

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
(as Trustee of the Bankruptcy 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 Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing: 2020: 13 August

Date of Decision: 2020: 08 September

Appearances:

Mr. Garth Patterson Q.C. in association with Ms. Taylor Laurayne, Lex Caribbean, for the Claimants

Ms. Fawn Phillips-Singh for the Defendant

Judgment – Order for Judgment not perfected – Application to vary terms of judgment – Jurisdiction to vary terms of judgment – Exercise of Court’s discretion.

RULING

Introduction and Background

[1] The Defendant Lindsay Cumberbatch was adjudged bankrupt in bankruptcy proceedings conducted in the Bristol County Court, England in June, 2015. In June, 2016, the Defendant was discharged from bankruptcy however his bankrupt estate remains to be administered. In April, 2016, the Trustees (UK) in bankruptcy of the Defendant’s estate applied to the Court for the appointment of an interim receiver of property owned by the Defendant here in Barbados. The application for appointment of an interim receiver was made pursuant to Part XI of the Bankruptcy and Insolvency Act, Cap. 303 of the Laws of Barbados, sections 224(1) and 227(3) (‘the Act’). The matter was heard in February, 2020 and in June, 2020 the Court delivered its decision in the matter, appointing an interim receiver to property subject to certain specified terms and conditions.

[2] The Court concluded its written decision however the order made by the Court was not perfected. The actual terms of the powers of the interim receiver was left to be concluded by the Court as part of the process of perfection of the Court's order, along with the remaining issue of costs. The Claimants filed an application on the 23rd June, 2020 seeking to have the Court vary its order by removing the conditions attached by the Court to the appointment of the interim receiver (the text of the Court's order is extracted in full hereinafter). The Defendant resisted the application, terming it an abuse of the Court's process. The application to vary was heard on the 13th August, 2020, this is the Court's decision. The facts and background to this matter are set out in the Court's written decision of June 12, 2020¹ and need not be repeated herein.

The Order

[3] The Court's order made on the 12th June, 2020 is set out in its entirety as follows:-

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*

¹ CV0587/2016 Standish et anor v Lindsay Cumberbatch

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.

The Application

[4] The Claimants' application of June 23rd, 2020 sought to vary paragraph D of the Court's order as extracted above. The variation sought was the removal of the restriction on sale appended to the powers of the receiver and for the power of sale to be exercised immediately. The ground of the application was that the condition suspending sale of the property for four months amounted to the Court of its own motion staying the execution of its judgment, but more importantly, doing so without hearing the parties. The authority for the Court being asked to vary its order was grounded in its inherent jurisdiction, exercisable in this case on the basis that the Claimants were not given an opportunity to be heard prior to the Court's imposition of the condition prohibiting sale for a specified period. Queen's Counsel for the Claimants referred the Court to a number of authorities on the Court's power to vary an order before the order is perfected.

[5] To start, reference was made to **Re Harrison's Settlement**² in which the English Court of Appeal made a definitive pronouncement of the power of a judge to recall and alter an order prior to the order being perfected. Further reference was made to **Abdool Latiff v Tani Persaud**³ insofar as the jurisdiction to vary or alter was stated in slightly wider terms than that expressed in **Re Harrison's Settlement**. On this authority, the Court's jurisdiction to vary was commended in terms that it is '*not limited to cases of manifest omission*' but is '*as wide as the interests of justice demand*'. Having supplied their authority to vary or alter an unperfected order or judgment, the application on behalf of the Claimants contended that the Court's order suspending the powers of the receiver was unjust, as it was made without giving the Claimants an opportunity to be heard. The cases of **Moat Housing Group South Ltd v Harris et anor**⁴; and **Global Petroleum Corp v CBI Industries Inc.**⁵ were cited in support of this contention.

[6] Further to having not been heard, Queen's Counsel's application for the Court's order to be varied was based upon an asserted prejudicial effect of the operation of the Court's order, on the Claimants.

² **Re Harrison's Share Under Settlement, Harrison v Harrison et al; Re Ropner's Settlement Trusts, Ropner v Ropner et al** [1955] Ch 260.

³ (1968) 14 WIR 50

⁴ [2005] 4 All ER 1051

⁵ [1997] N.S.J. No. 60

Namely, that whilst being vested with the responsibilities and liabilities of the appointment as interim receiver by the terms of the order, the suspension of the order deprived the interim receiver of the capacity to earn an income during the period of suspension, as well as potentially for an indefinite time based on the terms of the order. Further, that the terms of the order exposed the Claimants to further incurrence of costs, without the possibility of reimbursement, as well as the possibility that the bankrupt's estate would be unable to discharge its debts.

[7] As pertains to the actual conditions imposed by the Court, Queen's Counsel urges the variation of the Court's order on the following bases:-

- (i) The Defendant has never asserted that the property is owned entirely by his parents. As a result (this contention without prejudice to the Claimants' position that the property is owned entirely by the Defendant), it is inevitable that the property would have to be sold in order to realise whatever portion of the property belongs to the Defendant. In light of the prospect of such inevitable sale, a potential finding of beneficial interest in favour of the parents should not operate as a barrier to the sale of the property. The Trustees would be obliged to account out of the proceeds of sale, for any beneficial interest that might be established on behalf of the parents;

- (ii) Based on the documentation submitted by the Defendants as evidence of the asserted beneficial interest of his parents, at best a 25% interest is at stake, which could readily be converted into a share of the proceeds of sale of the property pending proof of such interest;
- (iii) There is greater prejudice to be suffered by the Claimants, particularly in relation to the further delay in administering the bankrupt estate, costs of administering the property during that delay and the potential inability to satisfy the Defendant's creditors arising from the further delay and costs. On the other hand, the objects of the Court's protection are third parties not before the Court, in circumstances where the opportunity has existed for four years (since the commencement of the Claim) – for the Defendant's parents to have taken action to assert their own rights;
- (iv) The loss occasioned to the bankrupt's estate by the delay to the interim receiver's power to sell cannot be adequately addressed by costs against the Defendant's parents, as they are not parties to the Claim. Further, the action giving rise to the incurrence of further costs would not arguably be able to be addressed by costs (awarded by the Court) as the action originates out of the Court's own motion;

- (v) Given that the issue of the Defendant's parents interest in the property was not properly put before the Court, the weight attributed to such assertions should be limited and any conditions imposed for the protection of such interests should be imposed in such a way that causes as little prejudice to the Claimants as possible;
- (vi) It is also submitted that the conditions attached to the Court's order would put the Claimants to further expense of having to return to the Court to permit the sale in the event that there are in fact proceedings instituted for the determination of any beneficial interest held in the property by the Defendant's parents.

[8] In lieu of the condition against sale by the interim receiver, the Claimants have proposed an alternative mode aimed at achieving what they say is the same objective as the Court, namely, to secure a measure of protection for any beneficial interest to which the property is subject. The alternative proffered by the Claimants is for the Court to permit the sale of the property but direct a portion of the net proceeds to be paid into Court pending the determination of any proceedings for the establishment of a beneficial interest in the property. The Claimants have set out the proposed terms of their alternative at paragraph 10 of the draft order annexed herewith as Appendix I.

[9] Counsel for the Defendant submitted that the Claimants' application amounted to an attempt to re-hear the matter and as such is an abuse of the Court's process. Counsel for the Defendant regards the Claimants' recourse to be one of appeal. With respect to the Court's power to vary or alter its order, Counsel for the Defendant submits that the inherent jurisdiction of the court is not an alternative source of the court's substantive powers such as are derived at common law or statute. Rather, the inherent jurisdiction of the court refers to its power to fulfil its role as a court of law, by regulating its proceedings, preventing the abuse of its process and by compelling observance of its process. Counsel's submissions drew primarily from the judgment of Goodridge JA in **Oscar Maloney v Commissioner of Police**,⁶ including references to several of the authorities cited therein.

[10] Counsel also referred to CCJ decision **Knox v Deane et al**⁷ which reinforces the concept of the Court's inherent jurisdiction as a residual power of the court which exists to meet the ends of justice or to enforce rules of practice.⁸ Additionally, Counsel for the Defendant submitted that contrary to the Claimants' position that an order takes effect from the time it is perfected, **CPR Rule 42.8** provides that a judgment or order becomes effective from the

⁶ Magisterial Appeal No. 6 of 2014, per Goodridge JA citing inter alia Halsbury's Laws Vol. 37 (4th Ed.) para. 12 and Prof. IH Jacob, *The Inherent Jurisdiction of the Court* [1970] *Current Legal Problems* 23

⁷ 2020 CCJ 5 (AJ)

⁸ *Ibid* @ para 25

time it is pronounced. Further, that the jurisdiction of the Court to vary or alter its order is limited to the provision made in **CPR R 42.10** in respect of the ‘slip rule - i.e. for correction of clerical or typographical errors or omissions. This position in Barbados, Counsel says, is unlike the power contained in the UK CPR Rule 3.1(7) which is nonetheless exercisable in limited terms (per **Roult v North West Strategic Health Authority**⁹).

- [11] Counsel for the Defendant submitted that **Re Harrison’s Settlement** firstly does not assist the Claimants in their argument regarding the existence of the inherent jurisdiction of the court to vary or alter its own order. Secondly, that even if it can be accepted that such a jurisdiction does exist, that case is distinguishable from the case at bar, insofar as the facts therein supported the trial judge’s exercise of discretion to vary the terms of his order. The distinguishable facts are predicated upon the existence of an unperfected order affecting a class of persons, and a supervening decision of the House of Lords, which held that the law applied in coming to the prior decision had been misconstrued.

In relation to the UK CPR Rule 3.1(7) alluded to as providing a basis in the UK but not available in Barbados, Counsel referred to **Tibbles v SIG plc (t/a**

⁹ [2009] EWCA Civ 444

Asphalt Roofing Supplies)¹⁰, as authority for how the rule should be construed.

[12] Again citing the need for finality in court orders or decisions, the UK Court of Appeal held that the power under Rule 3.1(7) should only be exercised where there has been a material change of circumstance since making the order, or that the factual basis for the earlier order had been misstated. Finally, Counsel for the Defendant referred to **Cole v Howlett**¹¹ as illustration of what is meant by a material change in circumstances. Counsel maintained that there was no such change in circumstances and that the application amounted to an attempt by the Claimants to have the matter relitigated. On the issue of prejudice, Counsel for the Defendant submitted that the Claimants had filed no positive evidence regarding the state of satisfaction of the debt owed to the Defendant's creditors and there was evidence on the Defendant's case that there had been some partial satisfaction of the underlying judgment by the other party against whom the judgment had been granted.

[13] With respect to the nature of the property in question, Counsel for the Defendant submits that the Claimant's could suffer no prejudice by the terms of the delayed power to sell as the property is not a perishable asset.

¹⁰ [2012] EWCA Civ 518

¹¹ [2015] EWHC 1697 (Ch)

Further, the Claimants would have been aware from early in the proceedings of the claims asserted on behalf of the Defendant's parents regarding a beneficial interest in the property. As a result, it is submitted that the Claimants carried on the proceedings on the premise that the Defendant's parents had some involvement or claim to the property. The Claimants are thus unable to assert that the Defendant's parents have failed to make any claim to establish their rights during the period of time elapsed from the commencement of the proceedings. The question of prejudice as alleged by the Claimant's is therefore not substantiated.

The Court's Consideration

[14] The first question that the Court must consider is whether or not it has a jurisdiction to vary or alter its own decision. The Court acknowledges Counsel for the Defendant's references to CPR Rule 42.8 and 42.10; their UK CPR counterparts as well as the UK CPR 3.1(7). Rules 42.8 and 42.10 as a matter of principle, pre-date the CPR and do not introduce any new principles.

These two rules embody the law which existed before, as can be seen from the references to these principles in **Re Harrison's Settlement**¹² and the numerous authorities cited therein. The principles that (i) a judgment or order takes effect from the time it is pronounced and (ii) corrections to a perfected

¹² Re Harrison's Settlement supra @ pg 284

order can be made under the 'slip rule' - are acknowledged by Jenkins LJ in the following manner¹³ (emphasis mine):-

"The submissions in support of the appeals are to the effect: First, that, in general, an order is made once and for all at the time when it is orally pronounced, and cannot thereafter be discharged or varied otherwise than on appeal. Secondly, that by way of exception to this general rule a judge may have a limited discretionary power of varying or discharging an order orally pronounced by him at any time before it is perfected by entry, but any such power is confined to cases of manifest error or omission or, in other words, cases broadly speaking comparable to those in which an order can be corrected after entry under R.S.C., Ord. 28, r. 11.

[15] In respect of those submissions, Jenkins LJ categorically said thus¹⁴:-

But we reject the limitations sought to be placed by the first three submissions on the power of a judge to recall his own order at any time before it has been perfected by entry. So far as the limitations involved in the first and second submissions are concerned, these seem to us to be plainly inconsistent with practice and the weight of authority..."

Further in relation to the submissions above (there were in fact five such submissions which were answered by the Court) (emphasis mine):-

"These three submissions would, we think, if accepted, produce an unworkable result. Few judgments are reserved, and it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae. The appellants make a nominal concession to meet this difficulty by saying that the judge retains seisin of the matter so long as the parties are before him but that once the parties have left the court and the next case has been called, it is too late because the parties may have already acted

¹³ Ibid

¹⁴ Re Harrison's Settlement supra, @ 284-285

*on his oral judgment. Our answer to this is that although the judgment dates from the day of its pronouncement it is not perfected until drawn up, passed and entered, and anyone who acts on it beforehand must take such risk as there is that it will be drawn in the form in which it was heard to be pronounced.*¹⁵

And finally by way of illustration of the principles which Rules 42.8 and 42.10 embody (emphasis mine):-

“We think that an order pronounced by the judge can always be withdrawn, or altered, or modified by him until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced.”

[16] The provisions of CPR Rules 42.8 and 42.10 do not take away from this position. They affirm this position. Rule 42.10 speaks to an order that is already perfected. With respect to Counsel for the Defendant’s reference to UK CPR 3.1(7) which makes provision for alteration of orders and the fact that there is no counterpart in the Barbados CPR - the Court construes this rule differently. UK Rule 3.1(7) provides as follows (emphasis mine):-

‘A power of the court under these Rules to make an order includes a power to vary or revoke the order.’

The power considered therein is ‘*a power under these Rules*’, meaning the UK CPR, which would mean any power exercised by the court pursuant to a rule – for example, to strike out, extend time, substitute a party – any order as

¹⁵ Ibid

empowered or provided under the procedural rules of court. The exercise of a CPR power is not what is under consideration in the case at bar. The application at bar is to vary the Court's order which was based upon its determination of the substantive law under consideration.

- [17] UK CPR Rule 3.1(7) and the guidance thereon as provided in **Tibbles v SIG (t/a Asphalt Roofing Supplies)**¹⁶ and **Cole v Howlett**¹⁷ * as well as the fact that there is no counterpart rule in the Barbados CPR are therefore not relevant to the case before this Court. At this juncture, the Court considers that based on the authority of **Re Harrison's Settlement** which examined a number of prior long standing authorities, the position is that until perfected – drawn up and entered – an order or judgment can be withdrawn or varied. The position after the judgment or order is formally entered would be different.

It is at that point that Rule 42.10 is applicable and any question of variation of an order already perfected would then bring to the fore the inherent jurisdiction of the Court.

- [18] The Court considers that Counsel for the Defendant's submissions on the inherent jurisdiction of the Court and the authorities cited therein, are entirely in order.¹⁸ However, none of those authorities were referring to variation of

¹⁶ [2012] EWCA Civ 518

¹⁷ [2015] EWHC 1697; * NB, leave to appeal the order of the judge pursuant to Rule 3.1(7) setting aside a prior order was granted, this decision appears at [2016] EWCA Civ 720.

¹⁸ Paras 9-10 supra

an unperfected judgment or order. For example, the position in **Oscar Maloney v COP** in relation to the inability of a court to extend time for doing an act which is prescribed by statute where there is no statutory provision for extension,¹⁹ is an entirely different question than the scope of the court's authority before its judgment or order is perfected. The Court considers the following statement from **Re Harrison's Settlement**²⁰ as illustrative of the position (emphasis mine):-

“When a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed. This control must be used in accordance with his discretion exercised judicially and not capriciously.”

The principle is further demonstrated by its application by the Guyana Court of Appeal in **Abdool Latiff v Tani Persaud**²¹ in which Crane JA (Ag) said:-

“A judge's power to ‘review and reconsider’, as seen from the decision of the Court of Appeal in Re Harrison's Settlement..., is therefore considerably wide, it is as wide as the interests of justice demand, but so long as he acts within jurisdiction, his recall cannot be disturbed, and ‘anyone who acts on it beforehand must take such risk as there is that it will not be drawn in the form in which it was heard to be pronounced’, for although it dates from the date of its pronouncement, in theory it is not perfected until it is drawn up, passed and entered.”²²

¹⁹ Oscar Maloney v Commissioner of Police *supra*

²⁰ Re Harrison's Settlement @ pg 284

²¹ (1968) 14 WIR 50

²² Abdool Latiff *supra* per Crane JA @ 57

[19] It is considered that sufficient time has already been dedicated to illustrating the Court's ready acceptance of the submission of Queen's Counsel on behalf of the Claimants, that the Court is at liberty to vary, alter or recall its unperfected order. At the risk of belaboring the issue however, the Court makes a final reference to the dictum of Jenkins LJ in **Re Harrison's Settlement**, as it is considered that the principle is of vital importance and it is necessary to be clear that the power that is being exercised is not a power of the Court's inherent jurisdiction, in the sense illustrated by Counsel for the Defendant. Jenkins LJ examined a number of authorities²³ in which the position more or less remained constant, that prior to being perfected – drawn up and entered – a judge retained the authority to recall and vary an order which was pronounced. These cases all operate on the basis that the matter is still before the court until the order is perfected, thereby giving rise to the court's authority to recall or vary its order.

[20] The Court must now examine the next question, which is whether or not the Court should vary its order. In this regard, the Court must ascertain precisely what it is being asked to vary. That is, whether an issue that has truly been

²³ *Re Harrison's* @ 278-281; eg @ 280 – “*In re Australian Direct Steam Navigation Co. (Miller's case)*.”⁹ It is said that this might well have been by consent of the parties, but if jurisdiction was in question this would not affect the validity of the authority. It is to be observed that in this case the Master of the Rolls, after he had given an oral judgment and before the final order was made and perfected, considered other material to which his attention had not previously been drawn. The same judge later referred to *Miller's case*⁹ in *In re St. Nazaire Co.*,¹⁰ in these words: “*In Miller's case*”¹¹ no order had been drawn up. A judge can always reconsider his decision until the order has been drawn up.” *In re Roberts*¹² Kay J. regarded himself as free, where an order had not been drawn up, whether it were an order made in chambers or in court, to stay the drawing up of the order and rehear the matter before making a final order. He acted accordingly.”

litigated and determined, as is the submission of Counsel for the Defendant; or as submitted on behalf of the Claimants, an exercise of the Court's powers on its own motion, without having given the parties an opportunity to be heard. This question is important, for as was extracted by both **Re Harrison's Settlement**²⁴ and **Abdool Latiff v Tani Persaud**²⁵(respectively), albeit the power to vary its unperfected order exists, the power must be exercised 'judiciously' and 'within jurisdiction'. The Court's original order at paragraph D provides as follows:-

"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*

²⁴ Re Harrison's Settlement, supra, @ 284

²⁵ Abdool Latiff Tani Persaud supra, @ 57

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."

[21] As far as the Court is concerned, Paragraph D above represents a mechanism by which the Court's substantive determinations were to be put into effect. The Court's substantive determination is firstly to be evidenced by the issues identified for determination in paragraph 2 of the decision of June 12, 2020 and thereafter by Paragraphs A-C of its order²⁶. In the round, the Court decided that the preconditions for the exercise of its power to appoint an interim receiver under Part XI of the BIA had been satisfied and the interim receiver was appointed in accordance with the requirements of the Act. The Court also determined that there was a need to place a temporal restriction on the interim receiver's power of sale on the basis that the Court was on notice that a claim of beneficial ownership of the property was being asserted in favour of the Defendant's parents. The Court's position was that the combination of that notice along with the statutory exclusion of trust property from the bankrupt's estate obliged the Court to provide a means by which such interest could at the very least be adjudicated before the property was disposed of.

²⁶ Contained in paragraph 39 of the said decision.

[22] The variation of the Court's order sought by the Claimants, seeks to replace the Court's mechanism with an alternative mechanism, which is submitted, can achieve the same objective as that which was intended by the Court. The proposed variation as submitted in the draft order supplied by the Claimants is as follows:-

1) *"If within four (4) months of the date of this Order, any person institutes legal proceedings for the determination of any beneficial interest held in the Property and provides the Receiver with notice of same (the "**Proceedings**"), then the above orders shall be subject to the following terms and conditions imposed by the Court pursuant to section 224(4) of the Act:-*

- a. the Receiver shall retain out of the Net Sale Proceeds of the Property (as hereinafter defined) a sum representing 25% of the Net Sale Proceeds (the "**Retention Sum**") and hold the same on trust for the Trust Period (as hereinafter defined) for the purpose of settling the claim of any third party (the "**Applicant**") who is able to establish to the satisfaction of a court of competent jurisdiction that he was, prior to Defendant's bankruptcy the sale of the Property, entitled to an interest in the Property.*
- b. the Net Sale Proceeds shall mean the monies received for the purchase of the Property less all expenses properly incurred in ensuring the completion of the sale of the same, including but not limited to the payment of:*
 - i. all statutory rates and charges levied against the Property or incurred in the sale of the Property, including land tax, water rates, property transfer tax and stamp duty; and*
 - ii. all professional fees incurred in the sale of the Property.*

- c. *the Trust Period shall mean the period commencing from the date of the completion of the sale of the Property until the earliest of:*
- i. *the determination or disposal of the Proceedings;*
 - ii. *an order of the Court varying the condition imposed by the foregoing paragraph (a); or*
 - iii. *the agreement in writing of the Applicant and the Receiver to the release and/or application of the Retention Sum.*
- d. *at the termination of the Trust Period in accordance with the foregoing paragraph (c), the Receiver shall:*
- i. *apply the Retention Sum in accordance with any binding order of the Court or agreement in writing between the Applicant and the Receiver; and*
 - ii. *if there is any surplus remaining of the Retention Sum after compliance with (i) above, pay said surplus to the Claimants; or*
 - iii. *if no provision is made for the application or payment of the Retention Sum by court order or agreement in writing between the Applicant and the Receiver, pay the Retention Sum to the Claimants*

Provided that nothing in this Order shall be construed as requiring the Receiver to pay to the Applicant any amount exceeding the Retention Sum.

[23] This variation is resisted by Counsel for the Defendant on the basis that it is an attempt to have the Court relitigate the matter.

The Court does not agree. The substantive issues which arose for the Court's determination in this matter concerned the scope of its jurisdiction and discretion under sections 224 and 227 of Part XI of the BIA. The proposed

variation does not affect the Court's consideration of its construction of the law as already determined. Additionally, Counsel for the Defendant contends that there has been no change in circumstances which justifies the variation of the Court's order. The Court agrees that there has been no change in circumstances in existence from the time of hearing the matter, delivery of its decision and the filing of the application to vary. However the Court also acknowledges that the imposition of the conditions under section 224(4) was effected without hearing the parties as that section was not considered at all during argument.

[24] In this regard, the Court considers that it can properly hear Counsel for the Claimants on the issue of the exercise of its powers under section 224(4). Whether or not the proposed variation of the Court's order should be granted, does not flow from any entitlement to be heard. Rather, the grant or not of the proposed variation must rest on the scope and effect thereof, as well as any questions of prejudice which may be occasioned to either party, by the grant or refusal of the variation. In terms of the scope of the proposed variation, the Court is of the view that what is proposed is an alternative to the mechanism identified by the Court for the purpose of affording any beneficial owner of the property in question the opportunity of asserting its interest before the Court. In terms of prejudice, there is none to the Defendant; he has no interest

to protect. In terms of the beneficial interest asserted on behalf of the Defendant's parents, the purpose of the condition is to provide an opportunity to assert their claim. The Court agrees with Queen's Counsel for the Claimants that the Defendant has not asserted that the entire beneficial ownership rests with his parents.

[25] The Court also agrees that the property would inevitably have to be sold in order to alienate the Defendant's interest, whether of the whole or in part. The Court is further of the view having heard the Claimants, that a retention of a portion of the proceeds of sale would serve the same objective as the Court's suspension of the interim receiver's powers. The Court is of the view that a retention of a portion of the proceeds of sale of the property for a period of time more effectively serves the interest of justice in this case. The Defendant's parents are not before the Court and the Claimants are entitled to realise the property of the Defendant in order to administer his bankrupt estate. The Court finally also acknowledges that a sale of the property will not be immediate, during which time it would be open the Defendant's parents to assert their beneficial interest. As a result, the intended objective of the suspension of the interim receiver's powers can be effectively attained.

[26] The only question would be what portion of the proceeds of sale should be retained. The Claimants have suggested twenty-five (25%). Counsel for the

Defendant (whilst maintaining her opposition to the application to vary), advised that this percentage was not acceptable to her client. The Court's primary concern was to afford an opportunity for any beneficial interest to be determined. The Court is not in a position to make that determination and considers that the 25% proffered by the Claimants is reasonable. The Court also considers that the terms proposed in the draft order are acceptable. The Court will make the variation requested to Paragraph D of its judgment which was made on the 12th June, 2020. The variation shall take the form of the removal of Paragraph D and a substitution in terms of the draft order proposed by the Claimants as extracted at paragraph 22 hereinabove, with such modifications as deemed fit by the Court.

Costs

[27] The final issue is that of costs. The Court has already awarded costs to the Claimants upon the determination of the claim in their favour, the only question to be determined is the basis upon which costs are to be awarded. Queen's Counsel for the Claimant has submitted that costs are payable as between solicitor and client on a substantial indemnity basis. Queen's Counsel points out that the proceedings are not civil proceedings so as to attract Parts 64 and 65 of the CPR 2008. Queen's Counsel submission is that the Claimants as statutory appointees in bankruptcy proceedings, are entitled to be

recompensed for carrying out their statutory functions. Reference was made to **The 2001 Annotated Bankruptcy and Insolvency Act by Lloyd Houlden & Geoffrey Morawetz**²⁷ which points out that a solicitor acting for a bankrupt estate has no client, and can only look to payment out of the bankrupt estate. In proceedings, therefore, the court should award costs whether in favour of or against, a trustee, on a solicitor and client basis.

[28] Queen's Counsel also referred the Court to Canadian authority **Residential Warranty Co. of Canada Inc. (Re)**²⁸ in support of his submission that a trustee in bankruptcy is entitled to receive reasonable compensation paid out of the assets of the bankrupt estate. This authority was further proffered in support of the trustee being obliged to gather in and administer property in respect of which there is a claim for a beneficial interest, except that such property would ultimately not be available for distribution to creditors. Counsel for the Defendant is opposed to the award of costs on a 'substantial indemnity' basis and submits with reference to Canadian case **Net Connect Installation Inc. v Mobile Zone Inc.**²⁹, that an award of substantial indemnity costs is applicable only where there is some egregious conduct on the part of the party against whom the costs order is made, that justifies such an award.

²⁷ page 710, para I49

²⁸[2006] AJ No. 349

²⁹ 2017 ONCA 766

[29] The Court is assisted by the brief submissions and authorities of both counsel to the extent that it is clear that the Claimants as trustees of the Defendant's bankrupt estate, are entitled to be compensated for their costs in these proceedings. The Court is also assisted to the extent that it accepts that the costs are appropriately assessable as between attorney and client. The grayer area is the basis upon which such assessment should be conducted. The first question that the Court would consider is what law is being applied? The law of the main bankruptcy proceedings, the law of Barbados, the law of Barbados as informed by virtue of the Barbados Act being modelled on the Canadian BIA? Both counsel were of the opinion that the law of Canada should continue to serve as the Court's reference point in the proceedings. The Court considers that the Canadian jurisprudence was relevant when seeking to construe the terms of the statute (Part XI of the Act).

[30] In the absence of application of the CPR and there being no specific rules identifiable in relation to costs in bankruptcy proceedings, the Court does not consider that it is entirely appropriate to transpose the Canadian principles on costs, without some level of critical inquiry. The Claimants seek costs on a substantial indemnity basis. This is not a basis of costs provided for or recognized in Barbados, but it is part of the regime of costs assessment in Canada. In the absence of specific rules, costs are in the discretion of the Court

as provided by the Supreme Court of Judicature Act, Cap. 117A. Rather than adopt terminology that is not applicable in Barbados, the Court considers it more prudent to express what costs the Claimants are entitled to recover and why. The Court accepts that the Trustees were obliged to pursue this action in furtherance of their statutory appointment and duty to administer the Defendant's estate.

[31] As a consequence, the underlying rationale expressed by the court in **Residential Warranty Co. of Canada Inc.**³⁰, provides acceptable guidance as to the basis upon which the Court can order that the Claimants recover their costs in pursuing these proceedings as part of their duties in administering the Defendant's bankrupt estate.

It is preferred however, to simply indicate that the Claimants are entitled to recover their costs in the proceedings out of the Defendant's estate. Further, the Claimants are entitled to recover these costs, assessed by the Court, on an indemnity basis. As is applicable in relation to any costs to be assessed by the Court, the costs recoverable are expected to be reasonable and proportionate within the circumstances of the claim.

³⁰ Supra, @ para 67.

Disposition

[32] These proceedings are concluded in the following manner:-

- (i) The application filed by the Claimants to vary the Court's order as contained in paragraph 39D of its written decision of 12 June, 2020 is granted, in terms of paragraph 10 of the draft order annexed hereto.
- (ii) The order of the Court upon determination of the proceedings in their entirety is in terms of the draft order hereto annexed.
- (iii) The Claimants as Trustees, are entitled to recover their costs in these proceedings on an indemnity basis, from the Defendant's estate in bankruptcy.


SHONA O. GRIFFITH
Judge of the High Court

APPENDIX

- (1) The Receiver is hereby empowered and authorised to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property and to act at once in respect thereof.
- (2) The Defendant and all other persons acting on his instructions or behalf and all other persons having notice of this Order (together with the Defendant, “Persons”) shall grant immediate and continued access to the Property to the Receiver and shall forthwith deliver up possession of the Property to the Receiver.
- (3) All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the Property in that Person’s possession or control and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof.
- (4) Without prejudice to the powers bestowed by virtue of the Act, this Order and any other laws of Barbados or the generality of the foregoing, the Receiver is empowered and authorised to do any of the following on behalf of or in the name of the Defendant in respect of the Property where the Receiver considers it necessary or desirable:
 - e. receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
 - f. engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;
 - g. report to, meet with and discuss with such affected persons as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
 - h. initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Property and to settle or compromise any such proceedings;
 - i. market for rent or for sale any part or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and

negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

- j. sell, transfer or assign, whether on credit, by private tender, public auction or otherwise, or to lease or mortgage the whole of the Property or any part or parts thereof;
- k. execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Defendant, for any purpose pursuant to this Order;
- l. borrow such monies from time to time as it may consider necessary or desirable at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures and charge the Property or any part thereof as security therefor;
- m. to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property; and
- n. to take any steps reasonably incidental to the exercise of these powers,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorised and empowered to do so, to the exclusion of all other persons, including the Defendant, and without interference from any other person.

- (5) No proceeding or enforcement process in any court or tribunal shall be commenced or continued against the Receiver or in respect of the Property except with the written consent of the Receiver or with leave of this Court.
- (6) Without prejudice to the protection afforded to the Receiver under the Act and any other laws of Barbados, the Receiver shall incur no liability or obligation as a result of his appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on his part.
- (7) Any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise (the “**Receiver’s Charge**”).
- (8) All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever relating to the Property, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the

Receiver (the "**Receivership Accounts**") and the monies standing to the credit of such Receivership Account from time to time, net of any disbursements or expenses incurred, (the "**Proceeds**") shall be held by the Receiver on behalf of the Claimants to be paid in accordance with the terms of this Order or any further order of this Court.

(9) Subject to paragraph 10 below and any further order of this Court, the Proceeds shall be applied in the following manner:

- (a) the costs and expenses of the sale of the Property shall be paid;
- (b) those monies secured by the Receiver's Charge shall be paid;
- (c) the costs of this Application (as provided for in paragraph 5 of this Order **Error! Reference source not found.**) shall be paid;
- (d) any valid secured claims over the Property shall be redeemed;
- (e) any other claims that are afforded a preference under the laws of Barbados shall be paid; and
- (f) the monies remaining shall be remitted by the Receiver to the Claimants as trustees in bankruptcy of the estate of the Defendant.

(10) If within four (4) months of the date of this Order, any person institutes legal proceedings for the determination of any beneficial interest held in the Property and provides the Receiver with notice of same (the "**Proceedings**"), then the above orders shall be subject to the following terms and conditions imposed by the Court pursuant to section 224(4) of the Act:-

- (a) the Receiver shall retain out of the Net Sale Proceeds of the Property (as hereinafter defined) a sum representing 25% of the Net Sale Proceeds (the "**Retention Sum**") and hold the same on trust for the Trust Period (as hereinafter defined) for the purpose of settling the claim of any third party (the "**Applicant**") who is able to establish to the satisfaction of a court of competent jurisdiction that he was, prior to Defendant's bankruptcy, entitled to an interest in the Property.
- (b) the Net Sale Proceeds shall mean the monies received for the purchase of the Property less all expenses properly incurred in ensuring the completion of the sale of the same, including but not limited to the payment of:
 - i. all statutory rates and charges levied against the Property or incurred in the sale of the Property, including land tax, water rates, property transfer tax and stamp duty; and
 - ii. all professional fees incurred in the sale of the Property.

- (c) the Trust Period shall mean the period commencing from the date of the completion of the sale of the Property until the earliest of:
- i. the determination or disposal of the Proceedings;
 - ii. an order of the Court varying the condition imposed by the foregoing paragraph (a); or
 - iii. the agreement in writing of the Applicant and the Receiver to the release and/or application of the Retention Sum.
- (d) at the termination of the Trust Period in accordance with the foregoing paragraph (c), the Receiver shall:
- i. apply the Retention Sum in accordance with any binding order of the Court or agreement in writing between the Applicant and the Receiver; and
 - ii. if there is any surplus remaining of the Retention Sum after compliance with (i) above, pay said surplus to the Claimants; or
 - iii. if no provision is made for the application or payment of the Retention Sum by court order or agreement in writing between the Applicant and the Receiver, pay the Retention Sum to the Claimants

provided that nothing in this Order shall be construed as requiring the Receiver to pay to the Applicant any amount exceeding the Retention Sum.

