[2013]JMCC Comm. 8

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMERCIAL DIVISION

CLAIM NO. 2010 CD 00086

BETWEEN	**FIRST FINANCIAL CARIBBEAN TRUST COMPANY LIMITED (In Liquidation)**	**CLAIMANT**
AND	**DELROY HOWELL**	**1ST DEFENDANT**
AND	**KENARTHUR MITCHELL**	**2ND DEFENDANT**
AND	**FIRST FINANCIAL CARIBBEAN (JAMAICA) LIMITED**	**3RD DEFENDANT**
AND	**FIRST FINANCIAL INTERNATIONAL GROUP LIMITED**	**4TH DEFENDANT**
AND	**FIRST FINANCIAL CARIBBEAN LIMITED**	**5TH DEFENDANT**
AND	**FIRST FINANCIAL CARIBBEAN (HOLDINGS) LIMITED**	**6TH DEFENDANT**

IN CHAMBERS

Mr. Michael Hylton Q.C. , Mr. Kevin Powell and Mr. Sundiata Gibbs instructed by Michael Hylton & Associates for the Claimant.

Mr. Douglas Leys Q.C. and Mr. Roderick Gordon instructed by Gordon McGrath for the 1st Defendant.

Mr. Douglas Leys Q.C. and Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright & Co. for the 2nd to 6th Defendants.

COMPANY LAW – INSOLVENCY – PRIVATE INTERNATIONAL LAW – APPOINTMENT OF LIQUIDATOR IN WINDING-UP PROCEEDINGS IN FOREIGN COURT – CLAIM FILED BY COMPANY FOR BREACH OF FIDUCIARY DUTY, CONTRACT AND FRAUD PRIOR TO WINDING-UP ORDER – LOCUS STANDI OF LIQUIDATOR TO CONTINUE PROCEEDINGS – WHETHER NEED FOR LETTER OF REQUEST FROM FOREIGN COURT TO JAMAICAN COURT SEEKING ASSISTANCE – INHERENT JURISDICTION OF THE COURT TO RECOGNIZE AND ASSIST LIQUIDATOR – FORM OF RECOGNITION – WHETHER ASSISTANCE NECESSARY

HEARD: 3RD and 4th April, 10th May 2013

Mangatal J:

[1] The issues that I now have to rule upon are very interesting and novel, at least in our jurisdiction. On the 10th of May I refused the applications and promised to let the parties have my reasons for judgment. These I now provide.

[2] By application filed on the 20th March 2013, the 1st Defendant, and by application filed the 19th March 2013, the 2nd to 6th Defendants, respectively seek the following relief/orders:

> **1. That the Claimant and/or the Liquidator (Maria Ferere) has no locus standi to continue the present proceedings and institute any further Applications in the present proceedings in this Honourable Court.**
>
> **2. That as a consequence Claim No. 2010 CD 00086 be struck out from the Court's record and judgment entered for the .... Defendants, with costs.**
>
> **3. Alternatively that all proceedings in this Claim be stayed on the following conditions. That:**
>
> > **(i) the existing freezing orders be discharged;**
> >
> > **(ii) all monies and other assets which were held in the name of the Claimant and which have been remitted outside of the jurisdiction of this Court into the hands of the liquidator shall**

be immediately returned to the persons from whom they were collected by the Claimant's Attorneys-at-Law;

(iii) that the sum of US$2,435,053.33 owned by the 3rd Defendant herein and which have been remitted by the Claimant's Attorneys-at-Law into the hands of the liquidator outside the jurisdiction of this Court be forthwith returned to the Defendant by paying the same to its Attorneys-at- Law together with interest at the rate of 9% per annum from the date of payment to the Claimant's Attorneys-at-Law, until repayment;

(iv) this Honourable Court and these Defendants be notified of the date of such return to the said persons from whom they were collected by the Claimant's Attorneys-at-Law;

(v) the Claimant pays the sums of US$298,969.07 and US $377,000.00 in favour of the 1st Defendant on the one hand and of the 2nd and 3rd Defendants (on) **the other hand respectively, against the costs ordered by the Court of Appeal on January 22, 2013 within 7 days of the date of this Order.**

(vi) the costs incurred by the ... Defendants in this Claim since May 18, 2011 or subsequent to the appointment of the liquidator by the Turks and Caicos Islands Supreme Court be paid by the Claimant on an indemnity and client/attorney basis (save the order for costs reserved by this Honourable Court on the Claimant's Application for Directions dated the 14th January 2013);

(vii) the sum of US$140,000.00 be paid against the said costs incurred by these Defendants, since the appointment of the liquidator, within 7 days of the date of this Order.

(viii) If the Claimant fails to comply with the above mentioned conditions and/or the proceedings are not resumed within a period of three months from the date hereof, the Claim herein and all reliefs sought thereunder stands dismissed with costs to the Defendants and conditions (i) to (vii) shall be effected immediately by the Claimant without further order from this Court.

4. That this Honourable Court do make such further orders or give such directions as it thinks fit.

[3] The stated grounds of the applications are as follows:

"i. The Claimant is in liquidation under the jurisdiction of the Supreme Court of the Turks & Caicos Islands (TCI) and a liquidator has been appointed by that Honourable Court since May 18, 2011. The Liquidator is an officer of TCI Supreme Court duly appointed aforesaid.

ii. The Claimant has not since the said appointment made any application to that court requesting the said court to seek the assistance of the Jamaican Supreme Court to recognise her status as liquidator in this jurisdiction and to carry out her functions as such in Jamaica, which functions would include the authorisation for continuation of proceedings, commenced by the Claimant prior to her appointment as liquidator as well as collecting and dealing with the assets of the Claimant. The Claimant, its Attorneys-at-Law and/or the Liquidator in pursuing these proceedings do so without the lawful authority of this Honourable Court.

iii. The Liquidator has not demonstrated that it has any lawful authority to act in aid of the foreign liquidation ordered by the TCI Supreme Court in this jurisdiction. She is not lawfully an officer of the Jamaican Supreme Court and has not submitted herself to the jurisdiction of the Jamaican Court as required by law.

iv. In particular, the Claimant and/or Liquidator has not sought nor obtained an order from this Honourable Court recognizing, empowering and authorizing her to continue proceedings in the name of the Claimant or in her own name in this Honourable Court. The continuation of this claim under the instruction of the liquidator in the name of the company without seeking recognition aforesaid is an abuse of the process (of) **this Court and is likely to obstruct the just disposal of the proceedings as** (the Defendants) **cannot lawfully apply for certain reliefs essential to the conduct of the case because the Court cannot lawfully exercise jurisdiction over the liquidator.**

v. This Court has power to grant the relief being sought under its inherent jurisdiction or pursuant to its case management powers contained in Rules 26.1(2)(e),(f),(g),(j) and (v), Rule 26.3(1)(b), in keeping with the overriding objective stated in rule 1, and pursuant to Part 64 of the Civil Procedure Rules 2002."

BACKGROUND

[4] This claim was filed on the 19th August 2010 by First Financial Caribbean Trust Company Limited ("First Financial") in the Supreme Court of Judicature of Jamaica ("the Supreme Court'). First Financial was incorporated in the Turks and Caicos Islands in 2001. It was licensed by the Financial Services Commission of the Turks and Caicos Islands ("the FSC") to carry on business as a trust company in that jurisdiction, and did so at times material to this claim since 2002. The claim was brought against the Defendants for damages for several causes of action, including damages for breach of fiduciary duty, breach of contract and fraud arising from actions allegedly occurring prior to First Financial being placed in liquidation.

[5] On May 18 2011, the Supreme Court of the Turks and Caicos Islands ("the TCI Court") ordered that First Financial be wound up and appointed Maria Ferere as the liquidator ("the Liquidator"). The winding-up process is still ongoing . One of the specific powers with which the Liquidator became vested upon her appointment, set out at paragraph 3.(18) of the Winding Up Order was:

"to bring, continue, defend or intervene in any action or other legal proceedings in any jurisdiction in the name and on behalf of the Company and including for the avoidance of doubt the giving of any indemnity or cross undertaking in damages as may be necessary and limited to the free assets of the Company coming into the Liquidator's possession;"

[6] Prior to May 18 2011, there had been a number of interlocutory applications made and considered by the Supreme Court and the Court of Appeal of Jamaica, which exercises appellate jurisdiction over the Supreme Court. In particular, for example, in September 2010 Brooks J. (as he then was) heard applications by the Defendants to, amongst other matters, strike out the claim. One of the bases for that application was that these proceedings and the claim were commenced without authority. In his written judgment delivered on 1st October 2010, Brooks J. held that those in charge of First Financial were entitled to, if not obliged, to institute the claim to, "at least have a proper accounting of the trust monies" (page 13 of the judgment).

[7] On the 14th of June 2012 an Amended Claim Form and Amended Particulars of Claim were filed, with the Certificate of Truth being signed by the Liquidator. No new causes of action were alleged in these amended Statements of Case.

[8] The 1st Defendant Mr. Delroy Howell, ("Mr. Howell"), in his Affidavit filed March 19th 2013 in support of the applications by the Defendants, gives evidence that the Jamaican Court was first alerted to the fact of the presentation of the Petition to Wind Up First Financial, filed in the TCI Court by the Financial Services Commission, by Mr. G Anthony Levy, Attorney-at-Law, then on the record as representing Mr. Howell. Mr. Levy filed an Affidavit containing this information on the 23rd of March 2011. According to paragraph 5 of the Affidavit of Maria Ferere, the Liquidator, filed March 27, 2013, in response to these applications, she disclosed to the Supreme Court that she was appointed Liquidator by an Affidavit filed in these proceedings on June 28, 2011. In any event, however it is that the notification of the change of status/circumstances of First Financial first came about, numerous different orders have been made in the Supreme

Court, subsequent to the Supreme Court and all the Defendants having been made aware of the appointment of the Liquidator by the TCI Court. For example, on the 19th September 2011, before Brooks J. the Liquidator was present and orders were made amongst other matters, permitting "The Claimant's Attorneys-at-Law.... to pay to the Claimant (certain) funds....." On the Claimant's application, filed July 14, 2011, it was also ordered that Jamaica Money Market Brokers Limited, Pan Caribbean Financial Services Limited, and NCB Capital Markets Limited, being financial institutions in Jamaica, produce to the Claimant's Attorneys statements of account indicating the balances held in any accounts in the name of the Claimant and setting out all dealings on those accounts since August 19 2010. The Court of Appeal has also adjudicated on a number of issues involving this law suit.

[9] There has been no formal order of the Supreme Court expressly recognizing the Liquidator and there has been no letter of request for assistance issuing from the TCI Court to the Supreme Court.

[10] The first time that this issue has been raised, (as far as I am aware) asserting that "the Claimant and/or the Liquidator has no locus standi to continue these proceedings and institute any further applications" in the Supreme Court was this year, 2013. It was first raised as a preliminary point in respect of an application by the Claimant for Directions from the Supreme Court, filed January 15 2013, seeking an order that the same financial institutions in Jamaica (in respect of which the order was made on the 19th September 2011), within 7 days of service of the Supreme Court's order, close all accounts held for or in the name of First Financial and pay all balances due to First Financial and to its Attorneys-at-Law. In the 25th Affidavit of Sundiata Gibbs, one of the Attorneys-at-Law having conduct of this matter on behalf of the Claimant, filed January 15 2013, it was indicated that on December 3rd 2012, the TCI Court ordered and authorized the Liquidator to seek authorization from the relevant Jamaican court ordering and/or directing relevant Jamaican financial institutions to pay monies held on behalf of the Claimant to the Liquidator. The order was exhibited and was one of many directions given to the Liquidator by the TCI Court. This application was subsequently withdrawn by the Claimant after the preliminary objection as to locus

standi was only part-heard. The basis put forward by the Claimant's Attorneys for withdrawing the application, and this is attested to in paragraph 15 of the Liquidator's Affidavit, filed on March 27 2013, was that the costs of the application if continued would significantly exceed the estimated costs for making the application and the total proceeds that would be recovered if the application was successful.

[11] The Defendants have now formally applied to the Supreme Court raising this very important and fundamental point about locus standi in relation to the entire proceedings. It is perhaps not accidental that the point first occurred to the Defendants' present Attorneys-at-Law, when the application filed January 15 2013 was made. This application, like the one dealt with on September 19 2011, was filed in these proceedings which are seeking relief against the Defendants, and served on them. This notwithstanding the fact that the relief claimed in the applications does not appear to directly relate to the Defendants, or any of them. I will return to this point later on in the course of this judgment.

[12] This hearing has been extremely complicated and numerous authorities have been cited to me emanating from all parts of the Commonwealth, dealing with intricate and far-reaching questions of private international law, insolvency and comity. There have been detailed written submissions on all sides. I am grateful to the Attorneys-at-Law for the clarity of their submissions and industry in researching the matter.

THE DEFENDANTS' CASE

[13] I will try to summarize the submissions made by the Defendants, as put forward by Lead Counsel for all of the Defendants, Mr. Douglas Leys Queen's Counsel.

[14] Reference was made to the judgment of Millet J. in **In re International Tin Council** [1987] 1Ch 419 where the effect of a winding up order and the duties of a liquidator are discussed. At page 446 A-H, the learned judge stated:

> **"The making of a winding up order divests the company of the beneficial ownership of its assets, which cease to be applicable for**

its own benefit. It brings into operation a statutory scheme for dealing with the assets for the benefit of the creditors and members. The custody and control of all the property of the company and the power to manage its affairs are taken from the persons entrusted with them by the company's constitution and entrusted instead to a liquidator, whose powers are limited to carrying on the company's activities for the purpose of winding up its affairs, and who acts under the ultimate direction of the court.

Any disposition of the property of the company and any alteration in the status of the company's members made after the presentation of the petition are void unless the court otherwise orders. Antecedent transactions of the company made before the presentation of the petition are liable to be set aside. All proceedings against the company are automatically stayed, as is the power of the creditors to enforce their remedies against the company. In performing his duties in a compulsory winding up, the liquidator acts as an officer of the court. One of his duties is to take into his custody or under his control all the property and choses in action to which the company is or appears to be entitled:...

.....

Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation. In the case of a foreign company, therefore, the fact that other countries, in accordance with their own rules of private international law, may not recognize our winding up order or the title of a liquidator appointed by our courts, necessarily imposes practical limitations on the consequences of the order. But in theory the effect of the order is worldwide."

(Underlining emphasis mine)

[15] It was Mr. Leys' contention that the appointment of the Liquidator by the TCI Court means that it is the Liquidator that is now in control of the Claimant. There is no

one else but the Liquidator who can lawfully control its affairs. It is therefore the Liquidator who now controls the conduct of the litigation in this matter. The Liquidator controls the financing of the litigation and takes all decisions and gives all instructions as regards the future conduct of the litigation.

[16] It was submitted that the Liquidator cannot hide behind the Claimant or use the company's name as a shield from the jurisdiction of the court. Reliance was placed upon the decision in **Ho Wing On Christopher and others v. ECRC Land Pte Ltd (In Liquidation**, [2006] SGCA 25, a decision of the Court of Appeal of Singapore where, at paragraph 24 of the Lexis Reprint, it was stated:

> **" The strict adherence to the principle of the separate corporate personality of an insolvent company during a winding up is not necessarily in the public interest if it allows liquidators to hide behind an invisible shield to launch unmeritorious claims against defendants who ultimately emerge victorious but end up being the poorer for it."**

[17] Mr. Leys Q.C further submitted that the Companies Act of Jamaica governs the appointment and control of liquidators in this jurisdiction. That the Jamaican Courts only have jurisdiction over companies registered under the Companies Act and liquidators appointed under that Act. There is no statutory provision which empowers the court to appoint or recognize liquidators appointed by a foreign Court, such as the TCI Court.

[18] However, there is, learned Queen's Counsel submits, at common law, and under the inherent jurisdiction of the Court, a power conferred on the Court to recognize and empower a foreign liquidator to control the liquidation in a foreign country such as Jamaica. This includes the conduct of litigation proceedings. Reliance was placed upon the, if I may say so, comprehensive and illuminating unreported decision of Justice Ola Mae Edwards of the High Court of Anguilla in **Canadiana Limited (In Liquidation) et al** AL 2003 HC 11, May 28, 2003 and also the decision of the English Court of Appeal in **Hughes and Others v. Hanover Ruckversicherungs-Aktienesellschaft** [1997]

B.C.C.921. The submission advances the proposition that these cases, and others cited, demonstrate that a foreign liquidator acting under a winding up order of a foreign court is not entitled as of right to exercise jurisdiction in the Requested State. Recognition must first be sought from the Requested State and that recognition is not automatic. The courts of the Requested State are vested with discretion.

[19] Learned Queen's Counsel submits that the Liquidator in her capacity as such has not produced any evidence that she has sought a specific order of recognition from the Supreme Court enabling her to act in this jurisdiction by invoking its inherent jurisdiction.

[20] The real crux of the Defendants' submissions is that at common law this application for recognition comes in the form of a request being made by the foreign court, the TCI Court to the Supreme Court. It was argued that this request comes as a letter of request, and is a matter of judicial comity, born of the mutual respect both courts have for each other's jurisdictional competence and territorial limits. It was submitted that any request for assistance by the Liquidator cannot come directly from the liquidator. The request must come directly from the TCI Court to the Supreme Court. The Affidavit of Mr. Oliver Smith, an Attorney-at-Law with the firm Stanfielde Greene who are on the record for Mr. Howell in the TCI liquidation proceedings, sworn on the 21st March 2013, and filed on behalf of Mr. Howell, indicates that the Registry of the TCI Court has confirmed that no letter of request has been issued.

[21] In their written submissions, the Defendants' Counsel submit that " The letter of request is the 'trigger', which empowers the Jamaican Supreme Court to an enlarged jurisdiction and to control the actions of the Liquidator in this jurisdiction and ultimately the actions of the Claimant in the conduct of the litigation. Without that request, the Jamaican Supreme Court is impotent and cannot assist the TCI Court in the Liquidation. The letter of request would spell out with specificity what the Requesting Court wishes the Requested Court to do. This is not something that the Requested Court can do of its own motion."

[22] Heavy reliance was placed on the work of Dicey and Morris on **The Conflict of Laws**, 13th Edition, paragraphs 30-097-100. It was submitted that the practice at common law is that a letter of request is done and that this practice was confirmed in decisions of the Judicial Committee of the Privy Council in **Al Sabah v. Grupo Toras S.A.** [2005] LRC 771, and **Cambridge Gas Transport Corp. v. The Official Committee of Unsecured Creditors (of Navigator Holdings plc and others)** [2006] UKPC 26 and on the House of Lords decision in **McGrath v. Riddell** [2008] 3 All E.R. 869. In oral submissions, Mr. Leys sought to clarify that he was not saying that the common law required a letter of request, but that the established practice is that there must be a letter of request moving from court to court.

[23] The passage in Dicey and Morris, which the Defendants rely upon states as follows:

> **"30-097-Judicial assistance.....**
>
> **30-100- ...the duty under section 426 applies only as between courts and, before the English Court can act it must have received a request from the foreign court so to act. Thus a foreign liquidator cannot invoke the assistance of the English court directly: it will be necessary to approach a relevant foreign court which must issue the request...."**

[24] Counsel concluded the submissions on this aspect of the matter by contending that the principles upon which recognition is granted are well set out and codified in the case of **Canadiana Ltd. (In Liquidation)**. Reference was made to a number of paragraphs of the judgment, including paragraph 80, where the principles governing the exercise of the court's jurisdiction in proceedings such as the one before her, were set out by Edwards J. At paragraph 80F, the learned judge stated that **"The existence of a letter of request is a weighty matter to be taken into account, but it cannot outweigh all other facts"**. The Defendants indicated that they also rely on the authorities referred to in that case in respect of recognition of foreign liquidators at common law.

THE CLAIMANT'S CASE

[25] It was argued that the Defendants' applications are based on a contention that the Jamaican Court has not recognised the Liquidator's status as liquidator in this jurisdiction. Mr. Michael Hylton Q.C., lead Counsel for the Claimant, submitted that the premise upon which the Defendants have made their applications is misconceived. He submitted that these applications must fail for the simple reason that these proceedings are not insolvency proceedings.

[26] Learned Queen's Counsel submitted that these proceedings are not part of, or incidental to the winding up proceedings being undertaken in the TCI Court. The winding up commenced after these proceedings and does not affect the substantive issues between the Claimant and the Defendants in these proceedings.

[27] The Liquidator has not sought, and it was submitted, does not require the assistance of the Supreme Court to continue this claim. The relief sought does not relate to the Liquidator or the liquidation in any way and the Liquidator does not seek any relief or orders *qua* liquidator. Further, the submission continues, in fact, her only role in these proceedings is that she is effectively, the only person authorised to give instructions on the Claimant's behalf. She is in the same position as the unidentified directors of the corporate Defendants. No issue can arise as to their status in these proceedings, Mr. Hylton submits, because they have none and have not claimed to have any.

[28] Counsel submitted that a number of the cases cited by Counsel for the Defendants in support of the submission that the Liquidator requires the assistance of the Supreme Court were situations where the liquidator sought to assert his or her powers as liquidator. Such situations, it was submitted, are to be distinguished from a situation where it is the company that is asserting its rights. (Counsel's emphasis).

[29] Reliance was placed upon **Halsbury's Laws of England**, Volume 19 (2011) 5th Edition, paragraph 782 as explaining the difference. This authority was relied upon for

the proposition that in cases not involving a winding up or insolvency proceedings, the English Courts have a common law jurisdiction to recognise a person empowered under foreign insolvency law to act on behalf of a company over which a foreign court has jurisdiction, and actively to assist that person.

[30] In those cases, it was submitted that no letter of request is necessary. The only issue is whether the liquidator is in fact empowered to speak for the company, which is based upon the law of its place of incorporation. Reliance was placed upon **Atkin's Court Forms, Volume 9(2),(3),(4), paragraph 153** as well as on **Halsbury's Laws of England, Volume 19, paragraph 763.**

[31] The Claimant's Counsel also submits that the passage in Dicey and Morris on **The Conflict of Laws** relied upon by the Defendants specifically is worded as it is because of the mandatory language of section 426 of the English Insolvency Act there under discussion and under which the English court can act with enlarged powers. It was submitted that therefore, even where proceedings are in fact insolvency proceedings, the letter of request is not a requirement at common law. Mr. Hylton submitted that the **Canadiana Ltd. (In Liquidation)** decision, at paragraph 80F, and paragraphs 38-43 support the submission that the letter of request is not a requirement at common law.

[32] The Claimants submit that the Liquidator is empowered by the winding up order made by the TCI Court. Further, that it is the Law of TCI, the place of incorporation, that determines who is authorised to continue this litigation on behalf of the Claimant. It was submitted that in any event, a determination of the authority of the Claimant or the Liquidator to continue these proceedings involves an inquiry into the capacity of either or both of them to do so. It was submitted that their capacities are not in dispute. The Defendants have already recognized that the Liquidator is the lawfully appointed Liquidator of the Claimant. Also, it is evident from the winding up order that the Claimant has not been dissolved and continues to be a legal entity.

[33] Furthermore, it was argued that that the orders made by the Supreme Court and by the Court of Appeal referred to in paragraphs 7 and 8 of Mr. Howell's Affidavit were made with the full knowledge of the courts and the Defendants that the Liquidator had been appointed.

[34] Learned Queen's Counsel submitted that in the circumstances, the Claimant and the Liquidator have the capacity and authority to continue these proceedings.

RESOLUTION OF THE ISSUES

[35] In my judgment, it is important to grasp what is the precise nature of the proceedings involved in this lawsuit. In the course of earlier submissions in respect of the abandoned application, Mr. Leys Q.C., with admirable industry and candour, having referred to and relied upon the decision of the Judicial Committee of the Privy Council in the **Cambridge Gas** decision, advised me that he had come across the recent House of Lord's decision in **Rubin v. Eurofinance S.A. & others** [2013] 1 All E.R. (Comm) 513 in which **Cambridge Gas** had been disapproved. In my judgment, what was disapproved of is the Privy Council's election to treat a default judgment obtained in foreign insolvency proceedings in a different way from any other foreign in personam judgment for the purposes of recognition at common law. In **Rubin,** which was a decision by a majority, in relation to the juridical nature of insolvency proceedings as opposed to other types of proceedings, there was no express disapproval of Lord Hoffman's description of these differences or the principle of modified universalism in relation to insolvency proceedings. Indeed, Lord Collins, who was Lord Hoffman's main critic, at paragraph 92 described Lord Hoffman's contributions in **Cambridge Gas** and in **Re HIH Casualty and General Insurance Limited**[2008] 3 All E.R. 869, (both cited by, and relied upon, by all the parties herein), as being a "brilliantly expressed Opinion" and "equally brilliant speech" respectively.

[36] Bearing all of the foregoing in mind, and the fact that **Cambridge Gas** is a decision of the highest court in our judicial system, I intend to refer to and rely upon the uncontroversial aspects of Lord Hoffman's speech, which in any event appears, in my

humble view, logical and extremely helpful. Indeed, one English Commentator, and author of an interesting article entitled "Keep Calm and Don't Submit-the Supreme Court Has Its Say On Recognition of Foreign Insolvency proceedings", Craig Montgomery, published by Sweet & Maxwell, [2013] Volume 26, **Insolvency Intelligence** , Issue 2, page 29, discusses **Rubin** and **Cambridge Gas** . He has expressed the view that it will be interesting to see what happens in respect of two countries where final appeal lies to the Privy Council and where certain matters had been adjourned pending the English Supreme Court's decision in **Rubin** . The author felt it would be of interest to see whether they prefer to follow "Lord Collins' approach in *Rubin* or the more liberal approach of the Privy Council." As is typical of Lord Hoffman's judgments, he expresses basic and fundamental principles of the law with great clarity, purity and simplicity.

[37] At paragraphs 13, 14 and 15 of the judgment in **Cambridge Gas** , Lord Hoffman stated the following:

> **"[13].... Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.**
>
> **[14] The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established.....**
>
> **[15]....The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them. Of course, as Brightman L.J pointed out in *Re Lines Bros Ltd* [1982] 2 All E.R 183 at 194-195,[1983] Ch 1 at 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged; proofs of debts may be**

rejected or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings."

[38] There are a number of features of the instant case that in my judgment clearly demonstrate that they are not insolvency proceedings. Firstly, these proceedings were started prior to First Financial going into liquidation. Indeed, they were commenced in August 2010 and the Winding Up Order was not made until May 2011.The purpose of the instant proceedings between the Claimant and the Defendants is to obtain a judicial determination of the existence of rights as between the company First Financial and the Defendants. In my judgment, it makes no difference that the Claim was amended and signed by the Liquidator. The amendments were not major and did not import any changes such as to alter the causes of action or the nature of the claim being one for the determination of rights as between the company First Financial and the Defendants. These are not insolvency proceedings, as described so lucidly by Lord Hoffman, where the purpose is to provide a mechanism of collective execution or collective proceeding to enforce rights. In fact, this is a classic example of the type of situation where the alleged rights of the company First Financial and entitlement to damages for breach of fiduciary duty, breach of contract or for fraud, have to be left to be determined by ordinary action.

[39] Indeed, the 3rd Defendant First Financial Caribbean Jamaica Limited has made a substantial Counterclaim against the Company First Financial. That claim is aimed at the company as a corporate entity, and has nothing to do with the Liquidator in her capacity as liquidator per se. Further, it is not a claim in the winding up proceedings and is not in the nature of insolvency proceedings. It is the Liquidator that will have to conduct the defence of First Financial and the proceedings arising on the Counterclaim, on behalf of First Financial, because it is the Liquidator who is the one charged with

managing the affairs of the Company and with conducting litigation on its behalf. That would appear to be a claim that the 3rd Defendant wishes the Court to determine without more.

[40] The passage from Dicey and Morris on the **Conflict of Laws** is addressed to insolvency proceedings and has no relevance whatsoever to the proceedings between the Claimant and the Defendants. However, in any event, the passage extracted on behalf of the Defendants cannot be taken as representing the common law situation or indeed, the practice at common law because it is specifically related to the mandatory language of section 426 of the English Insolvency Act. That legislation has no applicability to Jamaica and we do not have any statutory equivalent. Further, what is in the English section does not represent the position at common law, in England or in Jamaica. This can be readily seen by reading the paragraphs of Dicey carefully. Indeed, the authors start out by citing sub-sections 426(4) and (5) of the English Act, which state:

> **"(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.**
>
> **(5) For the purposes of sub-section(4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.**
>
> (My emphasis)

[41] The passage in Dicey and Morris referred to in paragraph 23 of this judgment, occurs after the above sub-paragraphs of the English section were set out, and after the authors point out that the mandatory language in subsection (4) imposes an obligation

on the English court to provide assistance to "relevant countries or territories" under the Act. They state:

> **"Although section 426 appears to impose an obligation to provide assistance, in international situations, the obligation only extends to a relevant country or territory."**

[42] The authors then state that the obligation to assist only arises after the English court receives a request from the foreign court. I agree with Counsel for the Claimant that that is the context in which the passage upon which the Defendants rely begins with the words **"the duty of assistance under section 426 applies only as between courts."**

[43] Thus, whilst the discussion in the Dicey and Morris suggests that under section 426, a request from a foreign court in a relevant country is the "trigger" that allows the English Court to exercise the enlarged powers granted by that section, the request or letter of request is not a necessary requirement, and hence is not the trigger, for the exercise of the court's inherent jurisdiction.

[44] Section 426 allows the English courts, on satisfaction of the necessary criteria, to exercise an enlarged jurisdiction. Indeed, in the **Cambridge Gas** decision, the Privy Council expressed doubt whether at common law the assistance that could be given by the local court could take the form of applying provisions of the foreign domestic law not a part of the domestic system.

[45] The fact that the learned authors comments in paragraph 30-100 cited by Counsel for the Defendants, is specific to the section 426 powers, and not to the common law, is made even clearer when one looks at one of the preceding paragraphs, paragraph 30-097:

> **"JUDICIAL ASSISTANCE- A prominent and distinct feature of the private international law of insolvency has been the development of procedures whereby English courts have a discretion to provide assistance in aid of foreign proceedings. Although** (t)**here were no**

statutory procedures in the context of corporate insolvencies until the Insolvency Act 1986, it was clear that the principle of co-operation was recognised at common law. The statutory regime is to be found in the Insolvency Act 1986, section 426, though there is no reason to doubt that the existence of this section does not prejudice the continued operation of the common law."

(Underlining emphasis mine)

[46] A footnote to paragraph 30-097 refers to the fact that provision for co-operation in the field of individual insolvency was to be found in the now repealed section 122 of the English Bankruptcy Act. 1914. It should be noted that in Jamaica, we do have statutory provision for co-operation in the field of individual insolvency in section 160 of our Bankruptcy Act. However, it would appear that the provisions in section 160 do not have any extra-territorial effect. In other words, the provisions operate within "the domestic context of Jamaica"- This section's predecessor was so referred to in the Privy Council 's decision in the Caymanian case of **Al Sabah v. Grupo Torras S.A.**

[47] Section 160 of our Bankruptcy Act provides as follows:

"160. Enforcement of warrants and orders of Courts

All the Courts in bankruptcy and the officers of such Courts, shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy and any order of any one Court in a proceeding in bankruptcy may, on application to another Court, be made an order of such other Court, and may be carried into effect accordingly. And an order of any Court in bankruptcy seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

(Underlining emphasis mine)

[48] In **Al Sabah**, at paragraphs 17 and 26 Lord Hoffman discussed the fact that the provision's predecessor, section 64, was not extra-territorial in effect. At paragraph 17, it was stated:

> **"17. These provisions do not in terms have any extraterritorial effect. Bankruptcy law was administered in Jamaica by several district courts whose jurisdiction was based on the residence or place of business of the debtor, with an appeal to the Supreme Court....**
>
> **....changes made by ss. 3-11 of the Jamaican Bankruptcy Law 1880,...established the High Court of Justice as the Chief Court of Bankruptcy, and gave limited jurisdiction.... to the Resident Magistrates' Courts, with an appeal (in either case) to the Court of Appeal."**

[49] **Al Sabah** was a case in which the Trustee in Bankruptcy appointed in the Bahamas required the exercise in Cayman of all the statutory powers accorded to a Trustee in Bankruptcy in the jurisdiction of Cayman. A letter of request was issued from the Bahamian Grand Court to the Grand Court of the Cayman Islands. It was an example of a case in which the Trustee in Bankruptcy was seeking to assert rights as Trustee. Other than involving the question of individual insolvency, i.e. bankruptcy, the facts in **Al Sabah** are in my view readily distinguishable from the facts in the instant case.

[50] Further, I agree with Counsel for the Claimant that the following are examples of situations where a foreign liquidator would require assistance from the court:

a. ancillary winding up proceedings and multiple liquidators, as in **Re HIH Casualty and General Insurance** [2008] 3 All E.R. 869;

b. challenges to the appointment of the liquidator, as in the **Canadiana** ;

c. to restrain proceedings against the company in another jurisdiction, as in **Hughes v. Hanover** [1997] 1 BCLC 497;

d. to implement a scheme of arrangement or a reorganization plan, as happened in **Cambridge Gas** .

[51] I have already indicated that in my view, the instant proceedings are not insolvency proceedings and are quite different in nature from those referred to in the above paragraph. Since they are not insolvency proceedings, what then is the law and position which governs them? In the **Halsbury's Laws of England, Volume 19, (2011), 5th Edition, paragraph 763,** the learned authors discuss the applicable legal principles as follows:

> **"10. CORPORATIONS**
>
> **(1) STATUS, DOMICILE AND POWERS**
>
> **763. Recognition of foreign corporations.**
>
> **English law recognises the existence of a corporation duly created in a foreign country, and will allow it to sue and be sued in England in its corporate capacity. It follows that whether a corporation has continued in existence, or has been dissolved, is likewise governed by the law of its place of incorporation.**
>
> **The law of the place of incorporation determines who is entitled to act on behalf of the corporation....."**

[52] In the Atkins' Court Forms, Volumes 9(2), (3), (4), paragraph 153, it is stated:

> **"As a general matter, an English court will recognise the effect of a winding up or dissolution of a foreign company carried out under the law of its incorporation. Provided the relevant representative authority is conferred upon the foreign officeholder by the law of the place of incorporation of the company, then English law will recognise such**

officeholder and his authority to wind up the company and to represent it in legal proceedings brought against it or on its behalf... Recognition carries with it the active assistance of the court. ... "The purpose of recognition is to enable the foreign officeholder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

[53] In combination, these authorities suggest that at common law, courts will recognize the liquidator and his authority to carry on proceedings on behalf of the company. From as far back as the middle of 2011, the Supreme Court was provided with evidence about the winding up order and that the Liquidator had been appointed by the TCI Court, the Court of the country of incorporation. Whilst recognition brings with it the active assistance of the Court, what is required in terms of recognition and in terms of assistance will vary, depending on the circumstances. According to the **Halsbury"s** referred to in paragraph 46 above, English law will recognize the capacity of a company created in a foreign company to sue and be sued in England. The same obtains in Jamaica.

[53A] When a suit is filed by such a corporation in Jamaica, what does this entail? There is no formal application for, or recognition, and no need for assistance from the court. The Court does not even make any declaration of recognition. The Court simply accepts that the company has capacity, based upon the laws of its country of incorporation. In like fashion, it seems to me, that in cases not involving insolvency proceedings, and where therefore there is no need for any active assistance from the Court, the Supreme Court, upon being informed of the existence of the Liquidator, (as it was in this case), can simply treat with the matter on the basis that the relevant representative authority has been conferred on the Liquidator by the place of incorporation of First Financial, the TCI. Further, that the Liquidator is authorized to represent the company in these proceedings brought on its behalf. Thus, whilst recognition carries with it assistance, there is a distinction between the two concepts. There is no need for assistance where the nature of the proceedings are not insolvency

proceedings but are instead proceedings brought by the company prior to the winding up order and seeking to establish allegedly pre-existing rights. It is therefore hardly surprising that as regards these proceedings against the Defendants, there is no letter emanating from the TCI Court requesting assistance from the Supreme Court. This is an ordinary action. However, after the rights of the parties have been determined by the Supreme Court, such rights as may be established will be relevant to the winding-up proceedings. That is a quite different consideration and does not colour these proceedings as being insolvency proceedings.

[54] I now turn to consider the decision of the Court of Appeal of Singapore in **Ho Wing on Christopher v. ECRC Land Pte** , relied upon by the Defendants' Counsel to make the point that it is not necessarily in the public's interest to adhere strictly to the principle of separate legal personality when a company is in liquidation. I agree with Mr. Hylton Q.C. that the issue in that case was whether a liquidator who breached the estate costs rule should be personally liable for costs. The court's comments about the separate legal personality of a liquidator do seem to have been aimed at explaining that in circumstances of impropriety on the part of a liquidator, the liquidator can be held liable notwithstanding the principle of separate legal personality. The court in that case did not say, and it is not the law, that the concept of separate legal personality must be ignored altogether. The present case is not in any event a case where the claims against the Defendants have been found to be unmeritorious since indeed, they have not yet been finally determined. The principles in the **Ho Wing** case therefore do not assist with the resolution of the issues relevant to the present case, and at this juncture.

[55] However, in my judgment, even where there are insolvency proceedings, there is no evidence that at common law or under the inherent jurisdiction, a letter of request is a requirement for the purpose of recognizing a foreign liquidator. At footnote 14 of paragraph 782 of the **Halsbury's**, it is pointed out that the common law jurisdiction is inherent and thus independent of any jurisdiction under statute. In the **Canadiana** decision, upon which the Defendants have placed much reliance, that case acknowledges that a letter of request is not the invariable requirement. At paragraph 38, Edwards J. refers to two cases cited to her, including **African Farms Ltd.** (1906) TS

373, and the Canadian case of **In re IIT** (1975) D.L.R. 3dd55, in both of which cases there was no letter of request. In both cases the courts exercised inherent jurisdiction to recognise the liquidator's powers and rights. At paragraph 43 Edwards J. makes the observation that the practice involving a letter of request seems to have developed for the purposes of bankruptcy proceedings.

[56] I should add that whilst it has been submitted by Mr. Leys that the practice is that a letter of request should issue as a matter of comity between the Courts, there has been no evidence produced as to what has been the practice in our Courts. I hardly think that this is the first time in which there is a case before the Supreme Court involving a corporation incorporated elsewhere and where a liquidator has been appointed by the court of the country of incorporation. What have our Courts done? Have we been in the practice in insolvency proceedings of withholding recognition or assistance unless there has been a letter of request from the other court where the liquidator has been appointed? There is no evidence to that effect. At paragraph 84 of the **Canadiana** Edwards J. stated that the cases show that the need for a letter of request may depend on Statute or on the Court's exercise of its inherent jurisdiction. At paragraph 91, the learned judge remarked that in the matter before her, both the Grand Court in Cayman and the Bahamas Court appeared to take the view that quite apart from the statutory schemes the Bahamian Court could apply its inherent jurisdiction to issue the letter of request to the Cayman Court. At paragraph 92 Edwards J. notes that the Bahamian Court relied upon a statement by Sir Donald Nicholas VC in **Panayiolon and Others v. Sony Music Entertainment(UK) Ltd.** [1994] 1 All E.R. 755. That was a case involving requests for documents. At page 761, Nicholas VC stated:

"The Court's power to issue a letter of Request stems from the jurisdiction inherent in the Court. Inherent in the Court is the power to do those acts which the Court needs must have to maintain its character as a Court of Justice (See Lord Diplock in Brenner Valcon Schiffbau Und Maschinenfubrik South India Shipping Corp [1982] 1 All E.R. 289 at 295."

[57] In my judgment, this is a far cry from demonstrating that where insolvency proceedings are concerned, or proceedings in furtherance of execution, that there has

to be a letter of request before the Supreme Court can recognize or assist the Liquidator. At common law, there is not, as I understood the Defendants' argument to be, an absolute requirement for a letter of request to issue. Nor has there been any sufficient basis to satisfy me that this is indeed the practice in our jurisdiction.

[58] I have already said that in my judgment, the nature of these proceedings are not insolvency or execution proceedings and thus much of the argument about a letter of request does not apply. However, at this juncture I will return to the application filed by the Claimant on January 15 2013 seeking to have accounts held by certain financial institutions in the name of the Claimant closed and the balances handed over to the Claimant and its Attorneys-at-Law. It was during the course of that application that the legal issue of the Liquidator's locus was, as far as I am aware, first raised, and it was that application that was abandoned by Counsel for the Claimant. After the withdrawal of the application, Counsel for the Defendants indicated that they would be seeking an order that the costs of that application be paid personally by the Liquidator and that application is pending. It seems to me that this type of application IS, unlike the principal proceedings, in the nature of insolvency proceedings. This is because it really is an application in furtherance of the Liquidator collecting or gathering and taking into her custody or under her control the assets of the company First Financial. It is an application by the Liquidator qua liquidator. Perhaps that is why this distinct, and in my view, discreet, application is the one in respect of which the point was first raised. It would involve a recognition of the Liquidator's status by the Court, beyond that which was afforded, or required generally, in this ordinary action for establishment of rights as against the Defendants. However, I am of the view that no letter of request was necessary. The TCI Court by its order made on December 3rd 2012, ordered and authorized the Liquidator to seek authorization from the relevant Jamaican court ordering and/or directing relevant Jamaican financial institutions to pay monies held on behalf of the Claimant to the Liquidator. In my judgment, the Supreme Court can recognize the Liquidator's rights and can make orders to assist the Liquidator in carrying out this aspect of the winding up, without the need for a letter of request. This is because the Supreme Court has an inherent jurisdiction at common law to recognize the Liquidator as having been authorized by the law of the TCI, First Financial's place of

incorporation, and as having authority to wind up the company and gather in its assets. It is part of what has been referred to in a number of the authorities as the modified principle of universalism. Since the application with regard to these financial institutions has been withdrawn, there is not now therefore any aspect of this claim that constitutes anything but an ordinary action. The issue of the costs of the abandoned proceedings is a separate issue still to be argued. I do not therefore think it is now strictly necessary for me to treat with that application. Suffice it to say, that I think it would have been appropriate to seek recognition in a completely different claim. This application did not on the face of it really have anything to do with the Defendants. Secondly, it might perhaps have been appropriate for a declaration recognizing the Liquidator's rights to have been sought or obtained.

[59] In going through the files, (indeed, after I gave my decision orally on the 10th May 2013, promising these my reasons for Judgment), I have noted that the order made by Brooks J. on the 19th September 2011 for the financial institutions to disclose accounts to Michael Hylton & Associates, was in the formal order stated to have been made in respect of an application filed July 14 2011. On the file there is an application filed July 14 2011 where the Claimant sought the following relief:

> **"1. The court declare that Maria Ferere of FT Consultants Limited, Nassau Bahamas is the duly appointed Liquidator of the Claimant and is entitled to exercise the powers formerly held by the Board of Directors in relation to accounts and assets held by or in the name of the Claimant in Jamaica."**

[60] Some of the stated grounds of the application were as follows:

> **" ....**
>
> **2. On June 22, 2011 notice of Ms. Ferere's appointment as liquidator of the Claimant was given in the Jamaica Gazette.**
>
> **3. Some local financial institutions will not recognize Ms. Ferere's authority to give instructions on accounts in the Claimant's name until the Jamaican Supreme Court has either registered the TCI order or made a declaration regarding its enforceability in Jamaica.**

4. A declaration or order is therefore needed in order for the Liquidator of the Claimant to have access to assets and information regarding its assets held at financial institutions in Jamaica."

[61] There are even written submissions on file regarding that application but there is no indication what transpired with regard to it. Further, none of the Counsel for any of the parties has referred to this earlier application, whether to say it existed, but was withdrawn, or refused, or anything whatsoever. This matter has been the subject of numerous applications by all of the parties, both in the Supreme Court and in the Court of Appeal, a number of them being filed simultaneously on the same date. As a result it has not always been easy to track what transpired in relation to all of them. However, evidently, the point may not be as "new" as this Court thought it was. Be that as it may, since the January 15 2013 application (which I consider a follow up to the earlier order about disclosure of accounts from the financial institutions) has been abandoned, none of this affects my decision. This is because this matter now involves, not just principally, but solely, an ordinary action between the Company First Financial and the Defendants and in respect of which the Liquidator is the duly appointed representative authority. I therefore think that the proportionate way to have the lawyers for the parties comment upon this application filed July 14, 2011, if so advised, would be in the course of submissions on the question of costs.

[62] It is not in issue that the Company First Financial is, by the law of the country of its incorporation, TCI, still in existence and it plainly has locus standi to have its claim against the Defendants continue. The more crucial issue for the purposes of the Defendants' applications is the locus standi of the Liquidator. For the reasons set out above, in my judgment, the Liquidator does have locus standi to continue these proceedings on behalf of the Company First Financial and to on its behalf, institute and carry on applications against, and in relation to, the Defendants, or any of them, in these proceedings. In light of my ruling the application to strike out fails, and the alternative application for a stay would therefore not arise for consideration.

[63] However, in light of the matters that I have discussed in relation to the nature of the withdrawn application, and other aspects of the matter, I have decided to hear submissions from the parties with regards to costs. I therefore make the following orders:

> [1] The 1st Defendant's Notice of Application for Court Orders, and the 2nd-6th Defendants' Notice of Application for Court Orders, seeking determination of the authority of the Claimant and/or the Liquidator to continue proceedings, filed respectively on the 20th and 19th March 2013, are refused.
>
> [2] The question of costs reserved to the 16th May 2013, at 2:00 p.m.
>
> [3] Claimant's Attorneys-at-Law to prepare, file and serve the formal order.