasons that section 204 of the IBC Act is not a suitable legal basis for the JLs to bring preference claims against one body of creditors on behalf of another. Accordingly, the JLs do not have standing under section 204 to proceed with their claims against the alleged preference creditors.

[36] I would accordingly order, as follows:

(1) The appeal of the JLs against paragraph 2 of the judge's order is dismissed.

(2) The judge's order, granting the JLs limited permission to pursue claims against alleged preference creditors is set aside.

(3) The Amicus' cross appeal is allowed.

(4) No order is made as to costs.

I concur.
Gertel Thom
Justice of Appeal

I concur
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar