ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2010/031

In the Matter of Stanford International Bank Limited (In LIQUIDATION)

And in the Matter of International Business Corporations Act, Cap 222 of the Revised Laws of Antigua and Barbuda

And in the Matter of an Application for the REMOVAL OF THE LIQUIDATORS

BETWEEN:

[1] NIGEL HAMILTON-SMITH
[2] PETER WASTELL
(Joint Liquidators)

Appellants/Applicants

and

ALEXANDER M. FUNDORA

Respondent/Applicant

Before:

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

Appearances:

Mr. Kendrickson Kentish instructed by Mr. Daniel Hennif
for the appellants
Mr. Anthony Astaphan, SC leading Mr. Craig Christopher
and Ms. Nicolette Doherty instructed by Martin Kenny & Co.
represented by Mr. Malcolm Arthurs for the respondent
Ms. Jasmine Wade watching for the Financial Services
Regulating Commission

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2010: August 26, 31.

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Notice of appeal – Whether order final or interlocutory – Whether leave to appeal required – Application to strike out notice of appeal – Removal of Liquidators – The International Business Corporations Act, Cap. 222 of the Laws of Antigua and Barbuda, Revised Edition

1992 as amended ("IBC Act") s.304 – Eastern Caribbean Supreme Court Act, Cap 143, Laws of Antigua and Barbuda, Revised Edition (1992) s. 31(2), s. 11, – How the Court exercises its jurisdiction in insolvency and winding up proceedings – English Insolvency Act 1986, s. 172 – English Insolvency Rules 1986, Rules 4.119, 4.120, 7.47, 7.49 – UK Practice Direction; Insolvency Proceedings – English Civil Procedure Rules, Part 52.4

An order was made in the High Court inter alia to remove the appellants as joint liquidators of Stanford International Bank ("SIB") for several reasons including the fact that they failed to act in the best interest of the estate and/or creditors. The court ordered that the present Liquidators of SIB will continue to conduct the liquidation in the interest of the creditors until such time as the replacement is appointed by the High Court. The appellants appealed this decision. The respondent has applied to strike out the notice of appeal on the grounds that the order of the High Court is interlocutory and therefore leave is required to appeal. A second application for a stay of execution of the judgment and all other proceedings pending the appeal was filed. The appellants question whether the English Insolvency Rules 1986 and the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 are applicable in relation to this appeal.

Held: granting the application to strike out the Notice of Appeal; dismissing the applications for extension of time, relief from sanction and stay of execution; costs to the respondent to be agreed, if not then assessed;

1. the judgment and order of Thomas J which removed the appellants as the joint liquidators for "SIB" are interlocutory in nature and consequently leave to appeal is required. The Court of Appeal therefore lacks jurisdiction to exercise appellate review without leave to appeal being granted to the appellants;

   TSJ Engineering Consulting Ltd. v Al Rashid Petroleum Investment Company; Virgin Islands Civil Appeal No. 13 of 2010 (27th July 2010), followed; Oliver McDonna v Benjamin Richardson Anguilla Civil Appeal No. 3 of 2005 (29th June 2007), and Nam Tai Electronics, Inc v David Hague and Another Virgin Islands Civil Appeal No. 12 of 2003 (26th April 2004) applied.

2. the Application of the respondent Alexander Fundora filed on 29th July 2010 is granted and the Notice of Appeal filed on 6th July 2010 without the leave of the Court is a nullity and is struck out with costs to the respondent;

3. by virtue of rule 2.2(3)(b) of CPR 2000 these Rules do not apply to insolvency (including winding up of companies) proceedings. In the absence of special provisions in the Eastern Caribbean Supreme Court Act Cap. 143 of Antigua and Barbuda or rules of court regulating the practice and procedure in relation to an appeal from a High Court decision to remove a liquidator from office in winding up or liquidation proceedings section 31(2) of the Eastern Caribbean Supreme Court Act Cap. 143 of Antigua and Barbuda empowers the court to apply any relevant Rules of the Supreme Court in England which regulate appeals in winding up or liquidation proceedings which can be used in Antigua and Barbuda. Therefore the English Insolvency Rules 1986 and any relevant Practice

Directions which regulate appeals to the Court of Appeal from the High Court in England are applicable and may be modified and adapted to conform with the provisions of the International Business Corporations Act and the Supreme Court Act of Antigua and Barbuda;

4. the appellants' application filed on 30th July 2010 for the multiple orders stated therein is dismissed with costs to the respondent Alexander Fundora;

5. the costs to the respondent are to be agreed on by the parties and where not agreed to be assessed by the court.

JUDGMENT

[1] EDWARDS, J.A.: There are 2 applications before me following the Notice of Appeal filed on 6th July 2010 by the appellants against the Court's decision to remove them from office as joint liquidators of Stanford International Bank Limited ("SIB"). The first application which was filed by Mr. Fundora on 29th July 2010 is to strike out the Notice of Appeal on grounds that the judgment of Thomas J is interlocutory, and leave is required to appeal the judge's decision. The second application which was filed on 30th July 2010 by the appellants is for a stay of the execution of the judgment of Thomas J and all further proceedings pending the hearing and determination of the appeal; and for the appeal to be expedited. Alternatively, that the appellants be granted relief from sanction, and an extension of time to apply for leave to appeal.

[2] It appears that the appellants had filed a previous application on 17th June 2010 for a stay of execution pending appeal, which Harris J adjourned in the High Court without a date, pending the determination of the application to strike out the Notice of Appeal by the Court of Appeal. Apart from the written submissions that were filed by the parties in support of their applications, I heard oral arguments from Senior Counsel Mr. Astaphan, Mr. Kentish and Mr. Christopher at the teleconference hearing by a single judge on 26th August 2010, and reserved judgment.

The Procedural Background

[3] The judgment was delivered on 8th June 2010 after Thomas J in a contested hearing heard the application of Mr. Fundora to remove the joint liquidators/appellants upon several grounds for cause, including that the appellants have failed to act in the best interest of the estate and/or the creditors. The learned judge made an order which included the following terms:

> "1. – 7. …
>
> 8. After consideration of all the circumstances and the law the Court considers it appropriate that the Liquidators should be removed.
>
> 9. Mr. Marcus Wide is or has the semblance of the Applicant's preferred liquidator which is prohibited by law. Accordingly the Applicant [Mr. Fundora] must within thirty days of the date of this order re-submit to the Court the names of Marcus Wide together with at least two other suitably qualified and experienced insolvency practitioners in order that a further determination may be made as to the replacement.
>
> 10. The present Liquidators of SIB will continue to conduct the liquidation in the interest of the creditors until such time as the replacement is appointed by this Court.
>
> 11. The Applicant is entitled to his costs to be assessed under Part 65.11 of CPR 2000, if not agreed. Such assessment must take place at the end of those proceedings."

[4] The application to remove the appellants was brought under section 304 of the International Business Corporations Act[1] which states:

> "In connection with the dissolution or the liquidation and dissolution of a corporation, the court may, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations, make any order it thinks fit, including, without limiting the generality of the foregoing,
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> (a) an order to liquidate;
> (b) an order appointing a liquidator, with or without bonding, fixing his remuneration and replacing a liquidator;
> (c) to (o) …" (My emphasis)

[1] Cap. 222 of the Laws of Antigua and Barbuda Revised Edition 1992 as amended.

[5] The appellants were on 19th February 2009 appointed Receiver-Managers of the SIB by the Financial Services Regulating Commission ("FSRC") pursuant to section 287 of the International Business Corporations Act ("IBC Act"). On 15th April 2009 the appellants were appointed joint liquidators of SIB by the High Court upon the application of the FSRC.

[6] It is trite law that the appellants on being appointed official liquidators by the court, are officers of the court who function, subject to the supervision of the court, in accordance with their defined statutory duties and powers in sections 307 to 311 of the IBC Act and other relevant law and principles. It is a basic concept of the law governing liquidation that the court may remove a liquidator and appoint another if there is "cause shown" by the applicant for his removal. It is not normally necessary to demonstrate personal misconduct or unfitness for this purpose. It will be enough if the liquidator fails to display sufficient vigour in the discharge of his duties. In determining whether due cause has been shown for the removal of a liquidator, the guiding principle is that "the Court is satisfied on the evidence before [it] that it is against the interest of the liquidation, …that a particular person should be made liquidator, then the Court has power to remove the present liquidator, and of course then to appoint some other person in his place."[2] "… [T]he due cause is to be measured by reference to the real, substantial, honest interests of the liquidation and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation."[3]

[7] There is no statutory provision in the IBC Act as to who may make the application for removal of a liquidator. It has been held by the Privy Council in Deloitte & Touche A.G. v Johnson and Another[4] that the applicant should be a person who "has a legitimate interest in the relief sought… the court will not remove a liquidator of an insolvent company on the application of a contributory who is not

[2] Principles laid down in Re Adam Eyton Ltd. (1887) 36 Ch D. 299 Per Cotton LJ at page 304
[3] Op cit. at page 306 Per Bowen LJ.
[4] [1999] 1 W.L.R. 1605, at page 1611

also a creditor… The only persons who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors." The learned judge found that Mr. Fundora is a creditor of SIB and therefore had a legitimate interest in having the appellants removed.

[8] In their written submissions, Counsel for Mr. Fundora emphasised that his application to remove the appellants was made within the existing winding up proceedings of Stanford International Bank Ltd. and was not brought as an original proceeding. Learned Counsel Mr. Kentish countered, relying on the underlined and emboldened statement in the following contextual quotation of Vaughan Williams LJ in In re Herbert Reeves & Co[5]:

> "The question which is raised upon a summons of this sort is the question whether there is a right to the delivery of the bill and to taxation, and that question is finally decided one way or the other whatever order is made upon the summons. If the order is, as the order of Kekewich J. is, that the summons stand dismissed, there is once and for all a final determination that the client has no right to relief under the Solicitors Acts in the nature of delivery of a bill and taxation. If, on the other hand, an order is made for the delivery of a bill of taxation, that finally disposes of the matter on the summons on the other possibility; and once and for all it is decided that the client is, in the circumstances before the Court, entitled to an order for delivery and taxation. It is suggested that, in the last alternative I have put the order is not final, because after the order there will be taxation, and a certificate, and possibly a review of the taxation. <u>But it is really plain that the mere fact that there may be inquiries to be carried out after the order or after the judgment has been delivered does not prevent the order or the judgment from being a final order or a final judgment</u>. **After you have got an order for winding up a company, there are obviously enormous quantities of questions which may be raised**…" (Mr. Kentish's emphasis)

[9] The application to strike out raises 2 questions: (1) whether the decision of Thomas J is a final judgment or an interlocutory judgment on applying "the

[5] [1902] 1 Ch D. 29 (CA) at page 31: while considering whether the order made dismissing the originating summons of Mr. B which requested an order for the delivery of a bill of costs by Solicitors in all matters wherein they had been concerned for him.

application test" and "the order test"[6]; and (2) whether the English Insolvency Rules 1986 are applicable in relation to this appeal.

Is the Judgment and Order Interlocutory or Final?

[10] Section 31(2) of the Eastern Caribbean Supreme Court Act Cap. 143[7] ("the Court Act") provides:

> "No appeal shall lie under this section -
>
> (a) - (f) …
>
> (g) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except –
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> (i) where the liberty of the subject or the custody of infants is concerned;
>
> (ii) where an injunction or the appointment of a receiver is granted or refused;
>
> (iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability;
>
> (iv) in such other cases, to be prescribed, as are in the opinion of the authority having power to make rules of court of the nature of final decisions."

[11] In the absence of a statutory definition as to what is an interlocutory judgment or an interlocutory order, it is well established in a plethora of decisions that our courts apply the "application test" to determine whether or not the order or decision is interlocutory. The observations of Vaughan Williams LJ in Herbert Reeves reflect our preferred approach. The "application test" looks at the outcomes that

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[6] Applied by Sir Dennis Byron C.J. in Pirate Cove Resorts Ltd and another v Euphemia Stephens and Others: Civ. App. No.11 of 2002 St. Vincent & the Grenadines at para. 9; and explained by Rawlins J.A. (as he then was) in Nevis Island Administration v La Copproprete du Navire et al: Civ. App. No 07 of 2005; St Christopher & Nevis at paras 15-16. SEE ALSO The Caribbean Civil Court Practice by David Di Mambro: notes at 31.6: "…if the determination of the application could have yielded a result that did not finally determine the matter in litigation then the order is to be regarded as interlocutory in nature"

[7] Laws of Antigua and Barbuda Revised Edition (1992) as amended

were possible on the application. The test is whether a decision on the application had it been decided in favour of the appellant or the respondent would have brought an end to the proceedings.[8] A final order must generally be one which ends the litigation and leaves nothing for the court to do but execute the judgment. In other words, the final order must conclusively determine the substantive rights of the parties. His Lordship Chief Justice Rawlins quite recently expanded on the test in TSJ Engineering Consulting Ltd. v Al Rashid Petroleum Investment Company[9] where he stated:

> "A determination whether an order is final or interlocutory is made by our courts on the "application test". An order or judgment is final if it would be determinative of the issues that arise in the claim, whichever way the application is decided. If the issues of liability on the claim are finally determined whether the outcome on an application is in favour of either party to the claim, the order would be final. The order would however be interlocutory, for example, if a ruling on the application in favour of the claimant would determine the issues of liability in favour of the claimant whereas a ruling in favour of the defendant would re-open the issue of liability for continued litigation. In determining whether an order is final or interlocutory, the court should consider the nature of the application and order and the circumstances that gave rise to them."

[12] Apart from looking at the possible outcomes on the application when applying the "application test", it is important also to consider the form of the proceedings in which the application is brought. Vaughan Williams LJ found this significant where he observed further that "people may regard a summons for an order for the delivery of a bill of costs and taxation as a summons the ultimate end of which is, not to ascertain whether or not there is a liability to deliver a bill and have it taxed, but as a summons initiated for the purpose of ascertaining the quantum of money which the client is liable to pay to the solicitor, or which the solicitor may have to pay the client. The proceeding may be so regarded but it is not so here, and the form of the proceedings itself shows that as things stand one must regard the object of the summons as being to ascertain whether or not there was a liability to deliver a bill of costs and have it taxed." (My emphasis.)

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[8] Barrow JA in Oliver McDonna v Benjamin Richardson Civ App No. 3 of 2005 (Anguilla)
[9] Civ. App No. 13 of 2010 (BVI)

[13] Mr. Kentish's submissions on this issue was as follows: The substantive lis between Mr. Fundora and the Liquidators is whether the liquidators should be removed from office. The application to remove them was made and determined after the Court had already made the winding up order for SIB. Mr. Fundora's original application for SIB to be wound up was rejected by the High Court and he was not a party to the successful liquidation application by the FSRC pursuant to which SIB was wound up and the liquidators were appointed. The only issue in dispute between the parties before the High Court at the hearing of the application to remove the appellants was whether the appellants should be removed from office. This issue having been finally determined (with the alternative decisions available to the court on the application being to either remove or not to remove them, both of which would be determinative) the subject order is a final order and leave to appeal was not required.

[14] Having carefully considered these submissions of learned counsel Mr. Kentish, in my opinion the fact that Mr. Fundora was not a party to the successful liquidation application of FSRC is irrelevant when considering the nature of the proceedings in which the application was made for the removal of the appellants. We are dealing here with liquidation proceedings authorised by the relevant provisions of the IBC Act. Mr. Fundora was able to make the application because as a creditor he had a legitimate interest in the estate and assets of SIB; and the court had the power to make an order replacing the appellants under section 304(b) of the IBC Act in the interest of the liquidation. As a creditor, Mr. Fundora's application in relation to the appellants under section 304(b) of the IBC Act, was not that of an adversarial claimant with a cause of action or claim of right or a substantive legal right. Neither do the appellants as joint liquidators and officers of the court under the IBC Act, have any statutory claim of right, or any substantive legal right or vested interest to continue in that office as joint liquidators.

[15] The court undoubtedly, determined the application for the removal order because it was "In connection with the liquidation and dissolution of a corporation" i.e. SIB, as required by section 304. The application for the removal of the appellants

was clearly an application in the liquidation proceedings, unlike the situation in Herbert Reeves where the summons was an original proceeding. The learned judge Thomas J, was not considering the personal and private rights of the parties. The judge was obliged to answer the broad question: whether he was satisfied that it is for the better conduct of the liquidation, or it is for the general advantage of those persons having a legitimate interest in the estate and assets of SIB that the appellants be removed and a new liquidator be appointed.

[16] By no stretch of the imagination does the removal of the appellants resolve the winding up of SIB within the larger liquidation proceedings. The rights of Mr. Fundora in the substantive winding up issue have not been disposed of as between SIB and its creditors. The order is not a final order where it has not brought to an end the issues between SIB and Mr. Fundora. Had the application been decided in favour of the appellants, such a decision would not be dispositive of the winding up proceedings in connection with SIB either. In Nam Tai Electronics, Inc v David Hague and Another[10] the Court of Appeal considered whether a summons seeking a number of orders and declarations filed by the official liquidators was interlocutory. At Paragraph 8 of the judgment Gordon JA held that: "The summons was by its nature interlocutory in that what it sought would not have finally disposed of the winding up which was the substantive action, of which the summons formed only part."

[17] For all of the foregoing reasons I would hold that the judgment and order of Thomas J which removed the appellants as the joint liquidators for SIB are interlocutory in nature and the Court of Appeal lacks jurisdiction to exercise appellate review without leave to appeal being granted to the appellants.

The Appeal Procedure for Winding Up Orders Under the IBC Act

[18] There are no statutory provisions or rules which specifically or specially speak to the practice and procedure for appealing an order made pursuant to section 304 of

[10] Civ App No. 12 of 2003 (BVI)

the IBC Act. Section 351(2) of the IBC Act provides that "The court may make such regulations and rules of court as it considers necessary for the better administration of Part IV [i.e. sections 284 to 315 which deal with winding up Corporations]." No such rules have been made.

[19] Section 31(2) of the Eastern Caribbean Supreme Court Act Cap. 143[11] states that:

> "The jurisdiction of the Court of Appeal so far as it concerns practice and procedure in relation to appeals from the High Court shall be exercised in accordance with the provisions of this Act and rules of court and where no special provisions are contained in this Act or rules of court such jurisdiction so far as concerns practice and procedure in relation to appeals from the High Court shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England –
>
> (a) in relation to criminal matters, in the Court of Appeal (Criminal Division);
>
> (b) in relation to civil matters in the Court of Appeal (Civil Division). (My emphasis)

[20] Senior Counsel, Mr. Astaphan urged the Court to invoke section 31(2) of the Court Act and apply it to the circumstances of this appeal when considering the application to strike out the Notice of Appeal. Mr Astaphan reminded the Court that the equivalent provision to section 31(2) in the Court Act of St Kitts and Nevis was invoked by Barrow JA in Christenbury Eye Center v First Fidelity Trust Limited[12] to apply the English CPR 52.3 when considering whether to review a failed application for leave to appeal.

[21] In Hugh C. Marshall Snr and Antigua Aggregates Limited and Others[13] Singh JA in his lead judgment made certain relevant observations concerning a company's winding up petition in Antigua. He said at paragraphs 15 and 16 as follows:

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[11] Laws of Antigua and Barbuda Revised Edition (1992) as amended
[12] Civil Appeal No. 14 of 2007 (St Christopher and Nevis) delivered 19th November 2008
[13] Antigua and Barbuda Civ. App. No. 23 of 1999 at paras 15-16

"[15] It is accepted that there are no local rules guiding the presentation of a company's winding-up petition in Antigua. It is also accepted that Antigua needed to look to the English Rules for such guidance. Power to do so, is given by section 11 of the Eastern Caribbean Supreme Court Act Cap 143 which states that –

> 'The jurisdiction vested in the High Court in Civil proceedings, and in Probate, Divorce and Matrimonial causes, shall be exercised in accordance with the provisions of this Act and any other law in operation in Antigua and Barbuda and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.'

[16] This provision did not mandate a total and slavish acceptance of the English Rules. It suggests that the jurisdiction should be exercised as nearly as may be, in conformity with the law and practice for the time being administered in the High Court of England. This, in my view, suggests, that only those rules, that could with convenience be used in Antigua should be adopted." (Justice of Appeal Singh's emphasis).

[22] I adopt that statement of Singh JA and apply it to section 31(2) of the Court Act for the following reasons. The power to make rules regulating the practice and procedure of the Court of Appeal and the High Court is conferred by section 17 of the West Indies Associated States Supreme Court Order 1967 which empowers the Chief Justice and two other judges of the Supreme Court to do so. Section 351(2) of the IBC Act empowers the Supreme Court's rule making authority to make rules for the specified purpose of the better administration of the winding up of corporations under the IBC Act. In the absence of such special rules, concerning practice and procedure, in relation to appeals from the High Court, where the Court of Appeal is exercising its jurisdiction in winding up or liquidation proceedings under the IBC Act and section 31 of the Court Act for Antigua and Barbuda; the Court is empowered by section 31(2) of the Court Act to apply any relevant Rules of the Supreme Court in England which regulate appeals in winding up or liquidation proceedings which can be conveniently used in Antigua and Barbuda.

[23] Mr. Kentish submitted that despite the statements of Singh JA in Marshall v Antigua Aggregates the English Insolvency Rules are not relevant to the issue concerning whether or not leave is required to appeal the judgment and order of Thomas J. Mr. Kentish also submitted that there was no lacuna in the laws of Antigua and Barbuda because section 31 of the Court Act sets out the circumstances when leave is required and it would be contradictory to the clear wording of section 31 of the Court Act and section 11 as well, to apply the English Insolvency Rules 1986 to this matter.

[24] Mr. Kentish's submissions in my view have overlooked the fact that the provision stipulating the circumstances when leave is required, does not prescribe any specified practice and procedure for obtaining such leave when it is required. It is Part 62 of the Civil Procedure Rules 2000 which regulate the circumstances for obtaining leave to appeal generally[14]; and Mr. Kentish was quick in pointing out that CPR 2.3(b) states that the Rules in CPR 2000 do not apply to insolvency (winding up of companies) proceedings. Moreover, section 351(2) of the IBC Act empowers the Court to make such Rules for the exercise of its jurisdiction in insolvency (winding up) proceedings. The question therefore is: Without such Rules how is the Court to exercise its jurisdiction in insolvency and winding up proceedings? Statements of Lord Diplock in Garthwaite v Garthwaite[15] concerning the statutory jurisdiction of the Court may be helpful in appreciating this apparent dilemma. Lord Diplock explained:

> "In its narrow and strict sense the "jurisdiction" of a validly constituted Court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its powers by reference (1) to the subject matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought or to any combination of these powers. In its wider sense it embraces also the settled practice of the Court as to the way in which it will exercise its power to hear and determine issues which fall within its "jurisdiction" (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has "jurisdiction" (in the strict

[14] The Court of Appeal Rules 1968 as amended contain no rules which apply to winding up of companies.
[15] (1964) P. 356 at page 387

sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances."

[25] It is because of this lacuna that the relevant English Insolvency Rules 1986 and any relevant Practice Directions which regulate appeals to the Court of Appeal from the High Court in England are presently applicable to the instant appeal in my view, and those Rules where applicable should be modified and adapted to conform with the provisions of the IBC Act and the Court Act of Antigua and Barbuda and the peculiar circumstances of the case as far as possible if necessary.

The English Insolvency Rules 1986 as amended for Removal of a Liquidator

[26] Part 4 Rules 4.119 and 4.120 regulate the Courts powers to remove a liquidator from office pursuant to section 172 of the Insolvency Act 1986. Rule 7.47 deals with Appeals and reviews of court orders in corporate insolvency. Rule 7.47(2) states:

> "Appeals in civil matters in proceedings under Parts 1 to 4 of the Rules lie as follows –
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> (a) to a single judge of the High Court when the decision appealed against is made by the county court or the registrar;
>
> (b) to the Civil Division of the Court of Appeal from a decision of a single judge of the High Court."

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

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

[28] The Practice Direction – Insolvency Proceedings paragraph 17.3 states:

> "(1) Section 55 of the Access to Justice Act 1999 has amended s 375(2) of the Act and Insolvency Rules 7.47(2) and 7.48(2) so that an appeal from a decision of a Judge of the High Court made on a first appeal lies, with the permission of the Court of Appeal, to the Court of Appeal.
>
> (2) An appeal from a Judge of the High Court in insolvency proceeding which is not a decision of a first appeal lies with the permission of the judge or the Court of Appeal to the Court of Appeal (See CPR Part 52 rule 3).
>
> (3) The procedure and practice for appeals from a decision of a Judge of the High Court in insolvency proceedings (whether made on a first appeal or not) are also governed by Insolvency Rule 7.49 which imports the procedure and practice of the Court of Appeal as stated in Paragraph 17.2(2)."

[29] Practice Direction Paragraph 17.2(2) states:

> "The procedure and practice for a first appeal are governed by Insolvency Rule 7.49 which imports the procedure and practice of the Court of Appeal. The procedure and practice of the Court of Appeal is governed by CPR Part 52 and Practice Direction 52 which are subject to the provisions of the Act, the Insolvency Rules and the Practice Direction: See CPR Part 52 rule 1(4)."

[30] Part 52.4 of the English CPR which deals with the Appellant's Notice states:

> "(1) Where the appellant seeks permission from the appeal court it must be requested in the appellant's notice.
>
> (2) The appellant must file the appellant's notice at the appeal court within -
>
> (a) such period as may be directed by the lower court (which may be longer or shorter than the period referred to in sub-paragraph (b); or
>
> (b) where the court makes no such direction, 21 days after the date of the decision of the lower court that the appellant wishes to appeal.
>
> (3) Unless the appeal court orders otherwise, an appellant's notice must be served on each respondent –
>
> (a) as soon as practicable; and
>
> (b) in any event not later than 7 days, after it is filed.

[31] It would seem therefore from these reproduced English Rules and Practice Direction that an appeal against the decision of Thomas J which removed the joint liquidators from office lay with the permission of Thomas J or the Court of Appeal. Where permission to appeal was not obtained from Thomas J, that court, could also give them directions as to within what period they were to file their Notice of Appeal. In the absence of such directions from Thomas J, the appellants were obliged to file their Notice of Appeal within 21 days from the date of the judge's decision. In such a Notice of Appeal the appellants would request permission to appeal. Counsel for Mr. Fundora submitted that where the English Insolvency Rules refer back to the English CPR Part 52, our Court ought to apply Part 62 of our CPR 2000. I accept that submission wholeheartedly. This would be consistent with section 31 of the Court Act in my view. It would also avoid the anomaly that results from seeking permission in a Notice of Appeal, rather than in an application as we know it, as is prescribed in Part 62.2 of our CPR 2000.

[32] However, had such a notice of appeal been filed by the appellants with a request for permission to appeal within the requisite time, this court would be placed in a position to give case management directions as to how the matter should proceed. I am of the view that such a Notice of Appeal should thereafter proceed in keeping with the Part 62 of our Civil Procedure Rules 2000 which governs the practice and procedure in our Court of Appeal for interlocutory appeals, notwithstanding CPR 2.2(3)(b). Unfortunately, this is not the case. Despite being aware quite early, of the respondent's contention that Thomas J's judgment was an interlocutory judgment, the solicitors for the appellants took an inflexible posture that the judgment was final, and no leave was required. Consequently, the Notice of Appeal filed by the appellants is a nullity and must be struck out.

The Application for Relief from Sanction and Extension of Time to Seek Leave to Appeal

[33] Mr. Kentish invited the Court to exercise its inherent jurisdiction and extend the time for the appellants to file their application for leave to appeal. He relied on one

of our leading authorities before the advent of CPR 2000: Simon v Henry & Joseph[16]. Mr. Kentish also submitted that because Thomas J's judgment and order arose from liquidation proceedings, the Court should not apply Part 26.8[17] of CPR 2000 which establishes the criteria for granting relief from sanction as CPR 2000 does not apply to insolvency and winding up of companies proceedings. He submitted that the English CPR rule 3.9[18] which deals with relief from sanction is applicable, and he commended its application in Sayers v Clarke Walker (a firm)[19] as the approach to be followed by this court.

[34] These submissions cannot clear the hurdle which exists where a notice of appeal has been filed without leave. Barrow JA in Frampton v Pinnard[20]; Oliver McDonna v Benjamin Richardson[21]; and Craig Reeves and Platinum Trading Management Limited[22] has pellucidly explained repeatedly that although no sanction was expressly imposed for failure to apply for leave to appeal in time there was nonetheless a sanction that attached to non-compliance with the time limit, i.e. the applicant applying for an extension of time is not permitted thereafter

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[16] Antigua and Barbuda Civil Appeal No 1 of 1995 (Unreported judgment). Singh JA applied the 4 factors to be taken into account in determining an application for extension of time under the old rules O3 R5 to appeal: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the success of the appeal if the extension is granted; and (4) the degree of prejudice to the respondent if the application is granted.

[17] See CPR 2000 Rule "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be - made promptly; and supported by evidence on affidavit. (2) The Court may grant relief only if it is satisfied that - (a) the failure to comply was not intentional; (b) there is a good explanation for the failure; and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. (3) In considering whether to grant relief, the court must have regard to: (a) the effect which the granting of relief or not would have on each party; (b) the interests of the administration of justice; (c) whether the failure to comply has been or can be remedied within a reasonable time."

[18] See English CPR 3.9 :" (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –(a) the interests of the administration of justice; (b) whether the application for relief has been made promptly;(c) whether the failure to comply was intentional;(d) whether there is a good explanation for the failure;(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre action protocol(GL);(f) whether the failure to comply was caused by the party or his legal representative; (g) whether the trial date or the likely trial date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party. (2) An application for relief must be supported by evidence."

[19] [2002] EWCA Civ. 645 (14th May 2002)

[20] Dominica Civ. App No. 15 of 2005 (Unreported Judgment) delivered 3rd April 2006

[21] See Footnote 8

[22] St. Christopher and Nevis Civil Appeal No. HCVAP 2007/022 (Unreported Judgment) delivered 25th February 2008

to apply for leave to appeal. Barrow JA also stated in Craig Reeves that "a clearer expression of the sanction is that an intending appellant in that position loses the opportunity to appeal". In Oliver McDonna Barrow JA referred to the statutory equivalent in Anguilla of section 31(2) of the Court Act of Antigua and Barbuda and explained further, that where the right to appeal exists, an appeal filed out of time is an irregularity which the court has the jurisdiction to cure by extending the time to appeal; but where statute mandates that a litigant must obtain leave to appeal, the litigant's failure to obtain leave to appeal leaves him debarred by the language (in the instant case) of section 31(2) of the Court Act of Antigua and Barbuda. A Notice of Appeal filed without leave is a nullity and cannot be cured or retrospectively validated or revived by the subsequent granting of leave.

[35] Consequently, it is not necessary to determine the applications for extension of time, relief from sanction, and stay of execution of the judgment of Thomas J on their merits. To do so would be an academic exercise. These applications must be dismissed with costs to the respondent Alexander Fundora.

[36] The result of the 2 applications is in terms of the following order:

ORDER

(1) The Application of the respondent Alexander Fundora filed on 29th July 2010 is granted and the Notice of Appeal filed on 6th July 2010 without the leave of the Court is a nullity and is struck out with costs to the respondent.

(2) The appellants' application filed on 30th July 2010 for the multiple orders stated therein is dismissed with costs to the respondent Alexander Fundora.

(3) The costs to the respondent are to be agreed on by the parties and where not agreed to be assessed by the court.

Ola Mae Edwards
Justice of Appeal