

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 587 of 2016

IN THE MATTER of Section 224(1) of the Bankruptcy and Insolvency Act, Cap. 303 of the Laws of Barbados

AND IN THE MATTER of Section 227(3) of the Bankruptcy and Insolvency Act, Cap. 303 of the Laws of Barbados

AND IN THE MATTER of the Bankruptcy of Lindsay Adolphus Cumberbatch

BETWEEN:

David John Standish (as Trustee of the Estate of Lindsay Adolphus Cumberbatch (in Bankruptcy) FIRST CLAIMANT

Wendy Jane Wardell (as Trustee of the Estate of Lindsay Adolphus Cumberbatch (in Bankruptcy) SECOND CLAIMANT

AND

Lindsay Adolphus Cumberbatch (in Bankruptcy) DEFENDANT

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Date of Hearing: 2017 12 September

Date of Decision: 2018 12 December

Appearances: Ms Fawn M. Phillips Attorney-at-law for the Defendant/Applicant

Mr. Bartlett Morgan of Lex Caribbean Attorneys-at-law for the Claimants/Respondents

DECISION

The Application

- [1] This matter involves an interlocutory application filed by the Defendant (Lindsay Cumberbatch) (hereinafter referred to as Defendant/Applicant) to strike out proceedings, namely, Fixed Date Claim Form filed 26 April 2016 in the substantive action. His application is filed pursuant to **Part 26.3 (1) and 26.3 (3) of the Supreme Court (Civil Procedure) Rules 2008 (CPR)**.
- [2] The substantive claim was for an order, pursuant to **section 224 (1) and 227 (3) of the Bankruptcy and Insolvency Act, Cap. 303 of the Laws of Barbados (BIA)**, that, among other things, the Defendant/Applicant be adjudged bankrupt. The basis of the claim was an order to the same effect made by the County Court of Bristol, England on 23 June 2015 in bankruptcy and insolvency proceedings in that jurisdiction. The claim therefore involves international cross-border proceedings.
- [3] In fact, it will be seen hereafter that the Defendant/Applicant fits neatly into the definition of “debtor” to be found at **section 223 of Part XI of the BIA** as follows:

““debtor” means an insolvent person who has property in Barbados, a bankrupt who has property in Barbados, or **a person who has the status of a bankrupt under foreign law in a foreign proceeding and has property in Barbados.**”

History and Procedural Background

- [4] The Claimants David John Standish and Wendy Jane Wardell (hereinafter referred to as the Claimants/Respondents) are insolvency practitioners in the United Kingdom. They are the joint trustees of the estate of the Defendant/Applicant pursuant to the order of the County Court of Bristol. Their instrument of appointment, issued from that Court is dated 5 August 2015 and is an exhibit to their affidavit in this matter.
- [5] The Defendant/Applicant was previously employed by Excelerate Technology Limited (Excelerate) in the United Kingdom, but was made redundant. As part of his separation package he entered into an agreement with Excelerate prohibiting him from being employed by its competitors for a stipulated period.
- [6] The Defendant/Applicant then proceeded to act in breach of the agreement by taking up employment with Red Foot Technologies (Red Foot), also in the United Kingdom, a former competitor of Excelerate. Excelerate sued Red Foot and the Defendant/Applicant. On 16 January 2015, judgment was entered by the court against the Defendant/Applicant and Red Foot in favour of Excelerate, with both parties being adjudged jointly and severally liable to pay Excelerate the sum of £158,343.

- [7] The Defendant/Applicant, was also held to be jointly liable to pay the sum of £172, 677.40 in assessed costs with respect to the above action.
- [8] The Defendant/Applicant failed to pay the judgment debt and costs within the prescribed time. As a result, Excelerate, in its capacity as a judgment creditor of the Defendant/Applicant made an application to the County Court of Bristol and the Defendant/Applicant was adjudged bankrupt.
- [9] The Claimants/Respondents caused searches to be carried out in Barbados to verify the information provided them by the Defendant/Applicant as to property owned by him in this jurisdiction.

Procedural Background

- [10] The action was filed by way Fixed Date Claim Form of 26 April 2016. In it, the Claimants/Respondents sought the following orders:

“1. An order that pursuant to the Order dated June 23, 2015 of the County Court of Bristol England bearing insolvency number 0238 of 2015 Lindsay Adolphus Cumberbatch be adjudged bankrupt.

2. An order that the certified copy of the said order dated June 23, 2015 of the County Court of Bristol of England bearing insolvency number 0238 of 2015 be proof that Lindsay Adolphus Cumberbatch is bankrupt.

3. An order that Craig Lawrence Waterman as a trustee licenced pursuant to section 165 of the Bankruptcy and Insolvency Act, be appointed as the interim receiver of the property of Lindsay Adolphus Cumberbatch (in Bankruptcy) situated in Barbados described as Lot 40, Heywoods, St. Peter in this Island.

4. An order that Lindsay Adolphus Cumberbatch (in Bankruptcy) shall forthwith deliver up to Craig Lawrence Waterman possession of Lot 40 Heywoods in the parish of St. Peter in this island.

5. Such further or other relief as the Court deems just.”

- [11] The Fixed Date Claim Form was supported by the joint affidavit of the

Claimants/Respondents attesting, *inter alia*, to the facts already stated above and exhibiting their order of appointment, the judgment, the order of bankruptcy and the searches.

[12] **Paras [13] and [15]** of the Claimants/Respondents joint affidavit are instructive and significant. They state as follows:

“13. As a result of Mr. Cumberbatch’s assertion that the property was owned by himself along with a Mr. and Mrs. Cumberbatch, our Barbados Attorneys-at-Law caused a search of the Property’s most recent conveyance to be conducted at the Barbados Land Registry. This search revealed that a Deed of Conveyance has been registered at the Barbados Land Registry on September 2, 1996 as instrument number 6525 of 1996. This Deed indicates that on October 31, 1995, the Property was purchased by Lindsay Adolphus Cumberbatch of No.9 Portish Head Lodge, Beach Road West, Portish Head, Bristol in the United Kingdom from Peter Harry Boxall and Julie Ann Boxall of 6 Spinmaker View, Bedhampton Havant, Hampshire in the United Kingdom. A certified copy of the Deed of Conveyance is now shown to us and is attached hereto as “Exhibit 8”.

...

15. Against this background, we verily believe that Mr. Cumberbatch is the sole legal owner of the Property and we verily believe that Mr. Cumberbatch is in possession of the Property.”

[13] On 22 September 2016 the Defendant/Applicant filed the subject Notice of Application to strike out the Fixed Date Claim Form seeking the following orders:

“1. The order granted by the District Judge Britton in the Bristol County Court on the 23rd day of June, 2015 bearing insolvency number 0238 of 2015 adjudging the Defendant as bankrupt be deemed unenforceable and of no effect within the Jurisdiction of Barbados as a result of the said order having been discharged on the 23rd June, 2016 in the United Kingdom, that being the court of origin.

2. The proceedings filed on behalf of the Claimants be struck out in accordance with Part 26.3 (1) and 26.3 (3) of The Supreme Court (Civil Procedure) Rules 2008 on the basis that-

(a) the Proceedings filed on behalf of the Claimants were not properly brought before the court and or did not comply with the rules as outlined in The Supreme Court (Civil Procedure)

Rules 2008 nor did the Claimants comply with further stipulations as contained in various laws of Barbados. In particular-

- (i) there has been a failure on the part of the Claimants to comply with the procedural requirements of having the Judgment of the High Court of Justice Birmingham District Registry dated January 16 2015 registered in the High Court of Barbados for the purpose of enforcement within Barbados in accordance with Part 72 of The Supreme Court (Civil Procedure) Rules 2008 and as such having failed to do so the said Judgment therefore should not be considered valid and or relied on by the Claimants within the courts of this jurisdiction until such time as it has been properly registered.
- (ii) there has been a failure on the part of the Claimants to comply with the procedural requirements of Section (3) of the Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act Cap. 201 of the Laws of Barbados in having the judgment dated January 16, 2015 of the High Court of Justice Birmingham District (the superior court in the United Kingdom) registered in the High Court of Barbados at any time within twelve months after the date of the judgment or such longer period as may have been allowed by the High Court;
- (iii) there was a failure on the part of the Claimants to serve the Fixed Date Claim Form accompanied by a form of acknowledgment of service on the Defendant contrary to Part 8.12 of The Supreme Court (Civil Procedure) Rules 2008;
- (iv) there has been a failure on the part of the Claimants within their affidavit dated April 11th, 2016 to confirm whether the foreign judgment of the High Court of Justice Birmingham District Registry dated January 16, 2015 is valid, final and conclusive;
- (v) there has been a failure on the part of the Claimants to confirm whether the time for appeal has ended and or whether an appeal has been lodged with respect to the judgment dated January 16, 2015 of the High Court of Justice Birmingham District which was entered against the Defendant.

3. Costs

4. Such Other relief as this Honourable Court may consider just and appropriate in the interest of justice.”

[14] The Affidavit in Support of Lindsay Adolphus Cumberbatch of 22

September 2016 was filed. In support of submissions as to the Claimants/Respondents' failure to comply with the requirements of the CPR, he deposed at para [9] that he was served on the 26 April 2016 with the joint affidavit, but not the Fixed Date Claim, the draft order nor the form of acknowledgement of service. He alleges further, that sometime in May 2016 he was served with a Take Notice informing him of the date of hearing. Thereafter, he was served with no further documents in these proceedings. He deposed that copies of the other documents were supplied to his attorney under cover of letter dated 6 July 2016, at her request.

[15] Significantly, he further deposed at paras [13] to [15]:

“13. The abovementioned order referred to at paragraph 7 of this affidavit and that same order being relied on by the First and Second Claimants in this present suit was discharged on the 23rd June, 2016, that date being the anniversary date on which the order was made. A notarised copy of the formal certificate of discharge is annexed hereto and marked “LAC-3”.

14. The order referred to above bearing the status as having been discharged in the County Court of Bristol on the 23rd June, 2016, is therefore at this current date invalid and of no effect in the court of origin, that being; the Court of Bristol and as such, cannot therefore be recognized by or enforced by the Courts of Barbados nor can it be relied upon by the First and Second Claimant as a basis for making the application for the orders as outlined at paragraph 9 of this affidavit.

15. Additionally, a search of the Barbados Judgment registry by Curtis Maloney the agent of my Attorney-at-Law Fawn M. Phillips revealed that up until August 25th, 2016 the Judgment of the High Court of Justice Birmingham District Registry dated January 16, 2015 from which the order dated June 23rd, 2016 flows was not registered and or enforced within this Jurisdiction. Annexed hereto and marked “LAC-4” is a copy of the report submitted to my Attorney-at-Law by paralegal Curtis Maloney.”

[16] Thereafter, the Claimants/Respondents filed three (3) further Affidavits as follows:

[i] The Affidavit of Lalita Vaswani filed October 25, 2016. This affidavit answered and denied the allegation that the Fixed Date Claim Form etc. were not served on the Defendant and referenced and exhibited an Affidavit of Service filed May 17th, 2016.

[ii] The Affidavit of Lalita Vaswani filed October 25, 2016 which appended the sworn and notarized Affidavit of Graham McPhie of Moon Beaver Solicitors of London in his capacity as English counsel for the Claimants.

[iii] The Affidavit of Graham McPhie dated November 11, 2016. This expressed his legal opinion on the issue of the discharge of the bankrupt is addressed at paras 10 to 14 in the following terms:

“10. By section 279(1) of the Act ***“A bankrupt is discharged from bankruptcy at the end of the period of one year beginning with the date on which bankruptcy commences”***.”

11. The effect of the discharge from bankruptcy is often misunderstood. The discharge from bankruptcy will free the bankrupt from restrictions associated with bankruptcy but it does not affect the functions of the trustee in bankruptcy and it does not re-vest bankruptcy estate assets in the bankrupt.

12. By section 305(2) of the Act, ***“the function of the trustee is to get in, realise and distribute the bankrupt’s estate in accordance with the following provisions of this Chapter; and in the carrying out of that function and in the management of the bankrupt’s estate the trustee is entitled, subject to those provisions, to use his own discretion”***.”

13. The effect of discharge from bankruptcy is dealt with by section 281 of the Act which states:

(1) Subject as follows, where a bankrupt is discharged, the discharge releases him from all the bankruptcy debts, but has no effect-

(a) on the functions (so far as they remain to be carried out) of the trustees of his estate, or

(b) on the operation, for the purposes of the carrying out of those functions, of the provisions of this Part;

and, in particular, discharge does not affect the right of any creditor of the bankrupt to prove in the bankruptcy for any debt from which the bankrupt is released.

(2) Discharge does not affect the right of any secured creditor of the bankrupt to enforce his security for the payment of a debt from which the bankrupt is released.

(3) Discharge does not release the bankrupt from any bankruptcy debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party.

(4) Discharge does not release the bankrupt from any liability in respect of a fine imposed for an offence or from any liability under a recognisance except, in the case of a penalty imposed for an offence under an enactment relating to the public revenue or of a recognisance, with the consent of the Treasury.

...

(5) Discharge does not, except to such extent and on such conditions as the court may direct, release the bankrupt from any bankruptcy debt which-

(a) consists in a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty, [or to pay damages by virtue of Part I of the Consumer Protection Act 1987, being in either case] damages in respect of personal injuries to any person, or

(b) arises under any order made in family proceedings [or under a maintenance assessment [maintenance calculation] made under the Child Support Act 1991] < ... >

(6) Discharge does not release the bankrupt from such other bankruptcy debts, not being debts provable in his bankruptcy, as are prescribed.

(7) Discharge does not release any person other than the bankrupt from any liability (whether as partner or co-trustee of the bankrupt or otherwise) from which the bankrupt is released by the discharge, or from any liability as surety for the bankrupt or as a person in the nature of such a surety.

13. The provisions of section 281 are extensive but they confirm that the discharge from bankruptcy does not affect the operation of the provisions of Part IX of the Act, i.e. the fact that the bankrupt's assets remain vested in his bankruptcy estate, that the trustee in bankruptcy has the duty to get in and realise those assets and of the right for creditors to submit a proof of debt to the estate for a pro

rata distribution from the realisation of the bankrupt's assets. It reinforces the bankruptcy concepts that the bankruptcy individual is freed of personal liability for any debts owed but as a consequence will find his assets are vested in the trustees in bankruptcy for realisation as part of the estate. Any creditors no longer have a claim against the bankrupt personally but submit a proof of debt for a share of the bankruptcy distribution. This situation subsists notwithstanding the discharge from bankruptcy as is made clear by section 281 of the Act.

14. I can certify to the court that I consider and believe this to be a correct statement of the Law of England and Wales for the matters referred to herein.”

The Oral Application

[17] On 12 September 2017, the Claimants/Respondents made an oral application to amend their fixed date claim form filed 26 April, 2016. The application was that the Court (i) recognise the foreign proceedings in respect of the County Court of Bristol in bankruptcy; (ii) that the Court recognise that the Claimants/Respondents are appointed trustees within the meaning of the **section 11** of **BIA**; (iii) that based on the order of these proceedings the Defendant is insolvent; (iv) and that the Claimants be appointed interim receivers and (v) an order for possession of the property.

The Submissions

The Defendant/Applicant's Submissions

[18] Counsel for the Defendant/Applicant's most significant submissions were on the basis of evidence not before the Court, as her Written Submissions filed 23 November 2017, inappropriately exhibited unfiled affidavits

which formed the core of her submissions. No leave was sought or granted for the filing of these affidavits.

[19] Her main submission is that while the Defendant/Applicant is the legal owner of the subject property, he is holding the same on trust for his parents Margaret J. Cumberbatch and Lindsay A. Cumberbatch Snr.. She argues that there is a constructive trust created and, in support, exhibits to her Written Submissions, the unfiled affidavit of Mr. Gerard James Reilly, a registered solicitor in the United Kingdom, a further affidavit of Lindsay Cumberbatch (unfiled and sworn before his solicitor Gerard James Reilly), the affidavit of Margaret Cumberbatch, unfiled and similarly sworn, exhibiting a Partnership Agreement between the Defendant/Applicant and his parents.

[20] I pause here to observe that the issue of an interest in the property other than that of the Defendant/Applicant is not before this Court for adjudication. The issue presently before this Court is that of whether the Fixed Date Claim Form should be struck out.

[21] In relation to the application for striking out, counsel for the Defendant/Applicant deployed one main argument. Her submission was that this action is not only guided by the BIA. While counsel readily admits that the **BIA** has no express requirement for the registration of a foreign judgment, she points out that such requirements are to be found in

Part 72 of the CPR and section 3 of The Foreign and Commonwealth Judgements (Reciprocal Enforcement) Act (Cap. 201) FCJA.

[22] She argues that since the Claimants/Respondents are seeking to be appointed as receivers of the property to satisfy the judgment against the Defendant/Applicant dated 16 January 2015, and the order adjudging him bankrupt flowed from that order, the latter order is not separate and apart from the former. Counsel therefore submits that until such time as this order is registered in accordance with **Part 72** and the **FCJA**, the Claimants/Respondents have no standing before the Courts of this jurisdiction.

[23] Counsel's ancillary submissions were that the pleadings were not properly served on the Defendant/Applicant and that, in any event the bankruptcy order made in June 2015 was discharged in June 2016 and was therefore of no effect.

The Claimants/Respondents' Submissions

[24] By way of background and context, counsel for the Claimants/Respondents submitted that the **BIA** is modelled on the 1986 and 2001 Bankruptcy and Insolvency Act of Canada.

[25] He stated that under the **BIA**, the Court has power to make orders and to grant relief on being satisfied of two things: one, that it is proven that a debtor is insolvent; and two, that a foreign representative has been

appointed pursuant to **section 224(1)** and **224(2)** of the **BIA**. He argues that the Court has the power to grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in the co-ordination of proceedings under the **BIA** with a foreign proceeding.

[26] Counsel advanced the Canadian case of **Zayed v Cook [2009] O. J. No. 5513** of the Ontario Superior Court of Justice (an application for recognition of an action in the United States of America as a foreign proceeding), as persuasive guidance in determining the applicable procedure for the making of an application of this nature and the content of the supporting documents. It was counsel's submission that section 269 of the Canadian 1985 BIA corresponds with our **section 224**.

[27] He made a distinction between registration under the **FCJA** and a proceeding under the **BIA**. He contended that the Claimants/Respondents are not seeking to have the judgment in question registered but rather for, an order which will result in a co-ordination of proceedings under the **BIA** with the English Bankruptcy proceedings. Counsel maintained that the Claimants/Respondents are not judgment creditors within the meaning of **section 2** of the **FCJA**, the point of distinction being that they did not obtain a judgment against the Defendant/Applicant.

[28] He argued that the Bankruptcy order is not a judgment within the meaning of **section 2** of the **FCJA** since it was not a judgment or order given or

made by a court for a payment of a sum of money. Thus, in his submission, **Part 72** of the **CPR** and the provisions of the **FCJA** have not been invoked in the present circumstances.

[29] He argued, therefore that from this it follows that, it is not necessary for the Claimants/Respondents to confirm that the foreign judgment is valid, final and conclusive or to establish whether the time for appealing has ended or whether an appeal of the order has been lodged. These are *inter alia*, requirements of the **FCJA**.

[30] As long as the Claimants/Respondents are foreign representatives within the meaning of the **BIA**, and are seeking orders, those orders may be granted where the Court has received proof that a debtor is insolvent and that a foreign representative has been appointed.

[31] Counsel submitted further that the Defendant/Applicant's assertion that the Bankruptcy order is unenforceable and of no effect within this jurisdiction because it has been discharged, is a matter of foreign law and evidence relating to foreign law may only be given by an expert. In this regard, he refers to the affidavit of Graham McPhie, which purports to provide expert legal opinion as to the effect of the discharge from bankruptcy. This expert opinion, counsel argues, establishes that under English law, the discharge of the English Bankruptcy Order does not affect the Claimant's ability to

realise the Defendant's Estate, including his property situated at Lot 40, Heywoods, Barbados.

[32] It was counsel's submission that the principle of comity, which is important in the bankruptcy context, underlies **Part XI** of the **BIA**. Counsel relied on the Canadian cases **Re. Walker 1998 CanLii 14906 (ON SC)** and **Babcock and Wilson Canada Ltd. 2000 CanLii 22482 (ON SC)**. On the basis of the learning in these cases (particularly **Re. Walker**) he submitted that the Canadian Bankruptcy and Insolvency Act (BIA Canada) and the English Insolvency Act are of a practical, reciprocal and corresponding nature. Therefore, counsel submits, this Court is not precluded from applying legal and equitable rules governing the English Insolvency Act, and notably the principle that where the bankrupt has been discharged the bankrupt's estate remains vested in the trustee to enable said trustee to perform the function of realizing the value of the estate for the benefit of creditors.

[33] The Claimants/Respondents argue that the principle of comity is reflected in **section 224(5)** of the **BIA**. They argue that this said provision allows a Barbados Court to apply legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives in so far as they do not conflict with the **BIA**.

[34] As it relates to the allegation that the Fixed Date Claim Form and Acknowledgment of Service Form not being served on the Defendant/Applicant, counsel relies on/stands by the affidavit of the process server Tara Graham. In short, they refute any allegation that the Defendant/Applicant was not served with the Fixed Date Claim Form and other documents.

[35] In conclusion, counsel submitted that even if they failed to comply with **Part 72**, this would be a procedural defect which the Court has power to rectify under **Part 26.4** of the **CPR**.

Issues Arising

[36] The above matters give rise to two issues: the first is whether the foreign bankruptcy order at the heart of this action requires to be registered in accordance with the **FCJA** and **Part 72** of the **CPR**; and the second, which is dependant in some measure on the first, is whether the action should be struck out on the basis of the Claimants/Respondents' failure to comply with the said **Act** and **Part 72** and for improper service of the process in this action.

Discussion

Cross Border Insolvency Proceedings

[37] **Section 224**, in this Court’s opinion and in this context, best reveals the legislative intent of the **BIA**. It does so in **subsection (3)**, where it gives an extremely broad discretion to the Court to “make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.”

[38] Further, **subsection (5)**, enjoins the Court to apply “such legal and equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act”.

[39] This connects with the submission of counsel for the Claimants/Respondents at **para [33]** above, as regards the application of the common law concept of comity of law and the application of legal and equitable principles in this context.

[40] **Bennett on Bankruptcy, 13th ed., 2011** (despite being a reference to the current law in Canada) speaks to this in the author’s reference to Part XIII of BIA Canada titled “Cross Border Insolvencies”, in the following terms at page 663:

“In short, Part XIII recognized the comity of law and international coordination. The courts of one jurisdiction would normally give effect to the laws of another jurisdiction out of mutual deference and respect. The Canadian Court was required to adjudicate on Canadian legislation and case law having regard to the laws of another nation, which may be different.

Part XIII did not, however, address the recognition of foreign discharges of individual debtors nor consumer proposals in other countries where the debtor returned to Canada.

Part XIII of the Bankruptcy and Insolvency Act addressed the issues of the recognition of a foreign representative, the right to initiate concurrent or ancillary proceedings in Canada, and granting control over Canadian assets without interference.

Under Part XIII, a foreign representative was a person holding office in a foreign jurisdiction with similar powers to a trustee, liquidator, administrator, or receiver appointed by the court. That foreign representative could apply to the court for recognition in legal proceedings taken in Canada.”

[41] Also relevant is section 269 (1) of BIA Canada dealing with applications for recognition of a foreign proceeding, the documents that must accompany the application, acceptance of these documents as proof and other evidence .

[42] In short, the **BIA**, like corresponding legislation in other jurisdictions, is meant to be of a practical, reciprocal and corresponding nature, aimed at achieving effective administration of an international bankrupt estate (per **Re Walker supra**). The judge in this case, had this to say at **para [13]** as follows:-

“Comity in the legal sense, is neither a matter of absolute obligation, on the one hand, or mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive and judicial acts of another nation, having regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.”

[43] It must be noted however, that the **BIA** has not been amended since its enactment in 2002; nor, importantly, have the regulations provided for in

section 254 been instituted. Thus, it is not safe to incorporate wholesale the Canadian principles, some of which are grounded in statutory provisions and regulations not present in our **BIA**.

The relevant provisions of the BIA

[44] The **BIA** is a modern (2002) piece of legislation intended “to revise the law relating to bankruptcy and insolvency; to make provision for corporate and individual insolvency; to provide for the rehabilitation of the insolvent debtor; and to create the office of Supervisor of Insolvency.”

[45] Of particular relevance to this application, **Part XI** of the **BIA** deals with the specialised area of International Insolvencies from **sections 223 to 231**.

[46] The substantive action before the Court was filed pursuant to **sections 224(1) and 227(3)**.

[47] However, I will start with **section 223** which defines “foreign proceedings” as:-

“a judicial or administrative proceeding commenced outside Barbados in respect of a debtor, under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally.”

[48] By definition, this matter clearly falls within the ambit of this **Act**.

[49] **Section 224** in its entirety is of relevance in this matter. It provides as follows:

“224. (1) For the purposes of this Part, where a bankruptcy, insolvency, reorganisation or like order has been made in respect of a debtor in a foreign proceeding, a certified or exemplified copy of the order is, in the absence of

evidence to the contrary, proof that the debtor is insolvent and proof of the appointment of the foreign representative made by the order.

(2) When a foreign proceeding has been commenced and a receiving order or assignment is made under this Act in respect of a debtor, the Court may, on application and on such terms as it considers appropriate, limit the property to which the authority of the trustee extends to the property of the debtor situated in Barbados as the Court considers can be effectively administered by the trustee.

(3) The Court may, in respect of a debtor, make such orders and grant such relief as it considers appropriate to facilitate, approve, or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

(4) An order of the Court under this Part may be made on such terms and conditions as the Court considers appropriate in the circumstances.

(5) Nothing in this Part prevents the Court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.

(6) Nothing in this Part requires the Court to make any order that is not in compliance with the laws of Barbados or to enforce any order made by a foreign court.”

[50] Counsel for the Claimants/Respondents in his written submissions, asserts that there is a corresponding Canadian provision which is explicated in the text **Houlden & Morawetz, (2000) Bankruptcy and Insolvency Act, Canada at L71** as follows:

“To prove that the bankruptcy, insolvency, etc, has occurred in respect of a debtor in a foreign proceeding, the foreign representative need only produce a certified or exemplified copy of the foreign order, and by section 268 (1), this is made proof of the debtor’s insolvency and the appointment of the foreign representative. A certified copy is one that is certified as a true copy by the officer to whom custody of the original document has been entrusted. An exemplified copy is an official copy of a document made under the seal of the court that granted the original order.”

[51] **Section 227(3)** provides:

(3) On application by a foreign representative in respect of a debtor, the Court may, where it is satisfied that it is necessary for the protection of the debtor’s estate or the interests of a creditor or creditors,

(a) appoint a trustee as interim receiver of all or any part of the debtor’s property in Barbados, for such term as the Court considers appropriate; and

(b) directs the interim receiver to do all or any of the following:

- (i) take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value;
- (ii) take possession of all or part of the debtor's property mentioned in the appointment and exercise such control over the property and over the debtor's business as the Court considers appropriate; and
- (iv) Take such other action as the Court considers appropriate."

[52] But these provisions must be read together with the other provisions of the **BIA**. It should never be assumed that **Part XI** is intended to stand on its own, separate and distinct from the other provisions of the **Act**. **Section 224(6)** makes this clear. Of particular significance therefore, is **section 38** which, among other things, provides that the property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt on trust for any other person.

[53] This in turn must be read together with **section 57**, which expressly deals with persons claiming ownership interest in property of the bankrupt, and sets out a process for proving such a claim. **Subsection (3)** places the burden of establishing a claim or interest in property under this provision on the person making such a claim. **Subsection (2)** provides:

“(2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the claim to the claimant or give notice in writing to the claimant that the claim is disputed with his reasons, and, unless the claimant appeals to the Court within 15 days after the mailing of the notice of dispute, the claimant shall be deemed to have abandoned or relinquished all his right to or interest in the property to the trustee, who may sell or dispose of the property free of any lien, right, title or interest of the claimant.”

[54] Also, of some relevance is **section 63** dealing with Partnership Property.

[55] Not to be forgotten, is **section 213** which sets out the power of the Court

“... to decide all questions of priorities and all other questions whatsoever, whether of law or fact, that may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.”

[56] **Section 214** states specifically that no proceeding is invalidated by defect or irregularity in the following terms:

“No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court.”

The (FCJA) Foreign and Commonwealth Judgment (Reciprocal Enforcement) Act, Cap. 201

[57] The **FCJA** is described in its preamble as “An Act to facilitate the reciprocal enforcement of judgments and awards in this island and other parts of the Commonwealth to make provision for the reciprocal enforcement of judgments in this Island and in foreign countries and for other purposes in connection therewith”.

[58] Part I of the **FCJA** commenced in 1922, Parts II and III in 1937.

[59] The defining process under the **FCJA** is the definition of “judgment” in **section 2**, when compared to the definition of “foreign proceedings” under **Part XI** of the **BIA**. It states as follows:

“any judgment or order given or made by a court in any civil proceedings whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.”

[60] “Judgment Creditor” is also defined in **section 2** as “the person by whom the judgment was obtained and includes the successor and assigns of that person”. Counsel for the Claimants/Respondents persuasively submits that they are not ‘judgment creditors’ within the meaning of **section 2** of the **FCJA**; and that the English Bankruptcy Order is not a judgment within the meaning of **section 2** of the **FCJA**, as it is not a judgment or order given or made by a court whereby any sum of money is made payable.

[61] **Section 3(1)** sets out the authority and process for the registration of Commonwealth judgments, specifically, a judgment in a superior court in the United Kingdom. Notable is the fact that this must be done “within twelve months after the date of the judgment, or such longer period as may be allowed by the High Court...”.

[62] **Section 3(2)** is also of critical importance in the determination of whether a foreign order should be registered in Barbados, as it enumerates (a to f) the circumstances the Court shall take into account before ordering a judgment to be registered, for example,

“No judgment shall be ordered to be registered under this section if:

...

(c) The judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;”

[63] A further example is **section 3(2)(e)** argued by counsel for the Defendant/Applicant which provides that no judgment shall be ordered to be registered if:

“The judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment.”

[64] **Section 13** is an interesting provision giving rise to a debate not the subject of this application:

“No proceedings for recovery of a sum payable under a foreign judgment, being a judgment to which this Part applies, other than proceedings by way of registration of judgment, shall be entertained by any court in this Island.”

Part 72 of the CPR

[65] **Part 72**, under the heading “Reciprocal Enforcement of Judgments”, details the procedural requirements for the registration of a judgment of a foreign court or tribunal and appears to relate to processes attendant to the **FCJA**, namely, the reciprocal enforcement of judgments. Significantly, however, **Rule 72.1(3)** provides that this “Part takes effect subject to the requirements of any relevant enactment”. As mentioned before, the regulations of the **BIA** have yet to be instituted.

The Court’s discretion to strike

[66] Our Court of Appeal in November 2017, in the case of **American Life Insurance Company v Ainesley Corbin Civil Appeal No 35 of 2014**, in a decision delivered by **Burgess JA**, looked extensively at the meaning

and import of **Rule 26.3 (1)** of the **CPR** under the heading “The Striking Out Issue”. This Rule empowers the Court to strike out a statement of case or part of a statement of case where it appears to the court that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings.

[67] The Court of Appeal made the following central rulings/findings:

- (i) The nature of the court’s power under Rule 26.3 (1) is discretionary;
- (ii) In deciding whether to exercise the Rule 26.3 discretion the governing principles /factors are those set out in the CCJ decision in *Barbados Rediffusion* (being both pre and post CPR law). These factors were set out at para [57] of the judgment and found by the Court to encapsulate the objectives of the Overriding Objective of the CPR.
- (iii) In balancing the factors above, there are two factors which are pre-eminent: first, where a striking out order is necessary to achieve fairness(the test of fairness being whether there is a real risk that a fair trial may not be possible as a result of one party’s failure to comply with an order of the court; and second, where it is necessary to maintain respect for the authority of the court’s order (in this regard the test is whether there was such a defiant and persistent refusal as may be classified as “contumelious or contumacious”).

[68] The following cases give significant insight into the approach of courts in the region to the exercise of the discretion to strike out a proceeding: **Citco Global Custody NV v Y2K Finance Inc., ECSC Civil Appeal No. 22 of 2009 [BVI]; S & T Distributors Limited V CIBC Jamaica Limited and Royal and Sun Alliance JM 2007 CA 44; Belize Telemedia Ltd v Magistrate Usher (2008) 75 WIR 138; Baldwin Spenser v The Attorney General of Antigua and Barbuda et al Civil Appeal No. 20A of 1997; Paradise Beach and Paradise 88 Limited v Edghill and Patel (Barbados) Civil Appeal No. 10 of 2011.**

Conclusions

[69] The two pieces of legislation, the subject of these submissions, provide for two entirely different regimes. One, the latter, is an indication of the modern approach and intent, and some may submit, the legislature's intent to act in consonance with its international law obligations; the former, a seemingly outdated piece of legislation for registration with a view to execution of a foreign judgment.

[70] This Court accepts that the application before it derives from the **BIA**, and in this regard is satisfied as to the two main requirements, namely, that the Claimants/Respondents are foreign representatives in a foreign proceeding within the meaning of the **BIA**; and secondly, the Claimants/Respondents have satisfied this Court that a debtor is insolvent and that they are the duly appointed foreign representatives within the meaning of **section 223** of the **BIA**.

[71] This Court accordingly accepts the submission of counsel for the Claimants/Respondents that this application falls within the regime or mechanism provided for in the **BIA** for the co-ordination of local proceedings with foreign proceedings and not within the regime or mechanism for the reciprocal enforcement of a judgment.

[72] The issue of the effect of the discharge of 23 June, 2016 is a matter for the trial judge on the hearing of the substantive action on a consideration of

the above-mentioned expert testimony. It should however be observed here that the **BIA** at **sections 146 to 160** deals specifically with the issue of Discharge of Bankrupts.

[73] Having accepted that this application is not caught by the requirements of the **FCJA** or **Part 72** of the **CPR**, there is no basis for the striking out of this application and this Court declines to so do.

[74] It does so, however, in full recognition of the wide discretionary powers given to the Court by the **BIA** in the case management of this action and also, in full recognition of the fact that the issue of the third party interests/the existence of a trust has yet to be determined by this Court in accordance with the provisions of the **BIA** and **CPR**.

Disposal

[75] In the premises, this Court orders as follows:

1. Leave is granted to the Claimants/Respondents to amend the Fixed Date Claim Form.
2. The application of 22 September 2016 to strike out the substantive proceedings is dismissed;
3. The Claimants/Respondents shall have their costs to be determined on application to the court if not agreed within the next 28 days;
4. This matter shall be set down for case management within the next 28 days.

[76] This and other decisions were intended for delivery in the first quarter of this year. Our removal from Coleridge Street and other challenges has resulted in the delay in the delivery of this judgement and others and for this I unreservedly apologise.

MARGARET A. REIFER
Judge of the High Court