EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2013/0010

In the Matter of the Companies Act (c. C65)

In the Matter of Leeward Isles Resorts Limited
(In Liquidation)

BETWEEN:

[1] BRILLA CAPITAL INVESTMENT MASTER FUND SPC LIMITED
A Cayman Islands segregated portfolio company, for and on behalf of Brilla Cap Juluca Segregated Portfolio M, a segregated portfolio thereof)
[2] ANGUILLA HOTEL INVESTORS II LIMITED
[3] BRIDGE FUNDING LIMITED

Appellants

and

LEEWARD ISLES RESORTS LIMITED (IN LIQUIDATION)

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

Appearances:

Mr. Robert Levy, QC, Mr. Edward Knight and
Mr. Ravi Bahadursingh for the Appellants
Mr. Christopher Pymont, QC, Ms. Dahlia Joseph and
Ms. Dia Forrester for the Respondent

2014: January 23;
2015: January 12.

Interlocutory appeal – Winding up of respondent company – Post-liquidation debt arising from breach of pre-liquidation obligation – Arbitration proceedings commenced out of jurisdiction by appellants against respondent company – Whether improper – Whether arbitration proceedings should be stayed pending resolution of extant applications between

the parties within jurisdiction – Whether learned judge erred in granting respondent permanent injunction against continuation of arbitration proceedings commenced by them

The appellants are the owners of a number of villas which form part of a five star plus, full service luxury resort hotel in Anguilla, known as Cap Juluca. The respondent company, now in liquidation, has been operating, and still operates, the Cap Juluca Resort.

After the respondent went into voluntary liquidation in the course of 2011, the court, in May 2012, upon application by two interested parties, terminated the appointment of the joint liquidators of the respondent, appointed a sole liquidator, and ordered that the company be wound up pursuant to section 215(1)(b) and (c) of the Companies Act.[1] The court's order also stated that the liquidation of the company was to be carried out as far as applicable and practicable in accordance with the Insolvency Rules of the UK.

At the commencement of the liquidation of the respondent company, there were several unsecured creditors of the company, by virtue of certain loan arrangements which predated the liquidation. The appellants submitted to the liquidator the details of their liquidated debts. With the operation of the resort continuing after the liquidation, the respondent continued to be liable to the appellants for any non-compliance by it with its obligations to them, as villa owners.

In November 2012, lawyers representing the appellants wrote to the liquidator of the respondent, itemising the breaches by the company of its obligations to the villa owners and requesting the taking of appropriate action to remedy the situation. No response was received from the liquidator, so the appellants commenced arbitration proceedings against the respondent in New York, seeking damages and injunctive relief in accordance with the agreements governing the duties and obligations of the resort operators to the villa owners. After the tribunal had been fully constituted, the liquidator wrote to the appellants' solicitors in Anguilla contending that the arbitration proceedings were improper and requesting that they be stayed pending the resolution of various extant applications in Anguilla. The solicitors did not accede to the respondent's request. The liquidator wrote them a further letter, suggesting that section 130 of the UK Insolvency Act 1986 was applicable to an Anguillan insolvency. The liquidator also made a written application to the arbitration tribunal for a stay of the proceedings, but this was refused.

The respondent then proceeded to file two applications in the Anguilla High Court, one for an order that the appellants take all necessary steps to stay and/or otherwise be restrained from proceeding with the arbitration until after the hearing and determination of the other application, which was for an order that the appellants take all necessary steps to discontinue and/or withdraw or be otherwise permanently restrained from pursuing the arbitration proceedings commenced against the respondent company.

The application for interim relief was heard first, by Redhead J [Ag.], and he granted the relief sought by the respondent on the basis that it had satisfied all of the requirements for the grant of an interim injunction, laid down by the House of Lords in the American

[1] Chapter C65, Revised Statutes of Anguilla.

Cyanamid case.[2] Accordingly, an interim injunction was granted until the hearing and determination of the application for the permanent injunction.

The application for the permanent injunction came before another judge, Mathurin J. She granted the application, having taken the view that there was no reason to digress from the decision of the judge who granted the interim injunction to stay the arbitration proceedings. She further stated that 'it appear[ed] to [her] that the circumstances of the case warrant[ed] the exercise of the jurisdiction of the court restraining [the appellants] from pursuing the arbitration against [the respondent].'

The appellants appealed, contending (inter alia) that Mathurin J erred in law by applying the American Cyanamid principles for an interim injunction to the application for the grant of a permanent injunction. The appellants argued that the appeal should be allowed and the order of the learned judge should be set aside, based on the errors that she made. The respondent also appealed by way of counter notice of appeal, conceding that the learned judge applied the American Cyanamid principles to an application for a permanent injunction, but setting out additional grounds, in support of its position that the order of the learned judge should be upheld, and the appeal dismissed.

Held: allowing both the appeal and counter appeal and upholding the order of Mathurin J restraining the appellants from proceeding with the arbitration proceedings, and granting the appellants leave to submit their claim to the liquidator of the respondent company, and ordering that each party bears its own costs, that:

1. The learned judge erred in applying the **American Cyanamid** principles to the determination of an application for a permanent injunction, these principles being inapplicable to the grant of such injunctions. Additionally, or alternatively, she erred in granting an injunction against the continuation by the appellants of arbitration proceedings begun by them, without providing any reasons in her judgment for so doing.

2. The appellants are required by section 221(b)(iii) of the **Companies Act** to submit any claims existing at the date of liquidation to the liquidator so that he may adjudicate upon them. While the claim submitted by the appellants to arbitration concerned a post-liquidation debt arising from the continued operation of the resort by the liquidator, it arose as a result of the breach of an agreement between them, which agreement was a pre-liquidation obligation of the respondent company. This therefore brought the appellants' claim within the scope of section 221(b)(iii) and accordingly, the appellants' claim against the respondent ought properly to have been submitted to the liquidator for adjudication, instead of being pursued by way of arbitration proceedings outside the reach of the winding-up court.

[2] American Cyanamid Co. v Ethicon Ltd. [1975] AC 396.

JUDGMENT

[1] **MICHEL JA**: This is a judgment of the court. The appellants are the owners of a number of villas forming part of the resort known as Cap Juluca – a five star plus, high end, full service luxury resort hotel which has been the flagship of the Anguillan tourist industry for several years. The respondent is a company, now in liquidation, which has been operating, and still operates, the Cap Juluca Resort.

[2] The respondent went into voluntary liquidation in the course of 2011, which voluntary liquidation was brought under the supervision of the High Court in Anguilla in November 2011. On 4th May 2012, upon application by two interested parties – Charles and Linda Hickox – the court terminated the appointment of the joint liquidators of the respondent company at the time, appointed Mr. John Greenwood as the sole liquidator of the company, and ordered that the company be wound up pursuant to section 215(1)(b) and (c) of the **Companies Act**.[3] The order of 4th May 2012 also stated that the liquidation of the company be carried out as far as applicable and practicable following the Insolvency Rules of the UK.

[3] At the commencement of the liquidation of the respondent company, there were several substantial unsecured creditors of the company, including the appellants (in the minimum amount of approximately US$25 million) by virtue of certain loan arrangements predating the liquidation.

[4] On 18th May 2012, the liquidator requested that all creditors of the company submit their names, addresses and particulars of their debts or claims on or before 18th July 2012, and the appellants did so as it pertained to their liquidated debts.

[5] After the commencement of the liquidation, the operation of the resort continued and, consequently, the respondent continued to be liable to the appellants (as the owners of villas forming part of the Cap Juluca Resort) for any non-compliance by the respondent with its obligations to the villa owners.

[3] Chapter C65, Revised Statutes of Anguilla.

[6] On 21st November 2012, lawyers representing the appellants wrote to the liquidator of the respondent company itemising the breaches by the company of its obligations to the villa owners and requesting the taking of appropriate action to remedy the situation. There being no response from the liquidator to the aforesaid letter, on 18th March 2013 the appellants commenced arbitration proceedings against the respondent company in New York (seeking damages and injunctive relief) in accordance with the agreements governing the duties and obligations of the resort operators to the villa owners.

[7] On 29th July 2013, after the arbitration tribunal had been fully constituted, the liquidator wrote to the appellants' Anguillan solicitors positing that the arbitration proceedings were improper and requesting that the appellants agree to a stay of the arbitration proceedings pending the resolution of various extant applications in Anguilla. When the appellants' solicitors did not accede to the liquidator's request, the liquidator again wrote to them (on 1st August 2013) suggesting that section 130 of the UK **Insolvency Act 1986** was applicable to an Anguillan insolvency. On the said 1st August 2013, the liquidator made a written application to the arbitration tribunal for a stay of the arbitration proceedings, which application was refused by the tribunal in a procedural order made on the same day.

[8] On 2nd August 2013, the respondent filed two applications in the Anguilla High Court. Although the two applications were filed together, the logical first one was an application for an order that the appellants take all necessary steps to discontinue and/or withdraw or be otherwise permanently restrained from pursuing the arbitration proceedings commenced against the respondent company; while the second application was for an order that the appellants take all necessary steps to stay and/or otherwise be restrained from proceeding with the arbitration until after the hearing and determination of the first application.

[9] The second application, being an application for interim relief, was heard first. Redhead J [Ag.] heard the application on 23rd August 2013 and granted the relief

sought by the respondent on the basis that the respondent had satisfied all of the requirements laid down by the House of Lords in the **American Cyanamid** case[4] for the grant of an interim injunction and that the interim injunction ought therefore to be granted restraining the appellants from proceeding with the arbitration until the hearing of the first application, which is the application for a permanent injunction.

[10] The application for the permanent injunction was heard by Mathurin J on 22nd October 2013 and on 30th October 2013 she made an order restraining the appellants from pursuing the arbitration proceedings against the respondent company.

[11] The judgment and order of Mathurin J was appealed by the appellants by Notice of (Interlocutory) Appeal filed on 15th November 2013 containing several grounds of appeal.

[12] The basis of Mathurin J's order is contained in paragraph 14 of her judgment, which reads as follows:

> "In summary, I am of the view that there is no reason to digress from the decision of Redhead J (Ag) granting an interim injunction to stay the arbitration proceedings and it appears to me that the circumstances of this case warrant the exercise of the jurisdiction of the court restraining [the appellants] from pursuing the arbitration against [the respondent]."

[13] This statement by the learned judge, which formed the basis of her order to grant the injunction, indicates that the learned judge made the order either –

(a) in accordance with the interim order made by Redhead J [Ag.]; she having stated that 'there is no reason to digress from the decision of Redhead J [Ag] granting an interim injunction to stay the arbitration proceedings'; or

[4] American Cyanamid Co. v Ethicon Ltd. [1975] AC 396.

(b) on the entirely unclear basis that 'the circumstances of this case warrant the exercise of the jurisdiction of the court restraining [the appellants] from pursuing the arbitration against [the respondent]'.

[14] If the learned judge premised her order on the basis of the interim order of Redhead J [Ag.], then she erred in so doing because Redhead J [Ag.] made his interim order by the application of the **American Cyanamid** principles, which are inapplicable to the grant of permanent injunctions.

[15] If, on the other hand, the learned judge granted the injunction on the basis that the circumstances of the case warranted the exercise of the jurisdiction of the court restraining the appellants from pursuing the arbitration against the respondent, without ever setting out in her judgment what the circumstances were which warranted the exercise of the court's jurisdiction to grant the injunction, other than by virtue of the incorrect application of the **American Cyanamid** principles, then the learned judge also erred in so doing because the appellants are entitled to know the basis upon which the court exercised its discretion to restrain them from pursuing arbitration proceedings in accordance with agreements duly entered into by them with the respondent company.

[16] The above finding would have been sufficient to allow the appeal and set aside the decision of the learned judge restraining the appellants from pursuing the arbitration proceedings, but the respondent – by counter notice of appeal filed on 2nd December 2013 – itself appealed against the judgment of Mathurin J on the following grounds:

> "(a) The Learned Judge erred in law by applying the American Cyanamid principles for an interim injunction to an application for a permanent injunction.
>
> "(b) The Learned Judge erred in law by failing to set out the principles to be applied for the granting of a permanent injunction in the case at bar.

> "(c) The Learned Judge's decision to grant the injunctive relief sought by the Respondent ought to have been upheld on the alternative and/or additional grounds …"

The respondent then proceeded to set out twelve alternative and/or additional grounds on the basis of which the learned judge ought to have made the order that she did.

[17] Both sides in this appeal accept that the learned judge erred in the making of the order that she did on the basis that she did so; the appellants contend that by virtue of this error the appeal should be allowed and the order of the learned judge should be set aside; the respondent however contends that this court ought to uphold the order of the learned judge and dismiss the appeal on the basis of any of the twelve new grounds set out by the respondent in its counter notice of appeal.

[18] In submissions filed on 17th December 2013, the appellants answer the respondent's counter notice of appeal and skeleton arguments in support thereof by maintaining the contents of their skeleton arguments filed on 15th November 2013 in support of their appeal and by responding to each of the twelve grounds set out by the respondent in its counter notice of appeal.

[19] The appeal was heard on 23rd January 2014 and judgment was reserved.

[20] On 28th February 2014, solicitors for the appellants wrote to the Chief Registrar of the Eastern Caribbean Supreme Court informing the Court that the appellants had withdrawn the arbitration proceedings without prejudice to their ability to recommence a new arbitration proceeding in due course. The aforesaid solicitors urged upon the Court to proceed with the determination of the appeal notwithstanding the withdrawal of the arbitration proceedings, since the outcome of the appeal will determine the future course of the matter.

[21] On 5th March 2014, the legal practitioners for the respondent wrote to the Chief Registrar with respect to the letter of 28th February 2014 and informed the Court that the respondent wished to leave it to the Court to determine the appropriate course to take in relation to the outstanding appeal.

[22] Consistent with the judgment of the House of Lords in the case of **Sun Life Assurance Company of Canada v Jervis**,[5] which is the leading English authority on the issue of when proceedings have been rendered academic and should not therefore be continued, this court will proceed with the determination of the appeal on the basis that the outcome of the appeal will determine the future conduct of the parties in relation to the issues in dispute in the appeal.

[23] Once it is accepted, as contended by the appellants and conceded by the respondent, that the learned judge erred in applying the **American Cyanamid** principles to the determination of an application for a permanent injunction and/or in granting an injunction against the continuation by the appellants of arbitration proceedings begun by them, without providing any reasons in her judgment for so doing, then this appeal will succeed or fail on the basis of one or more of the twelve alternative or additional grounds of the respondent's counter appeal.

[24] The first of the twelve grounds is stated by the respondent as follows –

> "Pursuant to section 221(b)(iii) of the Companies Act the Appellants must submit any claims, whether liquidated or unliquidated, future or contingent, to the liquidator in writing so that such claims may be adjudicated upon by the liquidator and consequently, the Appellants are restrained from proceeding with [the arbitration proceedings]."

[25] The response of the appellants to this ground is that, in accordance with section 221(b)(iii) of the **Companies Act**, claims existing as at the date of the liquidation have to be submitted to the liquidator for his adjudication, but this does not apply to claims arising as a result of the liquidator carrying on the business of the company.

[5] [1944] AC 111.

[26] This Court takes the view that the appellants are required by section 221(b)(iii) of the **Companies Act** to submit any claims to the liquidator so that he may adjudicate upon them. Their submission that post-liquidation claims are not covered by section 221(b)(iii) and that the claim submitted by them to arbitration is a post-liquidation debt arising from the continued operation of the resort by the liquidator is defeated by the definition of 'debt' in relation to the winding-up of a company.

[27] In **Halsbury's Laws of England**,[6] the definition of 'debt', in relation to the winding-up of a company, includes 'any debt or liability to which the company may become subject after [the date on which the company went into liquidation] by reason of any obligation incurred before that date'. The Declaration, which is the agreement for the breach of which the appellants instituted the arbitration proceedings, is a pre-liquidation obligation of the respondent company, the breach of which is alleged to have occurred subsequent to the liquidation.

[28] We therefore hold that the claim by the appellants against the respondent company in respect of its alleged breaches of the Declaration ought properly to have been submitted by the appellants to the liquidator for adjudication, instead of being pursued by way of arbitration proceedings outside the reach of the winding-up court, and so the order of injunction made by the learned judge restraining the appellants from pursuing the arbitration proceedings against the respondent ought not to be disturbed.

[29] Apart from the alternative ground addressed above, there are eleven other grounds advanced by the respondent on the basis of which the respondent submits that the learned judge could have granted the permanent injunction that she granted restraining the appellants from pursuing the arbitration proceedings against the respondent company. We do not propose, however, to address these other grounds since the one already addressed leads to the inescapable

[6] (5th edn., 2011) vol. 16, para. 707.

conclusion that the learned judge, although erring in the reasons advanced or not advanced by her for granting the injunction, could properly have made the order of injunction on the first of the alternative grounds in the respondent's counter notice of appeal, and so the order of injunction ought not to be disturbed.

[30] Inasmuch as the appellants expressed a wish that there be a judicial decision at the highest level on insolvency law in Anguilla 'so that individuals and corporations involved in the jurisdiction will have the clearest guidance in order that they may understand how the regime functions and make important determinations based on such guidance', this judgment will not be the occasion when such guidance will be given, since the issues in dispute between the parties have otherwise been addressed.

[31] The order of the Court is as follows:

(1) The appeal against the judgment of Mathurin J is allowed.

(2) The counter appeal against the judgment of Mathurin J is also allowed.

(3) The order of Mathurin J restraining the appellants from proceeding with arbitration case number 50 115 T 00305 13 Brilla Capital Investment Master Fund SPC Limited et al v Leeward Isles Resorts Limited (In Liquidation) is upheld.

(4) Leave is hereby granted to the appellants to submit their claim (which was the subject matter of the aforesaid arbitration case) to the liquidator of Leeward Isles Resorts Limited within one month of the date of this order and the liquidator is hereby directed to receive and adjudicate the aforesaid claim.

(5) Both the appeal and the counter appeal having been allowed, the parties to the appeal shall each bear their own costs.

[32] We thank learned counsel on both sides for their very helpful submissions in this case, both written and oral, and apologise to them and to their clients for the delay in the delivery of this judgment.