BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit 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 — **FIRST CLAIMANT**
(as Trustee of the Bankruptcy of
Lindsay Adolphus Cumberbatch (in Bankruptcy)

WENDY JANE WARDELL — **SECOND CLAIMANT**
(as Trustee of the Estate of
Lindsay Adolphus Cumberbatch (in Bankruptcy)

AND

LINDSAY ADOLPHUS CUMBERBATCH — **DEEFENDANT**
(in Bankruptcy)

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Dates of Hearing: 2020: 24 February
4 May
4 June

Date of Decision: 2020: 12 June

Appearances:

Ms. Taylor Laurayne, for the Claimants

Ms. Fawn Phillips-Singh for the Defendant

Cross-border insolvency – Bankruptcy and Insolvency Act of Barbados, Cap. 303, Part XI – Sections 224(1) and 227(3) - Appointment of Interim Receiver, Principles to be applied.

DECISION

INTRODUCTION

[1] This is a claim for orders pursuant to **sections 224** and **227** of the **Bankruptcy and Insolvency Act, Cap. 303 of the Laws of Barbados**. The Claim derives from proceedings commenced in England, by which the Defendant Mr. Lindsay A. Cumberbatch was adjudged bankrupt by order of the County Court of Bristol, England in June, 2015.

The Claimants are the Defendant's Trustees in Bankruptcy, who filed this Claim in April, 2016, seeking primarily the appointment of an interim receiver in order to administer the Defendant's estate in Barbados. The Defendant's estate in Barbados comprises one piece of real property, the legal title of which is in his name, and which is said to yield rental income. In response to the Claim, the Defendant initially contended that as the Bristol Court's order was discharged in June 2016, this Court lacked jurisdiction to entertain the Claim. By the time of hearing of the matter however, the Defendant's position rested

not upon any challenge arising from his discharge from bankruptcy, but on the basis that albeit he was the legal owner, his property was subject to significant equitable interests in favour of his parents. As a consequence the Defendant contended that the Court ought not to grant the order for interim receiver sought, as being subject to a trust, the property should be excluded from his estate. The matter was heard by way of oral and written submissions on the 24th February, 2020, with follow up submissions requested by the Court in May, 2020. This is the Court's decision.

ISSUES

[2] The issues which arise for determination in this matter are briefly stated as follows:-

(i) What is the effect on the Claim, if any, of the Defendant's discharge from bankruptcy in England?

(ii) Should the Claimants be recognized as foreign representatives in accordance with **section 224(1)** of **the Act**?

(iii) If yes to (ii) above, is it appropriate within the circumstances of this Claim, for the Court to exercise its discretion to appoint the Claimants as interim receivers of the subject property, pursuant to **section 227(3)** of **the Act**?

BACKGROUND AND PROCEDURAL HISTORY

[3] The uncontested facts which underpin this matter commence with the Defendant having been adjudged bankrupt in England on the 23rd June, 2015, by order of the Bristol County Court, England ('the Bristol Court').

Other than to state that the Defendant's financial difficulty involved an unsatisfied monetary judgment against him, it is not necessary to consider any further details relative to his bankruptcy. As Trustees in bankruptcy, the Claimants applied to the Court for certain relief pursuant to the **Bankruptcy and Insolvency Act, Cap. 303 of the Laws of Barbados ('the Act/the BIA')**. The Claim was filed in April, 2016, supported by a joint affidavit of the Claimants which detailed the circumstances giving rise to the bankruptcy order and details of the Bristol Court proceedings. Subsequent to the commencement of this Claim, the Defendant was discharged from bankruptcy by the Bristol Court, in June, 2016. The Defendant's initial position in response to the Claim was that the Court lacked jurisdiction to entertain the matter, because of the discharge of the bankruptcy order against him. Flowing from this position, the Defendant applied (in September, 2016) to strike out the Claim on the basis of the Court's lack of jurisdiction; as well as on the additional basis that being a foreign judgment, the Claimants ought to have sought recognition or registration of the Bristol Court's order, in order to enforce it. The Claimants resisted the Application to Strike Out and with respect to the contention regarding the Defendant's discharge from bankruptcy, filed an affidavit of an expert witness, deposing to the legal position in England.

[4] The Defendant's Application to Strike was heard in September, 2017 and dismissed in December, 2018 in a written Ruling. That Ruling determined that the matter had been properly brought within the ambit of the Act, as opposed to being required to be brought under any legal framework for reciprocal enforcement or registration of foreign judgments. Aside from this point, Counsel for the Claimant contends that the Ruling expressly determined issue (ii) as set out above, but the Court will make that determination on the effect of the Ruling, for itself. With respect to the issue of the effect of the discharge of the order of bankruptcy against the Defendant, the learned judge left this issue to the substantive hearing, which is herein set out as issue (i). Subsequent to the dismissal of the Defendant's Application to Strike, the Claimants filed an amended fixed date claim only slightly altering the substantive relief claimed.

[5] The Defendant filed an affidavit setting out the basis of the equitable claim asserted on behalf of his parents, but filed no ancillary claim seeking relief from the Court based on his assertions. Instead, the Defendant in his affidavit, appeared to claim such relief in respect of his parents, who remained third parties not before the Court. The Claimants filed further evidence notifying the Court of changes (in England) to the trusteeship of the Defendant's estate in bankruptcy. Counsel for the Claimants filed legal submissions in support

of the relief sought in the Claim whilst Counsel for the Defendant rested on the prior submissions filed on behalf of the Defendant in support of the Application to Strike Out. The Claim was heard in February, 2020 and in May, 2020 the Court by order, invited respective Counsel to file further submissions on certain legal questions which arose during the Court's deliberation. The additional submissions sought concerned the applicability if any, of the UNCITRAL Model Law on Cross Border Insolvency, 1997, to Part XI of the Act; and the question of whether the appointment of an interim receiver could be effected subsequent to that of a trustee in bankruptcy. Both Counsel obliged the Court with further written submissions, for which the Court is entirely grateful.

Issue (i) – The effect of the discharge of the bankruptcy order

[6] By the time of the substantive hearing of the matter Counsel for the Defendant was no longer advancing the initial argument that the Court lacked jurisdiction to entertain the Claim, given the Defendant's discharge from bankruptcy by the Bristol Court in June, 2016. Notwithstanding this position was no longer advanced by the Defendant, the Court considers it necessary to definitively dispose of the issue of the effect of the Defendant's discharge from bankruptcy. Counsel for the Claimants relied on the affidavit of English

Solicitor Mr. Graham McPhie[1], as an expert on a point of foreign law. The position advanced by Counsel for the Claimants as supported by the affidavit of Mr. McPhie, was firstly, that the effect of the bankruptcy order was to vest the Defendant's property – all property of every description, wherever situate – in his bankrupt estate, which was then assigned to the trustees in bankruptcy upon their appointment as such in England.

The law relied upon and verified by the affidavit of Mr. McPhie was extracted from the Insolvency Act 1986 of the Laws of England, and the learning set out in Halsbury's Laws of England.[2] Counsel's submissions on the issue of the effect of the discharge of the bankruptcy order continued - that upon a bankruptcy order, the bankrupt's creditors can no longer pursue any remedy personally against the bankrupt. A creditor is required to prove its debt to the trustee in bankruptcy and upon such proof, is entitled to pro rata distribution (along with other creditors) from the proceeds realized from the bankrupt's estate.

---

[1] Affidavit of Graham McPhie filed on Nov. 23th, 2016, paras 7-8.

[2] Para. 32 et seq., Submissions on behalf of the Claimant (Nov. 17th, 2016; June 27th, 2019); Halsbury's Laws of England, Conflict of Laws (Vol. 19, para 775).

[7] It was further explained in Counsel's submissions, that in accordance with the provisions of the Insolvency Act of England[3], a bankrupt is discharged from bankruptcy at the end of one year from the date of commencement of bankruptcy. The discharge of the bankrupt results in his release from all personal liability from creditors, whilst his estate, remains vested in the trustees, and continues to be realized for satisfaction of all debts proven by creditors. As a consequence, it was contended that the discharge of the bankruptcy order against the Defendant did not preclude the Claimants as trustees of his bankrupt estate, from seeking to collect in and administer his estate for distribution. As a consequence, given the effect of the bankruptcy order, the Defendant's property situate in Barbados, became part of his bankrupt estate, vested in the trustees and as such liable to be administered by the Claimants. Counsel acknowledged however, that despite the fact of the defendant's property in Barbados being subject to the bankruptcy order, the Claimants were obliged to apply for relief in the terms prayed, on account of the property being situated outside of the territorial jurisdiction of the English court. There was no legal argument put forward in rebuttal of this position by Counsel for the Defendants.

[3] Insolvency Act, 1986 (UK) s. 279 et seq.

Discussion and Analysis – Issue (i)

[8] The Court acknowledges **CPR Rule 31.2** which enables a party to adduce evidence on a question of foreign law[4]. No objection was taken to the affidavit of Mr. Graham McPhie, which was filed in November, 2016. The Court accepts the evidence adduced on the question of the effect of discharge of a bankrupt under the law of England, specifically, with reference to **sections 279-281** of **the Insolvency Act of England, 1986**. This evidence is to the effect that (subject to statutory exceptions), the discharge of a bankrupt releases the person from any further personal liability for their debts, whilst the estate in bankruptcy continues to be administered for the purpose of satisfaction of all claims proved by creditors. As a matter of information, the Court notes the comparable provisions of **sections 146** through **160** of **Barbados' Act (Cap. 303)** on the discharge of a bankruptcy order, but those provisions are not what the Court is required to consider. Instead, the Court also takes notice of judicial authority available in relation to the English Act, which speaks to the issue of the effect of discharge of a bankrupt. One such authority is the case of **Law Society and others v Shah and others; Law Society v Official Receiver and others.**[5] This case arose out of a claim by a

[4] The applicability of the CPR 2008 to these bankruptcy proceedings however is subject to comment at paras 19-20 of this decision.
[5] [2009] Ch 223

creditor against an insurer, for a debt owed by a discharged bankrupt. The underlying facts of the claim are not germane to the issue before this Court, but the court therein directly addressed the issue of the effect of the discharge of bankruptcy, having regard to the insurer's response to the claim against it by the creditor. The insurer's argument was that the discharge of the bankruptcy order extinguished not only the bankrupt's personal liability for his debts, but also the cause of action giving rise to those debts.

[9] **Floyd J** set out the insurer's argument thus[6]:-

> "Richard Sheldon, who appeared on behalf of the insurers and the discharged bankrupts with Stephen Robins, submitted that the effect of the discharge of a bankrupt was to "extinguish" his debts. By this he meant that the discharge had the effect not simply of releasing the bankrupt from the remedy of an order for payment, but also extinguishing the cause of action on which the obligation to pay is founded. If he is right about this then it provides a short cut to success for his clients, because nobody can claim on insurance in respect of an obligation which has been wholly extinguished."

Floyd J then illustrated the issue of extinguishment of a cause of action versus a remedy, with reference to the position in respect of limitation of actions, insofar as the period of limitation is said to bar the remedy as opposed to the right[7]. With respect to the issue in relation to discharge of bankruptcy,

---

[6] Ibid @ pg 236

[7] Law Society et al v Shah, *supra* @ pg 236.

Floyd J first referred to **section 281(1)** of **the Insolvency Act, 1986** insofar as it provides as follows (emphasis mine):-

> "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 trustee of his estate, or (b) on the operation, for the purposes of carrying out those functions, on 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."

He thereafter stated (emphasis mine):-

> "This language, which preserves the right to "prove … any debt from which the bankrupt is released", suggests to me that the underlying cause of action remains, so that it can be proved in the bankruptcy after discharge. It is only the remedy of enforcement as against the bankrupt which is extinguished, the creditor being left to the collective enforcement procedure under the 1986 Act to secure satisfaction of the underlying cause of action out of the estate in the hands of the trustee in bankruptcy, perhaps only to the limited extent that he can."[8]

[10] The Court is of the view that both section 281(1) of the English Insolvency Act, 1986 and the interpretation thereof provide a clear basis upon which to rest the Court's acceptance of the evidence on the effect of a discharge from bankruptcy under the law of England, as adduced by the Claimants. In the circumstances, it is determined that the Defendant's discharge from Bankruptcy by the Bristol Court in June, 2016 had the effect only of

[8] Ibid @ 237.

discharging him from personal liability (i.e. from being liable to any further suit or enforcement) for his debts.

Notwithstanding this discharge from personal liability, the Court also determines as contended by the Claimants, that the order of bankruptcy resulted in a vesting of the Defendant's property in his estate in bankruptcy[9], such estate subsequently having been assigned to the Claimants in August, 2016 upon their appointment as his Trustees in Bankruptcy. The Claimants were therefore entitled to bring the claim seeking relief as Trustees in Bankruptcy of the Defendant's estate. The Court will now examine the relief claimed and the entitlement of the Claimants to such relief.

Issue (ii) The 224 Declarations

[11] By their amended fixed date claim, the relief sought by the Claimants was for orders and declarations, inter alia, that the Court (paraphrased):-

(i) Recognize the Bristol Court bankruptcy proceedings as foreign proceedings;

(ii) Recognize the Claimants as foreign representatives within the meaning of **sections 223** and **224** of **the Act**;

(iii) Accept the certified copy of the Bristol Court's bankruptcy order, as proof that the Defendant is insolvent.

---

[9] Confirmed by the Affidavit of McPhie, paras 7- 8.

More significantly however, the Claimants sought the following:-

> "...4. An order that Mr. Craig Lawrence Waterman, a trustee licensed pursuant to section 165 of the Bankruptcy and Insolvency Act, Cap. 303 of the Laws of Barbados, be appointed as the interim receiver of the property of Lindsay Adolphus Cumberbatch (in Bankruptcy) situated in Barbados and described as Lot 40 Heywoods, St. Peter, in this Island pursuant to section 227 of the Bankruptcy and Insolvency Act, Cap. 303;
>
> 5. 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."

As can be seen, the relief sought by the Claimant invokes two separate provisions under Part XI of the Act, which is headed 'International Insolvencies'. The provisions under which the relief is sought are sections 224(1) and 227(3).

As correctly identified by the amended fixed date claim, the operationalization of Part XI of the Act rests upon satisfaction of certain preconditions, which are outlined in the definitions set out under section 223.

[12] **Section 223** of **the Act** sets out the following definitions:-

> "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;
>
> "foreign proceeding" means 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;
>
> "foreign representative" means a person, other than a debtor, holding office under the law of a jurisdiction outside Barbados who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Barbados, functions in connection with a foreign proceeding that are similar to those performed by a trustee, liquidator, administrator or receiver appointed by the Court.

Section 224(1), pursuant to which the Claimant seeks relief, 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…"

The Claimants seek relief under **section 227(3)** in their capacity as foreign representatives as against the Defendant as a debtor, hence the reason they are obliged to and have sought, that the Court first declare their status as foreign representatives as well as that the Defendant is a debtor, both as defined under **section 223**.

[13] In the prior Ruling on the Defendant's Application to Strike Out, the learned judge firstly accepted that the proceedings fell within the definition of 'foreign proceedings' as defined in section 223.[10] Further, the learned judge also ruled in the strike out proceedings that she was satisfied that the Claimants were foreign representatives in foreign proceedings and that the debtor is insolvent, both as defined within the meanings set out in section 223 of the Act. With respect to Counsel for the Claimants' contention that these prior findings of the Judge dispose of the issue of the Trustees' entitlement to a declaration in accordance with section 224(1) of the Act, this Court is inclined to agree. The main thrust of the Application to Strike Out concerned the issue of registration or recognition of judgments, or in other words, the correctness of proceeding under this Act. The strike out Ruling affirmed these proceedings as having been correctly brought and as a prerequisite to commencing these proceedings, was required to make a finding that the Claimants in fact possessed the necessary standing as dictated by the definitions of 'debtor', 'foreign proceeding' and foreign representative, all as defined by section 223 of the Act.

[14] The mechanism for making such a finding is provided by section 224(1), in the form of provision to the court of a certified copy of the order in the foreign

---

[10] Ruling dated December 12th, 2018 per Reifer J @ para 44-48.

proceedings in question. Pursuant to section 224(1), the order in the foreign proceedings would be deemed accepted as proof of (i) the existence and nature of such foreign proceedings; (ii) the qualification of the defendant as debtor according to one of the three modes in which debtor is defined; and (iii) the appointment of relevant persons as foreign representatives. This Court by its prior Ruling, has already determined that the certified copy of the Defendant's order of bankruptcy and appointment of the Claimants as trustees has been accepted, thereby Counsel for the Claimants' contention that the issue has already been decided, is likewise accepted. In this regard the Court determines that the Claimants are already by the prior Ruling, entitled to the declarations which affirm their satisfaction of the requirements of section 224(1) of the Act. The Court will accordingly declare pursuant to section 224(1) of the Act, that by virtue of its acceptance of the certified copy of the Bankruptcy Order made against the Defendant by the Bristol County Court on the 23rd June, 2015:-

(i) The Defendant is a debtor within the definition of section 223 of the Bankruptcy and Insolvency Act of Barbados; more particularly, that the Defendant is a person who has the status of a bankrupt under foreign law in a foreign proceeding and has property in Barbados; and

(ii) The Claimants, having been appointed by the Bristol County Court as Trustees to the Defendant's estate in Bankruptcy, are foreign representatives within the meaning of section 223 of the said Act.

Issue (iii) – Appointment of Interim Receiver

[15] The declarations made pursuant to section 224(1), now make way for the Court to entertain the final issue remaining for determination. That is, whether as prayed by the Claimants, the Court should exercise its power under section 227(3) of the Act, to appoint an interim receiver to the Defendant's property in Barbados. **Section 227** is set out in its entirety as follows:-

> "**227**(1) The Court may seek the aid and assistance of a court, tribunal or other authority in a foreign proceeding by order or written request or otherwise as the Court considers appropriate.
>
> (2) On application by a foreign representative in respect of a foreign proceeding commenced for the purpose of effecting a composition, an extension of time or a scheme of arrangement in respect of a debtor or in respect of the bankruptcy of a debtor, the Court may grant a stay of proceedings against the debtor or the debtor's property in Barbados on such terms and for such period as is consistent with the relief provided for under sections 41 to 44 in respect of a debtor in Barbados who files a notice of intention or a proposal or who becomes bankrupt in Barbados.
>
> **(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) direct 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**

(iii) **take such other action as the Court considers appropriate.**

(4) Section 10 applies, with such modifications as the circumstances require, in respect of an interim receiver appointed under subsection (3).

(5) On application of a foreign representative in respect of a debtor, the Court may authorise the examination under oath by the foreign representative of the debtor or of any person in relation to the debtor who, if the debtor were a bankrupt referred to in section 140, would be a person who could be examined under that subsection.

Submissions on behalf of the Claimant

[16] Counsel for the Claimants regards the claim before the Court as a straightforward one, which was required to be brought only as a result of principles of private international law, which arguably preclude them from enforcing their rights over the Defendant's property in Barbados without the sanction of the laws of Barbados.[11] More particularly, Counsel for the Claimants submits that the appointment of an interim receiver (pursuant to section 227(3)), with a power of sale, is a permissible and appropriate course of action, available to give effect to the Claimants' powers to realise and distribute the Defendant's (Bankrupt's) estate. The Court understands

[11] Submissions on behalf of Claimants, citing Dicey, Morris & Collins 13th Ed. 2000 Vol. 2, p. 1186

Counsel for the Claimants' argument to be structured in the following manner:-

(i) The bankruptcy order and corresponding assignment of the Defendant's property to the trustees in bankruptcy (the Claimants), operated to transfer title to all of the Defendant's property, moveable and immoveable, wherever situate, to the trustees. Therefore, the Defendant's property in Barbados (the Heywoods, St. Peter property) is in fact vested in the Claimants as trustees in bankruptcy;

(ii) Such vesting of the property aside, the principles of private international law restrict the extra territorial application of the bankruptcy order over the Defendant's property and the Claimants are thus obliged to seek authorization under the laws of Barbados, to give effect to the powers of the Claimants, as trustees;

(iii) The appointment of an interim receiver pursuant to section 227(3) of the Bankruptcy and Insolvency Act of Barbados, provides the legal basis upon which the Claimants, in their capacity as foreign representatives (as defined in Part XI of the Act), would be clothed with the authority to deal with the Defendant's property in Barbados;

(iv) With respect to the application of section 227(3), the Claimants invoke both qualifying grounds for appointment of an interim receiver, namely

'for the protection of the Defendant's estate', as well as 'for the protection of the interests of the creditors';

(v) The appointment of an interim receiver typically includes the power of sale and such a power would be appropriately granted in the instant case, as the Defendant's assertion that he holds the property on trust for his parents, establishes a risk of dissipation, should the interim receivership not be granted. Authority in support of the position that the interim receiver's powers includes a power of sale is submitted as **Big Sky Living Inc. (Re)**[12];

(vi) Over and above the Court's express powers enabled by section 227(3), the Court, should as a matter of comity, give effect to the English bankruptcy order. Counsel illustrates this position with reference to **Babcock & Wilcox Canada Ltd.**[13]

Submissions on behalf of the Defendant

[17] The Defendant's position was to the effect that the property in question was subject to a trust in favour of his parents and as such could not form part of his estate. Counsel for the Defendant rested on her initial written submissions produced in support of her application to strike out the claim (said application

[12] [2002] A.J. No. 886

[13] 2000 Can LII 22482 (ON SC).

having been dismissed by Reifer J. in December, 2018). These submissions identified the issue of whether the property in question was subject to a constructive trust held by the Defendant in favour of his parents.

At that time, the Defendant's submissions regarding the existence of the trust, relied upon affidavits (of the Defendant and of his mother), which had not been filed and as such were not before the Court. In disposing of the application to strike out, Reifer J. declined to treat with the affidavits as they had not been filed and as such were not properly before the Court[14].

[18] Further and in any event, Reifer J. ruled that the issue itself of whether or not a trust of the property existed in favour of the Defendant's parents was not before her in the application to strike out[15]. Subsequent to the dismissal of his application to strike out, the Defendant filed an affidavit (in May, 2019) in which he laid out the evidence upon which he based his assertion of the beneficial interest in the property held by his parents. In the concluding paragraphs of that affidavit the Defendant prayed relief in the round, which sought to have the Court declare and determine the beneficial interest in the property held by his parents. In addition to whether or not the Defendant holds the property on trust for his parents, Counsel for the Defendant resisted the

---

[14] Ruling of Reifer J dd 12th December, 2018 para. 18

[15] Ibid @ para 20.

appointment of an interim receiver and the powers consequent upon such appointment on the basis that there was no evidence of there being any risk of dissipation of the property.

Discussion and Analysis of Issue (iii)

[19] The Defendant's case raises an issue of procedural law which the Court considers necessary to highlight, even though it will not form part of the Court's *ratio* and these remarks by the Court will be *obiter*. This claim was commenced by way of Fixed Date Claim pursuant to CPR 2008 and comprises proceedings entirely arising under the Bankruptcy and Insolvency Act, Cap. 303. This makes the claim a bankruptcy proceeding. CPR Rule 2.2(3)(a) expressly excludes the application of the CPR 2008 to bankruptcy and insolvency proceedings. Cap. 303 as it currently stands, expressly repealed its predecessor, the Bankruptcy Act (1925).[16]

Pursuant to section 119 of the predecessor Act, the Bankruptcy Rules 1928 were brought into force and subsisted to govern the practice and procedure relating to bankruptcy. It is not apparent whether these old Rules were ever expressly repealed and there is no express transitional provision in the new Act, saving their validity. Instead, it appears to be the case that the repeal of the Bankruptcy Act has been treated as an automatic repeal of the Bankruptcy

[16] Section 256 of the BIA Cap. 303

Rules. However, section 30(3) of the Interpretation Act, Cap. 1 of the Laws of Barbados, preserves the validity inter alia, of any statutory instrument made under an enactment that is repealed or revoked, within certain parameters[17]. One such parameter is that the repealed or revoked enactment be replaced with an enactment that amends, revises or consolidates it. The BIA, according to its short title, is an Act to revise the law relating to bankruptcy and insolvency. Further, whilst the BIA in section 256 expressly repeals the Bankruptcy Act, Part X of the BIA headed 'Courts and Procedure' makes continuous reference to the 'Bankruptcy Rules', as opposed to 'any rules made under this Act'. The latter terminology is what would have been expected were it intended that the rules referenced in Part X meant rules prospectively enacted pursuant to the general power to make rules which is provided for under section 248 of the BIA.

[20] To illustrate, **section 211** of the **BIA** provides:-

> *"211.* The Court shall, have and exercise jurisdiction in respect of bankrupts and matters of insolvency, and such jurisdiction shall be exercised under and subject to this Act, the Bankruptcy Rules and any other enactment relating to bankruptcy and insolvency.

[17] By definition in the Interpretation Act (section 2), a statutory instrument would include rules or regulations made under an enactment.

Further, section 212 goes on to prescribe the manner in which proceedings filed must be intituled but it does so - '*subject to the Bankruptcy Rules'*. Reference is continuously made to the Bankruptcy Rules in the remainder of Part X, as well as other parts of the BIA[18], in terms which render it at best obvious or at worst arguable, that the 'Bankruptcy Rules' repeatedly referred to therein, are the 1928 Bankruptcy Rules or Rules that already existed.

This view of the Court notwithstanding, the question of the correctness or not of commencing these proceedings under the CPR 2008 was neither raised nor ventilated at the hearing, save for cursory inquiry by the Court. Having become seized of these proceedings at the advanced stage of substantive hearing, this procedural issue was not one which this Court could fairly pursue, without substantial prejudice to both sides, or further delay. However, the Court expresses its view that the question of the correct procedure for commencing bankruptcy and insolvency proceedings is not merely a matter of form that can ignore the express exclusion of CPR 2.2(3)(a). Substantive rights of parties in relation to the distinct processes involved in bankruptcy proceedings, would be enabled or otherwise regulated by the rules specifically intended to apply. For now however, the Court invokes section 214 of the BIA

---

[18] For example – s. 236(5) which makes it an offence to contravene any part of the Bankrupty Rules; s.10(c)(f), duties of a receiver to be in accordance with the Bankruptcy Rules; s.39(2)(a) – calculation by trustee of income to be retained by bankrupt.

which makes provision for the preservation of proceedings notwithstanding irregularities or defects of form.

[21] Returning to the substantive issue before the Court, consideration is first made of the Defendant's position in response to the claim. The Defendant's assertion of the existence of a trust and prayers for relief in that regard have not in the Court's view been effectively put before the Court. The Court holds this view for a number of reasons. In light of the bankruptcy, there are specific principles and processes which govern the composition and handling of the bankrupt's estate. Therefore, any claim being made by a third party would have to be made within the regime applicable for dealing with the bankrupt's property. Further, (questionable manner of commencement of the proceedings under the CPR aside), an affidavit response could not suffice to move the Court even in ordinary civil proceedings, in relation to rights asserted on behalf of third parties, who are themselves not before the Court. The beneficial interest claimed on behalf of the Defendant's parents, needed to have been asserted by moving the Court either by ancillary or separate claim. Additionally, within the parameters of the existing proceedings, aside from the prayer for relief in his affidavit in response to the (amended) claim, there was no management of the issue in any way which afforded or obliged the

Claimants to respond to the Defendant's assertion of his parents' beneficial interest in the property in issue.

[22] The Court is also cognizant of the fact that these current proceedings have been filed for the purpose of trustees obtaining assistance in respect of a foreign proceeding, and that no bankruptcy proceedings proper, have been commenced against the Defendant under the BIA. As a result, the scope of these proceedings (unless they had properly been enlarged by proceedings brought by the Defendant on the asserted issue of beneficial ownership), is limited by the provisions subsisting in relation to Part XI of the BIA. The Court continues to remind itself however, that subject to section 224(6) of the BIA[19], the wider provisions of the BIA are not under consideration in this case. In relation to the Defendant's argument that the property in question is subject to a trust in favour of his parents, thereby disqualifying it from forming part of the Defendant's estate, the Court rules that the issue of the beneficial ownership of the property was not before the Court for determination. The appointment of interim receiver sought by the Claimants can therefore not be refused on the basis that any such beneficial ownership of the property exists.

The claim for the appointment of interim receiver

---

[19] *"(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."*

[23] According to the Claimant's submissions, the Court's power to appoint an interim receiver with powers to take possession of or sell property is clearly and expressly provided for by section 227(3) of the BIA. The issue for the Court is whether this power should be exercised in the instant circumstances. The Court has some reservations in relation to the circumstances in which this power ought properly to be exercised. The first recourse in determining whether that power should be exercised, is to examine the legislative scheme and intent of Part XI of the BIA. Counsel for the Claimant had submitted (in her prior submissions on the hearing of the application to strike out), that the BIA is modelled on the Canadian Bankruptcy and Insolvency Act 1985, as it stood amended in 2001. The Court accepts this to be the position, but ponders whether the origins of Part XI of the BIA can be taken beyond the Canadian legislation.

The Canadian Bankruptcy and Insolvency Act, RSC 1985, ('the Canadian BIA') contains a similar Part XIII, titled 'Cross Border Insolvency' – which was introduced by amendment in 1997. The year 1997 is significant as it signifies the issuance of the first UNCITRAL Model Law on Cross-Border Insolvency.[20] The scheme of Canada's Part XIII bears resemblance to the

[20] United Nations Commission on International Trade Law (UNCITRAL) Report of Working Group on Insolvency Law from its 21st Session; model law brought into force by UN General Assembly Resolution No. 52/158, dd 30th January, 1998 (by meeting of 72nd Plenary Session on 15 December, 1997).

UNCITRAL 1997 Model Law on Cross-border Insolvency (the Model Law) and any such relation would be of assistance to the Court in determining the scope of application of Part XI of the BIA. It is in this regard, (i.e. whether the provisions of Part XI, as derived from the Canadian BIA's Part XIII, bear any relation to the UNCITRAL Model Law 1997), that the Court invited the further submissions of Counsel.

[24] In her submissions in response to the Court's question, Counsel for the Claimant pointed out the obvious in respect of which there is no demur – that Barbados has not incorporated (enacted is the more appropriate terminology) the Model Law into its domestic law. Counsel also points out, that Canada did not adopt the Model Law until 2005 – which is also correct. In fact, Counsel submits that the Canadian BIA Part XIII, when introduced by amendment in 1997, was enacted without reference or intention to incorporate the Model Law. Counsel cited Canadian publication 'The 2001 Annotated Bankruptcy and Insolvency Act' which offered a brief explanation as to the purpose of Part XIII and made no reference to UNCITRAL. As a result, Counsel submits, the Barbados BIA enacted in 2001, is not referable to the UNCITRAL Model Law. Counsel for the Defendant on the other hand contends that there must be a relation between the BIA's Part XI and the UNCITRAL Model Law given the similarity of several of its articles (particularly, article 21), to specified

provisions of Part XI. Counsel for the Defendant illustrated the apparent similarity of these provisions, particularly that under consideration in these proceedings - section 227(3) - with article 21(1)(e) of the Model Law. Counsel for the Defendant further extracted a number of other provisions in Part XI which either significantly reflect or by implication are similar to the particular articles in the Model Law.

[25] For a bit more assistance on the context of Part XI, the Court considers academic writings from Professor Jacob Ziegel[21], Professor of Law Emeritus, University of Toronto and the Canadian Supreme Court decision **Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)**[22]. The Court is somewhat emboldened in relation to the writings of Professor Ziegel, by the fact that his work on cross border insolvency is also cited by the Supreme Court in **Holt**. In his Article which examined judicial co-operation between Canada and the United States in cross border insolvencies, Professor Ziegel gave a comparative overview of the applicable law as it was prior to the introduction of the Canadian BIA's Part XIII; the provisions of Part XIII (having come into force in 1997) and the subsequent enactment of the Model Law in 2005. This overview affords some insight into the framework and

[21] Canada-US Cross Border Relations and the UNCITRAL Model Law, Brooklyn Journal of International Law, Vol 32 Issue 3 Article 12, pg .
[22] [2001] 3 SCR 907

intended operation of Canada's Part XIII, which would obviously then inform the Court's understanding of the intended operation of Barbados' Part XI. Professor Ziegel adverts to the fact that much like the English position, the Canadian position pre 1997 was that issues arising from cross border insolvency and personal bankruptcy were primarily decided by common law principles of private international law. The overall common law position was said to be one of 'modified universalism', as opposed to 'territorialism'[23] the latter adopted by most civil law countries.

[26] These concepts will be briefly examined in the discussion of **Holt**, which follows shortly. Professor Ziegler categorized most cross border issues as initially arising from personal bankruptcy, partnerships and insolvencies of small companies. He then identified financial collapses of major companies in the US and Canada in the 1980's and 1990's as fueling a rise of cross border insolvency issues which in the absence of specific laws, were addressed by insolvency administrators working harmoniously together and by direct court to court communication. (These relations were incidentally said to have strongly influenced the development of the UNCITRAL Model Law).[24] Thereafter followed the 1997 Part XIII, of which Professor Ziegel said thus:-

---

[23] Ziegel supra @ pg 1045
[24] Ibid @ pg 1046

> "Part XIII of the 1997 BIA amendments, introducing the new statutory conflict of law rules, comprises eight sections; The dominant motifs of the drafters were to encourage dual insolvency proceedings in Canada and the United States where the debtor had assets in both jurisdictions and to say nothing explicitly that would encourage Canadian courts to authorize removal of Canadian based assets by a foreign representative. This cautious approach was urged upon the drafting committee by the banking representatives who were worried that the long arm of U.S. bankruptcy courts would attempt to reach out to Canadian assets pledged as security to Canadian banks and to have them removed or realized in accordance with United States rather than Canadian bankruptcy law principles."

Notwithstanding the primary aim of co-operation on cross border insolvency issues, Professor Ziegel described the Part XIII provisions as 'cautious', specifically intended to protect Canadian sovereignty, for example[25] –

> "Further emphasis on the protection of Canadian sovereignty appears in section 268(6) (Canadian courts not obliged to give effect to foreign court orders) and in section 269 (no automatic enforcement of foreign stay of proceedings orders in Canada not endorsed by a Canadian court)".

The Barbadian equivalent of these protective provisions are **sections 224(2) – (6)**; **225** and **228**.

[27] The Canadian Part XIII equivalent to section 227(3), (here under consideration) is section 271(3) in respect of which Ziegel said as follows[26]:-

> "**Section 271(3)** is somewhat friendlier to the foreign representative. This section empowers the Canadian court, where it is satisfied that it is necessary for the protection of the debtor's estate or the interests of a creditor or creditors, to appoint a trustee as interim receiver of all or part of the debtor's Canadian property and to direct the interim receiver, inter alia, to take possession of that property and to exercise

[25] Ziegel, Cross Border Insolvency supra @ pg. 1048
[26] Ibid, pg 1049

> such control over the property and over the debtor's business in Canada as the court considers appropriate. Unlike section 268(3), section 271(3) is not predicated on the existence of concurrent insolvency proceedings in Canada and the foreign jurisdiction. Nevertheless, the section does require the appointment of a Canadian trustee if the foreign representative wants to assert any kind of control over the Canadian based assets even if the costs of doing so exceeds the value of the assets."

In addition to Canada's section 271(3) - (section 227(3) under the BIA), the Court notes section 270, which is section 226 under the BIA, pursuant to which a foreign representative may institute bankruptcy proceedings in Canada/Barbados. The Court now turns its attention to **Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)** which provides a judicial interpretation of applicable principles in Canadian law before and after the 1997 amendment which enacted Part XIII.

[28] The facts of this decision are not relevant to the Court's inquiry into the intended application of Part XI of the BIA. It suffices to state however that the case involved proceedings *in rem* in relation to a Belgian ship arrested in Canada at the instance of the ship's secured creditors. These proceedings conflicted with a bankruptcy order subsequently issued in Belgium (and recognized by the Bankruptcy Court in Canada) against the owners of the ship. At the time of the Belgian bankruptcy order, the *in rem* proceedings had already been determined by a default judgment against the owners and the ship had been ordered appraised and sold. The trustees in Bankruptcy

appointed by the Belgian court, applied in Canada (the Federal Court) for the *in rem* proceedings to be stayed or alternatively to have the ship or its proceeds of sale vested in them for purposes of distribution of the bankrupt ship owner's estate. The Federal Court declined the relief sought by the trustees, who appealed to the Supreme Court. The Supreme Court ultimately dismissed the trustees' appeal, thereby affirming the prior claim of the secured creditor against the foreign bankruptcy proceedings. The relevance to the case at bar, is that on the way to their decision, the Supreme Court examined and discussed the law applicable in Canada to cross border insolvencies at the material time of institution of that case. Additionally, the Supreme Court also discussed the effects and intended purpose of Part XIII of the Canadian BIA, which by the time of the delivery of their decision, had taken effect as an amendment to the law.

[29] The Court recalls its earlier reference from Professor Ziegel, to the terms 'modified universalism' and 'territorialism'. These terms will now be explained with reference to proper judicial authority, namely the Canadian Supreme Court in **Holt**.

As has been posited by Counsel for the Claimant, the Court's jurisdiction under Part XI of the BIA is to be exercised with reference to international

comity[27]. Recalling that the court was considering (in the absence of a statutory framework), whether to stay an admiralty claim *in rem* in order to give effect to a foreign bankruptcy order, Binnie J. delivering on behalf of the Supreme Court in **Holt**, said the following in relation to comity[28]:-

> '"*In* Zingre v. The Queen, [1981] 2 S.C.R. 392, *Dickson J. (as he then was) commented at p. 401 that "the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect"...*
>
> *Subsequently, in* Spencer v. The Queen, [1985] 2 S.C.R. 278, at p. 283, *Estey J. accepted as accurate the following definition of international comity:*
>
> *"Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due 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:.."'*

[27] Claimant's submissions, Nov. 17, 2016 paras 23-27, citing inter alia **Babcock & Wilcox Canada Ltd.** 2000 Can LII 22482 (ON SC)

[28] **Holt** supra @ paras 68-69

Binnie J then went on to explore the concept of 'universalism' as a manifestation of international comity within the context of cross border insolvency proceedings. He identified universalism arising from the trustee's arguments therein in terms that[29]:-

> *"The essence of the universalist approach advocated by the Trustees is that there ought to be a primary bankruptcy proceeding, title to assets locally situated should be vested in the foreign representative of the bankrupt estate, creditors should not be permitted to realize on a foreign debtor's assets in the local courts outside the framework of the primary bankruptcy, and orders made in foreign bankruptcy proceedings should be recognized and enforced elsewhere."*

(The primary bankruptcy proceeding is generally determined with reference to the bankrupt's domicile, hence the argument in favour of the Belgian bankruptcy order taking precedence over the creditor's claims in Canada).

[30] Binnie J. then referred to Professor Ziegel's classification of 'territorialism' as being the opposite of 'universalism' and said thus[30]:-

---

[29] Ibid @ para 70-72

[30] Ibid @ para 77-78

"Professor J. S. Ziegel contrasts the "universalist" approach to the "territorialist" approach, earlier referred to as the "Grab Rule", and concludes that most jurisdictions exhibit elements of both approaches: International insolvency jurists have long classified countries and their conflict of laws rules according to their willingness to recognize and give effect to foreign insolvency orders and judgments. Those regimes that are hospitable to extending such recognition are labelled universalist; those that deny such recognition are classified as territorialist. Common law countries are often described as belonging among the universalist families, while civil law systems are believed to be territorialist.

However, the pigeonholing is misleading. Common law countries differ as widely in their international insolvency rules as do civil law jurisdictions. On closer examination it will be found that some of the jurisdictions that claim to be universalist only practise a very diluted form of universalism while countries labelled as territorialist in fact extend varying measures of recognition to foreign insolvency orders and foreign insolvency representatives."

With respect to the Canadian position, Binnie J. concluded that as was the case in most common law jurisdictions, the approach of Canadian courts represented a mix of 'universalism' and 'territorialism'. Specifically, that:-

> *" Traditionally, only some of the key components of the universalist approach have been reflected in Canadian law. While our courts generally favour a process of universal distribution and recognize a foreign trustee's title to property, they also permit concurrent bankruptcies and protect the vested rights of what we regard as secured creditors under Canadian law. With respect to the latter, the usual Canadian position has been that a foreign trustee in bankruptcy should have no higher claim on the* secured *assets of a bankrupt than if the bankruptcy had occurred here. In a true universalist system the question of encumbrances would be settled by the law of the place of the bankruptcy (which may, as in this case, produce a result contrary to Canadian maritime law)."*[31]

Finally on the discussion on the Canadian position, the Court extracts the following (emphasis mine):-

---

[31] **Holt** supra @ para 80

In short, Canada has adhered to a middle position (dignified by the name "plurality approach") which recognizes that different jurisdictions may have a legitimate and concurrent interest in the conduct of an international bankruptcy, and that the interests asserted in Canadian courts may, but not necessarily must, be subordinated in a particular case to a foreign bankruptcy regime.

The general approach reflects a desire for coordination rather than subordination, with deference being accorded only after due consideration of all the relevant circumstances rather than automatically accorded because of an abstract "universalist" principle.

[31] Professor Ziegler's term 'modified universalism' should now need no further elucidation except to point out that the approach was dubbed by Binnie J as 'the plurality approach.' Against this backdrop of the judicial approach to the treatment of foreign bankruptcy proceedings in the Canadian courts, further reference is made to Binnie J. in Holt, who then continued on to a brief examination of the 1997 amendment to the Canadian BIA – Part XIII. This brief examination is obviously of importance to answering the Court's need for context and understanding the underlying rationale of Barbados' Part XI.

Most importantly, Binnie J. concluded that the introduction of Part XIII continued the pluralist approach of the Canadian courts.[32] It is considered helpful once more to extract in full the following words[33] (emphasis mine):-

> *"In April 1997 Parliament enacted Part XIII of the Bankruptcy and Insolvency Act entitled "International Insolvencies". It applies only to bankruptcy proceedings initiated after September 30, 1997, and thus has no direct application here. Nevertheless, it is worth noting that Parliament has continued the diluted universalism (or "plurality approach") adopted by Canadian courts under the common law. There is now, under Part XIII, specific authority to come to the aid of foreign courts and "foreign representatives" in the administration and adjudication of insolvencies that have international dimensions. There is also authority for Canadian courts, under s. 271(1), to request "the aid and assistance of a court, tribunal or other authority in a foreign proceeding". The objective of these provisions is to facilitate the coordination of foreign and domestic insolvency proceedings. Nevertheless, there is no rule requiring Canadian courts to refrain from entertaining concurrent proceedings. On the contrary,*

[32] **Holt** supra per Binnie J, para 84 - *"It thus appears that Canadian public policy, expressed as recently as 1997 by Parliament, endorses the plurality approach developed over the years by the courts."*
[33] Ibid

concurrent proceedings are anticipated as Canadian courts are given authority under s. 268(3) to make orders that will result in a coordination of domestic and foreign proceedings, not the elimination of one in preference to the other. By authorizing a Canadian court under subs. (2) to limit the domestic trustee's authority to property situated in Canada, Parliament obviously anticipated that in certain cases a territorialist approach would be acceptable. The amendments provide specifically that a court is not compelled to enforce any order made by a foreign court: s. 268(6)."

[32] The length and breadth of the exposition above allows the Court to conclude the following in relation to the application of Part XI of the BIA as a whole and ultimately section 227(3):-

(i) The common law position of cross border insolvency principles is predicated on what the Court regards as an international law concept of a coexistent acceptance of an obligation by a sovereign state to respect and recognize the laws or decisions of another sovereign state; but at the same time maintaining its own sovereignty by reservation of the right to protect its own citizens and laws within an acceptable framework;

(ii) The common law position of Canada embraced a balance between (i) acceptance of its obligation to give effect to or recognize foreign laws and judicial proceedings, and (ii) safeguarding its own laws and processes as well as the rights of persons falling under the protection of its domestic laws. This has been referred to the pluralist approach; modified universalism; a diluted approach to universalism[34];

(iii) The 1997 amendment to the Canadian BIA introduced a statutory framework for judicial co-operation in cross border insolvencies. This statutory framework however maintained the common law pluralist approach or modified universalism;

(iv) This amendment was in fact introduced in April, 1997 thereby predating the date on which the UNCITRAL Model Law on Cross Border Insolvency came into effect, namely May, 1997[35]. It is accepted as submitted by Counsel for the Claimant that Part XIII of Canada's BIA did not make mention of the Model Law, but having been in development since 1994[36] and adopted in May, 1997, given the scheme

---

[34] Ziegler Brook LJ supra; **Holt Cargo Systems Inc v ABC Containerline N.V. supra**

[35] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency

[36] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), 1 paras. 382-393. UNCITRAL was tasked to produce the model law arising out of a colloquium on insolvency held in April, 1994, hosted by the International Association of Insolvency Practitioners (INSOL) involving insolvency practitioners, judges, government officials, lenders and other stakeholders. This was followed by an international judicial colloquium in which judges and government officials refined the terms of reference or the area of cooperation, to developing the legislative framework for judicial cooperation, access by foreign insolvency officials and recognition

of the legislation and that of the Model Law, it seems logical that the former was influenced by the latter. In the absence of appropriate judicial authority on this issue however, the applicable guidance on Part XI is restricted to the Canadian authorities and treatise discussed.

(v) Part XI of the Barbados BIA is entirely based on Canada's Part XIII, which means that underpinning the legislation is the policy of modified universalism as expressed by the Canadian authorities. Based on the above discussion, the most important aspects of the interpretation of the law given are:-

(a) The legislative framework that is Part XIII (Barbados' Part XI, continued the balanced approach of the Canadian courts towards giving effect to foreign bankruptcy proceedings whilst maintaining appropriate protections envisaged by domestic law; and

(b) Eschewing a mechanical application of deference to the foreign proceedings based on comity, in favour of deference only after due consideration of all relevant circumstances.

---

of foreign insolvency proceedings – Report from UNCITRAL Working Group on Insolvency Law, 21st Session (Jan. 1997).

[33] With this underlying perspective to the operation of Part XI, the Court now turns its attention to the question of whether or not to appoint the interim receiver in the instant case, as prayed. Reverting to Professor Ziegel, it is accepted that the Canadian Part XIII equivalent to section 227(3)[37] under consideration here does enable a trustee in bankruptcy to apply for the appointment of an interim receiver. The Court's reservation at the appropriateness of appointing an interim receiver arose out of sections 7-8 of the BIA, by which the interim receiver is appointed subsequent to the commencement of proceedings but before the grant of a receivership (bankruptcy) order. As pointed out by Counsel for the Defendant, the UK Insolvency Act, section 286 is worded in much the same manner. This initial view aside however, Professor Ziegler's account of Canada's section 271(3), the BIA's section 227(3) equivalent, envisages the appointment of an interim receiver as the mechanism by which a foreign representative including a foreign trustee, is able to exert control over the local assets of a foreign debtor. There is nothing restricting the 227(3) interim receiver, to any particular stage of the foreign proceedings.

The Court is bolstered in accepting this position by the existence of section 226 (Canadian BIA section 270), which provides for a foreign representative

[37] Canadian BIA Part XIII s. 271(3); Ziegel supra @ pg. 1049

to commence proceedings in Barbados pursuant to section 4 (receivership order); section 7-10 (interim receiver) and section 12(1) (proposal by bankrupt, and other prescribed persons). The proceedings made available to the foreign representative under section 226 in accordance with the listed sections would be subject to all requirements or restrictions applicable in respect of proceedings commenced locally. Section 227(3) however, the Court accepts as intended to give effect to matters in aid of or auxiliary to the foreign proceedings of the foreign representative. There still must be however, due consideration of relevant factors in favour of or against the exercise of the power to appoint the interim receiver.

[34] The Court will now examine a few of the Claimant's authorities, cited in favour of the appointment of the interim receiver:-

(i) **Big Sky Living Inc. (Re)**[38] – this decision was commended unto the Court for the purpose of illustrating that a power of sale of property in an interim receivership was common and established. The Court's attention in this particular case was drawn to the fact that the order under consideration therein, was scrutinized by the court for its length and complexity, but Counsel for the Claimant pointed out that the power of sale was not one of the powers with which the court expressed

[38] [2002] A.J. No. 886

reservation. This case is not viewed by the Court as particularly helpful in relation to the current circumstances. The proceedings in **Big Sky** were local proceedings, not cross border; the interim receiver sought to be appointed was so done pursuant to the equivalent of section 10B of the BIA[39] (subsequent to a creditor's notice of intention to enforce security); and the subject property of the intended receivership order was the subject matter of the commercial dealings between the parties. The court therein questioned certain terms of the proposed order in **Big Sky** because of the nature of the proceedings vis-à-vis the appropriate powers of an interim receiver in those circumstances. Specifically, the court's position was that the creditor's notice of enforcement of security was effective for a period of 10 days before the enforcement took effect, thus the powers of the interim receiver were meant to operate only during that 10 day notice period. The extensive terms of the proposed order in this case were seen as in excess of what was countenanced as the interim receiver's powers within the context of the 10 day notice period.[40] Additionally, the inappropriateness of the scope of the order appears to have been overlooked by the court, on account of the consent

[39] Section 47(1) of the Canadian BIA
[40] Blue Sky Living Inc. (Re) supra @ paras 8

or lack of opposition to the order, by a number of key players in respect of whom the court's concern had been directed in the first place. In the instant case, the property in question before the Court was not one used in the course of business of the bankrupt, it is partially residential and the basis of the appointment of the interim receivership has not been shown to be for the purpose of protection of the bankrupt's estate. The purpose is entirely for facilitating distribution to creditors.

(b) Bennett on Bankruptcy – exhibited a sample order made pursuant to section 47(1) of the Canadian BIA, which is the same provision under which the interim receiver was appointed in Blue Sky. The same considerations therefore apply. The Court notes however, paragraph (m) of that order, which provides for application for any vesting or other orders necessary to convey the property to a purchaser, free of any liens or encumbrances affecting the property. When contrasted with paragraph (i) therein, the terms of both paragraphs suggest different treatment in relation to real and personal property;

(c) **In re Kooperman**[41] – this decision has been cited as illustration for the use by the court of an appointment of receiver in order to enable sale of local property by a curateur (the equivalent to a trustee in bankruptcy).

---

[41] [1928] WN 101

The Court has no difficulty with this illustration, but having accepted that section 227(3) can be utilized for this purpose, the decision advances the real question for the Court no further, as it cannot assist in determining whether or not the Court should in the instant circumstances, exercise its discretion in favour of appointment.

[35] The Court reverts to its understanding of the underlying purpose and intent of Part XI, as derived from the Supreme Court of Canada in **Holt** and the writings of Professor Ziegel, both on Canada's modified approach to the universalist view of cross border insolvency. As a result, the Court considers that it should not merely exercise the power without reference to local law or the protection of rights of persons who may affected. This approach is clear by the existence of section 224(6) of the BIA[42]. In terms of these factors, the Court considers that the Defendant has consistently asserted in response to these proceedings, the existence of beneficial ownership in the property in favour of his parents. Notwithstanding the Court has already ruled that the determination of such beneficial ownership did not fall within the boundaries of these proceedings, the Court nonetheless acknowledges that the assertion of such ownership is not merely a bald assertion, it is supported by evidence put before the Court.

---

[42] Supra fn 42.

[36] The law of Barbados, as is the law in the place of the bankruptcy proceedings, is that trust property is excluded from the bankrupt's estate. Therefore it could not be the case, that property which ought not to form part of the bankrupt's estate by law, is so included without proper legal determination. It is either that such an interest in the property exists, or it does not. In this regard, the Court is not of the view, that the absence of a determination in respect of the beneficial ownership asserted, should automatically result in a denial of all opportunity by the third parties to establish that the property in question should be excluded from the Defendant's estate in bankruptcy, as the law strictly provides. Insofar as the failure to date to have properly asserted those rights before the Court may cause delay to the Claimants in completing their statutory duty as trustees in bankruptcy, that kind of delay can be addressed by costs awarded or denied in relation to relevant parties. More particularly, the determination of the beneficial interest in the property is a matter that the Court considers properly taken into account, given its entitlement to ensure the protection of domestic interests, in keeping with the rationale of Part XI as discussed above.

THE REMEDIES

[37] In the entirety of the circumstances, the Court considers with little difficulty, that for the benefit of the Defendant's creditors whose claims remain

unsatisfied, the Claimants should be afforded the relief prayed, of the appointment of an interim receiver over the Defendant's property, situate in Heywoods, St. Peter, Barbados. The Court recognizes the need to give effect to the Bristol Court bankruptcy order in accordance with the internationally accepted approach to cross border insolvency principles. Of importance also however, is the Court's obligation and entitlement to persons falling under the protection of the domestic law, also recognized by principles applicable to cross border insolvencies. As a consequence, the Court considers that pursuant to section 224(4) of the BIA, the appointment of the interim receiver should be made subject to certain terms and conditions intended at the very least, to afford protection to the interests of any beneficial owners of the property.

[38] The orders issued by the Court in the instant case with respect to the appointment of the interim receiver will therefore be subject to conditions imposed by the Court, intended to afford the opportunity to persons claiming a beneficial interest in the Defendant's property in Barbados, to have that interest declared by the Court. In particular:-

(i) The interim receiver shall have the powers specified in the Appendix to the perfected order of the Court arising from this decision ('the final order'), which shall include the power of sale;

(ii) Subject to paragraphs (iii)&(iv) below (of this paragraph 38), the interim receiver's powers shall be suspended for a period of 4 months ('the period of suspension') from the date of the Court's final order ;

(iii) The interim receiver's power of sale shall remain suspended beyond the period of suspension, in the event that legal proceedings for the determination of any beneficial interest held in the property are instituted before the expiration of the period of suspension. Save that liberty is granted to the foreign representatives to apply at any time after the period of suspension, for the purpose of the exercise of any or all powers reserved to the interim receiver;

(iv) Notwithstanding paragraphs (ii) and (iii) above, the interim receiver shall be entitled to enter upon the Defendant's premises before the expiry of the period of suspension, for the purpose of conducting any assessments, appraisals, or repairs to the property, or to take any other action necessary for the management or preservation of value of the property, as is more particularly set out in the Appendix to the final order of Court.

DISPOSITION

[39] The following declarations and orders are made upon disposal of these proceedings:-

A. Pursuant to Section 224 of the Bankruptcy and Insolvency Act of Barbados, Cap. 303 it is hereby declared and ordered that the certified copy of the Bankruptcy Order made against the Defendant by the Bristol County Court on the 23rd June, 2015 is accepted as proof that:-

(i) The Defendant is a debtor within the definition of section 223 of the Bankruptcy and Insolvency Act of Barbados; more particularly, that the Defendant is a person who has the status of a bankrupt under foreign law in a foreign proceeding and has property in Barbados; and

(ii) The Claimants, having been appointed by the Bristol County Court as Trustees to the Defendant's estate in Bankruptcy, are foreign representatives within the meaning of section 223 of the said Act.

B. The property situate at Heywoods, St. Peter, Barbados, held in the name of Lindsay Cumberbatch the Defendant herein, is vested in the Claimants as Trustees of the Defendant's estate in bankruptcy.

C. Pursuant to section 227(3)(a)&(b) of the Act, Mr. Craig Waterman, licenced trustee under the Act, is appointed as interim receiver over the Defendant's property at Heywoods, St. Peter, Barbados, in accordance

with the terms of the Appendix to the Court's final order in these proceedings.

D. Such final order is subject to the following terms and conditions imposed by the Court pursuant to section 224(4) of the Act:-

(i) Subject to paragraph (iii) below, the interim receiver's powers shall be suspended for a period of 4 months from the date of the Court's final order

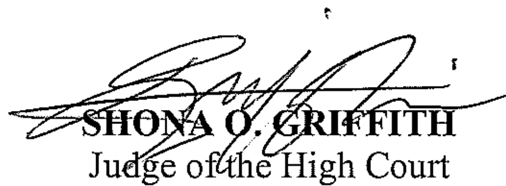
(ii) The interim receiver's powers shall remain suspended in the event that legal proceedings for the determination of any beneficial interest held in the property are instituted before the expiration of the period of suspension, save that liberty is granted to the foreign representatives upon expiration of the period of suspension, to apply for such suspension to be lifted for the purpose of the exercise of any or all powers reserved to the interim receiver;

(iii) Notwithstanding paragraphs (i) and (ii) above, the interim receiver shall be entitled to enter upon the premises for the purpose of conducting any assessments, appraisals, repairs or to take any other action necessary for the management or

preservation of value of the property, as is more particularly set out in the Appendix to the final order;

(iv) The terms of the Appendix to the Court's final order are to be determined by the Court on the 29th day of June, 2020.

E. Costs are awarded to the Claimants upon the determination of the Claim. The Court will hear Counsel for the Parties on the quantum of such costs on the 29th day of June. 2020.



SHONA O. GRIFFITH
Judge of the High Court