IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2019IS00003

In the Matter of Sections 213A(3)(b), 213B, 220 & 222 of the Companies Act

And

In the matter of Sections 58 & 71 of the Insolvency Act

And

In the matter of an Application by Exclusive Holidays of Elegance Limited for an Order to Wind up ARC SYSTEMS LIMITED or for an Order appointing a Receiver/Manager.

BETWEEN	**Exclusive Holidays of Elegance Limited**	**Applicant**
And	**ARC Systems Limited**	**Respondent**

Insolvency – Application to Appoint Receiver – Judgment creditors unpaid – Whether Respondent "*ceases to meet liabilities generally as they become due*" – Whether act of bankruptcy occurred within 6 months immediately preceding filing of claim - Whether continuing act of bankruptcy – Whether claim form properly constituted – Whether Applicant in liquidation at time claim filed – Whether claim therefore null and void and to be struck out- Interim Receiver's report – Whether evidence of fraudulent preference – Whether court to act at this stage.

Gordon Robinson and Keri Walcott instructed by Winsome Marsh for Applicant.

Lloyd Barnett, Jacqueline Cummings, Gillian Burgess, Debbie Ann Gordon, Clifton Campbell and Stephanie Sterling instructed by Archer Cummings & Co. for the Respondent.

Ariel Von Corke and Fayola Evans Roberts for Supervisor of Insolvency.

Nicola-Ann Brown Pinnock and Gabrielle Munza for the Government Trustee.

Howard Harris, Stacy Mitchell, Anisha Brown and Rachel Lodge instructed by Foga Daley & Co. for the Intervenor, Atradius Credit Insurance N.V.

Maurice Manning QC instructed by Nunes Scholefield Deleon & Co. for Mr. Kenneth Tomlinson (Interim Receiver).

Heard: 20th June, 12th & 24th July & 19th September 2019, 21st January 2020, 3rd February and, 7th May 2021.

In Open Court

Coram: BATTS J.

Preliminaries

[1] On the 20th June 2019 this Fixed Date Claim was listed as a hearing in Chambers. I adjourned it into open court as matters concerning bankruptcy and winding up ought, in the public interest and unless there are compelling reasons to the contrary, to be heard in public. There was no objection to this course of action and the 12th July 2019 was fixed for the hearing.

[2] On that date Mr. Howard Harris appeared on behalf of Atradius Credit Insurance N.V. He sought leave to intervene and asserted that his client was a judgment creditor who had seen the matter reported on in the newspapers. Over the objection of the Respondent I, acceded to the application and, granted the intervenor permission to file an affidavit which was done, see the affidavit filed on the 26th August 2019 and sworn to by Karl Patrik Olsson. My reason for allowing the intervention is simply that proceedings in bankruptcy and for winding up are

held in public for that very reason. That is to allow any person with an interest to attend, state their case, and thereby seek relief.

Point in Limine

[3] On the 12th July 2019, also, the Respondent made an application to strike out the proceedings. The application was based on the standing of the Applicant. The Respondent asserted that two orders to wind up had been made against the Applicant, in other proceedings, and had not been discharged. It was contended further that, by failing to disclose the existence of the winding up orders, the Applicant had committed an act of material non-disclosure. The application to wind up the Respondent should therefore be dismissed.

[4] Having heard submissions from all parties I dismissed the preliminary point. The two orders, for liquidation of the Applicant, are found at Tab E (the 2003 order) and Tab O (the 2014 order) of the Bundle. Miss Debbie Ann Gordon, who argued the point, submitted that only the liquidator, and in his absence the Trustee in Bankruptcy, could commence a claim in the name of a company in liquidation. Liquidation she reminded us commences from the date of the filing of the petition. She pointed to the letter dated 8th July 2019 from the Government Trustee, exhibit SB 2 to the further affidavit of Sholton Brown dated the 11th July 2019, and submitted that the appointment of a liquidator not having been revoked this action is null and void. Counsel further submitted that the Trustee cannot continue a claim commenced ultra vires and relied on sections 227(2), 264 and, 312 of the Companies Act. Mr. Gordon Robinson submitted, on the other hand, that the winding up order was never enforced. It was never even served on the Government Trustee or the company. The petitioner, in the 2014 proceedings, was represented by Nigel Jones & Co who had negotiated and obtained a payment which discharged the debt, see affidavit of Okelia A. Parredon filed on the 2nd July 2019 with attached exhibits. Even assuming that there is a defect in proceedings, Mr. Robinson submitted, this litigation is an asset of the Company which the liquidator/Trustee in Bankruptcy has a right to continue. He relied on Section 228

of the Companies Act. As regards non-disclosure Mr. Robinson indicated that his client could have no duty to disclose that of which they were unaware.

[5] Messrs. Manning and Harris joined with Mr. Robinson's submissions. Mrs. Brown-Pinnock for the Government Trustee submitted that her office had no interest in the matter. Her office had never been served with the order of 2014. They became aware of it in 2016 by email communication from an alleged creditor. The Trustee at that time by letter dated 28th July 2016 referred the alleged creditor to Messrs. Nigel Jones & Co., see exhibit NBP5 to the affidavit of Nicola –Ann Brown Pinnock filed on the 11th July 2019. The files of the Government Trustee therefore remained open. She referenced sections 228 (2) and 227(2) of the Companies Act and rule 42.8 of the Civil Procedure Rules (hereinafter referred to as the CPR) to support a submission that a winding up order takes effect from the date it was made. As regards the present proceedings the Trustee indicated a desire to seek to intervene with a view to continuing the matter.

[6] My *ex tempore* ruling, and the reasons stated at the time, were as follows:

> *"The application to set aside the appointment of the interim receiver is refused because:*
>
> *a) I find there was no material non-disclosure. The 2003 Order was stayed and, although the 2014 Order was not, it was not served and there is no evidence as to actual knowledge.*
>
> *b) The 2003 Order having been "stayed altogether" is no longer effective and is not a bar to the company pursuing this application.*
>
> *c) The 2014 Order however remains valid unless and until set aside. The failure of the Petitioner in 2013HCV06734 to serve it, in accordance with section 228(1) of the Companies Act, does not render the order of the court nugatory. On the other*

hand, the company not having been served; as also the Registrar of Companies not having been served and the company having settled that debt; clearly did not "wilfully" act in breach of section 229, which prohibits the commencement of proceedings without the leave of the Court.

If necessary, it is manifest that leave to commence and/or continue these proceedings will be granted.

d) The Order to wind up however remains valid until set aside. The court cannot ignore the existence of this order. The Trustee in Bankruptcy is therefore authorised to associate itself with the continuation of this claim.

e) The Trustee in Bankruptcy having indicated its intention to continue the Claim, if necessary, I grant such permission.

[7] After having heard further submissions on costs I ordered that costs of the day and costs thrown away were to be paid by the Respondent. The costs were to be taxed forthwith if not agreed. The Applicant, as well as the respective clients of Mr. Manning and Mr. Harris were also beneficiaries of the costs order. The Trustee indicated that she wished no costs awarded in her favour. Permission to appeal was requested and refused.

The Substantive Hearing

[8] The substantive hearing resumed on the 24th July 2019. On this occasion Dr. Lloyd Barnett, Jacqueline Cummings, Debbie Ann Gordon and Gillian Burgess appeared instructed by Archer Cummings & Co. for the Respondent. The appearances for the other parties remained the same.

[9] Mr. Robinson opened the case for the Applicant by stating his reliance on written submissions filed on the 18th June 2019. He indicated that the only remedy being

pursued was a receiving order pursuant to section 58 of the Insolvency Act and that sections 57 (1) (c) and (j) were being prayed in aid. He submitted that the acts of bankruptcy were continuing acts and did not cease the day after the judgment was entered. The Respondent, submitted Mr. Robinson, had ceased to honour its liabilities. In this regard he referred to the affidavit of Sholton Brown filed on the 16th May 2019 at paragraph 13. He submitted that if, which is denied, the Respondent was not trading and owned no assets the evidence was clear that the company had been stripped of assets to avoid its lawful debts. He relied on the reports of the interim receiver to support the latter submission.

The Evidence

[10] The affiants were then made available for cross-examination on their respective affidavits. I will briefly review the evidence. Mr. Fred Smith swore affidavits filed on 29th March 2019, 13th June 2019 and, 14th June 2019. He is a director of the Applicant (Exclusive Holidays of Elegance). He outlines the fact that in the year 2014 the Applicant commenced a suit against the Respondent (claim 2014CD00095) and, on 11th July 2017, obtained summary judgment in the amount of $25,835,040.00 with costs to be agreed or taxed. The judgment was served by registered post on the Respondent under cover of letter dated 31st October 2018. The judgment remains unsatisfied. In paragraph 8 of his affidavit filed on 29th March 2019 Mr Fred Smith states in part:

> *"… The Applicant has reason to believe that the Respondent's principals have formed associated companies and are in the process of or have already transferred all the Respondent's assets to one of those connected companies."*

In his affidavit filed 13th June 2019 Mr. Smith responds to an affidavit filed on the Respondent's behalf by Mr. Sholton Brown. He indicates that in its defence to the Claim filed in 2014 the Respondent did not allege that it had ceased trading in 2013. Rather it admitted that it had a registered office and was in business. The Respondent first stated that it was no longer in business in an affidavit in opposition

to the summary judgment application. That affidavit was filed on the 10th July 2017, (see exhibit FS3 to Fred Smith affidavit filed 13 June 2019). On the 19th May 2019 the Applicant became aware, by an advertisement placed in the newspapers on that date, that the Respondent intended to *"perfect the closure"* of business. This was to be by way of voluntary liquidation.

[11] Mr. Smith reveals further that an effort to execute its judgment by means of a levy failed when the bailiff, by report dated 31st May 2018, stated (exhibit FS5):

> *"that I contacted the Defendants attorneys at law, Archer Cummings and was advised by Ms. Cummings that the Defendant ceased operations over 10 years ago."*

Paragraphs 11,12 and 13, of Fred Smith's affidavit, detail the formation of several companies allegedly related to the Respondent by way of mutual owners or directors. These companies are Hilda Corporation Limited a St. Lucian Company formed on 18th March 2009 and registered to do business in Jamaica on or about 15 May 2019; Arc Manufacturing Limited formed on 9th February 2010; PKF Corporate Services Limited another St. Lucian Company which holds 12,000,000 shares in Arc Manufacturing and, Arc Properties Ltd.

[12] Dr. Barnett's cross-examination of Mr. Fred Smith was brief and to the point. The witness was challenged on another affidavit he had filed on the 2nd July 2019 (Tab N) at page 7. It was suggested he had not spoken the truth when he swore the Applicant was not in liquidation. He denied this and the following exchange occurred:

> *"Q: Was an order made in respect of liquidation at any time*
>
> *A: if I am not in receipt of the order I would not know about the Order*

Q: Was an order ever made, did you at any time become aware

A: I was told of an order while this case was proceeding. While case was proceeding I got a text asking if Exclusive was in liquidation."

Dr. Barnett also asked the witness whether at the time, referenced in para 6 of his July 2nd affidavit, several businesses were suffering hardship. The witness denied this. Dr. Barnett then suggested that when he, in that affidavit, referenced "*ups and downs*" he was talking of hardship. His response was *"not necessarily*." He admitted that his company too had failed to pay debts and had had judgments entered against it.

[13] Mr. Kenneth Tomlinson, the court appointed interim receiver, was the next witness to depose. He was called by Mr. Maurice Manning to put in evidence his interim reports. These were tendered and admitted through the witness as Exhibits, 1(a) Interim report dated 13 June 2019 and, 1(b) the 2nd Interim Report dated 29 June 2019. I will consider the content of the reports later. Mr. Tomlinson was cross-examined by Dr. Barnett. He admitted that he had seen no mortgages guaranteed by the Respondent for any of the allegedly related companies. As regards properties transferred from the Respondent he admitted mortgages were transferred on the titles.

[14] Mr Robinson thereafter indicated that he also relied on the affidavit, of Okelia A. Parredon, filed on the 2nd July 2019. This witness was however not required for cross examination. That affidavit related to the preliminary objection and spoke to the two orders for liquidation which had been made with respect to the Applicant.

[15] Dr. Lloyd Barnett opened his case for the Respondent by passing to the court a chronology of events. He indicated that he would waive his opening as it would be the same submission made in closing remarks. The Respondent's affiant Mr.

Sholton Brown was made available for cross-examination. His affidavits, of 16th May and 7th June 2019, stood as his evidence in chief. He describes himself as one of the directors of the Respondent. The company, he said, had been in business since 1996. In 2008 he says the company began going through financial difficulties compounded by the "*sudden downturn of the price of steel on the world market.*" A drop from US$1400.00 per ton to US$480.00 per ton. He acknowledges that, the intervener Atradius Credit Insurance N.V. obtained a judgment against the Respondent on the 27th May 2013, and that it was unable to pay that debt.

[16] Mr. Brown stated that the Respondent ceased trading in June 2013. He, in his affidavit, stated objection to the interim receiver having access to the Respondent's audited financials on the basis that it was his *"understanding that the role of a Receiver is limited to taking over the management of a business solely for the purpose of recovering a debt owed to the creditor."* Mr. Brown suggested that other named persons be appointed as the receiver. He says the Respondent has over three hundred million dollars in tax credits which it is unable to access or use and that it has several actions in court seeking to recover monies owed to it. He denies that the Respondent has transferred any assets to avoid paying the Applicant. He further denies that any act of bankruptcy was committed. He at paragraph 14 of his affidavit of 16 May 2019 stated:

> *"14. Consequently we do not see the utility of winding up the company at this time as we have not hidden our position from the Applicant and any Trustee to be appointed, would have done their due diligence into the affairs of the company will find that the status of the company today is as it exists in July 30, 2014 when the Applicant filed its original claim herein and realize that there is little money to earn from accepting any appointment herein"*

[17] In his affidavit of 7th June 2019 Mr. Brown stated that when served with the Claim No. 2014CD00095 the Respondent had already ceased trading. He references several "procedural irregularities" which he says his attorneys at law had told him about. He expressed the opinion that this claim was not a genuine attempt to recover but was brought to bring public pressure on the Respondent. He also in that affidavit stated that the Respondent had no property whatsoever for the Interim Receiver to take possession of and that no associate companies are involved. He also made what amounted to some legal arguments in that affidavit.

[18] Mr. Brown was extensively cross-examined by both Mr. Robinson and Mr. Manning. He admitted he was appointed a director in 2016. Prior to that he had no relationship with the Respondent. At that time, he says the company was doing no business. He described his responsibility as being to *"bring the operations to a close."* He admitted to having no qualifications in either accounting or law. Mr. Brown admitted that when the suit was brought the Respondent defended it by alleging that the Applicant had supplied defective steel. He acknowledged that, by defending instead of admitting that they were hard pressed to pay, they had put the Applicant to great expense. He admitted that this debt arose in the year 2008 when the steel was sold. He further admitted that the cheque for payment of the steel was stopped. It was suggested to the witness that since the cheque was stopped in 2008 the Respondent was aware of the debt and *"embarked on a deliberate course of action to ensure that Exclusive would not recover that money because no asset to recover it from."* The witness's response was to plead a lack of understanding as he said, *"I don't know what you are speaking about"*. He denied that it was the judgment of 2011 in Atradius' favour which prompted the Respondent to cease trading and lock down. He denied that the scheme to avoid debt involved the formation of a St. Lucian company as a conduit through which properties could be funnelled to other associated companies.

[19] In answer to Mr. Manning (now of the inner bar) the witness denied being a director of any other company. The witness appeared unsure whether the Respondent

operated at 4 Bell Road. He admitted that information in his affidavit was provided by Ms. Jacqueline Cummings and the auditor Mr. Ian Walters. After a series of questions and answers it became painfully obvious that the witness was unaware of the company's inner working. He knew nothing of financials, about disclosures sought, nothing about any recoveries from claims brought and nothing about the whereabouts of the Respondent's bank accounts. He did not even know whether the Respondent has, or had, employees. It was suggested to him that he was just a "figurehead" director and his response was: "*A director".* He said the other director is Mr. Lockie Horne. The witness then indicated that the only time he had ever been to 14 Bell Road was because he was Mr. Norman Horne's personal assistant and from time to time Mr. Horne would request his presence. He had been associated with Mr. Norman Horne since the year 2013. He was asked,

> *"Q: As director of ARC Systems how do you get paid*
>
> *A: Mr. Horne pays me*
>
> *Q: Which one*
>
> *A: Mr. Norman Horne."*

When asked what other companies he knew Mr. Norman Horne to be associated with he said Arc Manufacturing Ltd.

[20] After the taking of evidence was completed both parties expressed a desire to prepare and file submissions in writing. I therefore adjourned the matter part heard to the 19th September 2019 and directed that submissions be filed and exchanged by the 12th September, 2019. The oral submissions of each party was limited to 2.5 hours.

[21] On the 19th September 2019 the appearances remained the same save that, instead of Mr Harris, Ms. Stacy Mitchell, Anisha Brown and Rachel Lodge instructed by Foga Daley appeared for the Intervenor. Dr. Barnett indicated that

he intended to rely on the written submissions filed. Mr. Robinson, for the Applicant, had also filed extensive written submissions and indicated a similar reliance. The office of the Supervisor of Insolvency very helpfully filed submissions at my invitation. Parties were allowed to speak to the written submissions of each other.

The Respondent's Submissions

[22] In his submissions Dr. Barnett reminded the court that the Claimant was now only pursuing an application for a receiving order pursuant to section 58 of the Insolvency Act. In addition to written submissions, filed on the 12th September 2019, Dr. Barnett relied on speaking notes he handed to me. The positions advanced by the Respondent may be summarised thus:

a) The entire process is void. This is because the Applicant was in liquidation at the time judgment was obtained against the Respondent. The liquidator did not give permission for that action to be commenced or continued. Further when this Claim, for the appointment of a receiver, commenced the Applicant was still in liquidation. The Trustee in Bankruptcy had not consented to this claim being made. It was submitted that these irregularities and incapacities cannot be cured. Reliance was placed on ***Cape Breton Company v Fenn (1881) XVII Ch D 198, Measures Brothers, Limited v. Measures (1910) 2 Ch 248*** and, sections 229,241(1)(a),239 and, 240 of the Companies Act.

b) There are procedural irregularities. The Fixed Date Claim Form in this matter did not reference the statutory basis for the application. The Applicant therefore failed to state the grounds for the application. The facts necessary to ground

the application were not stated in the Fixed Date Claim or in the affidavit in support, Rule 8.1 of the CPR was relied upon.

c) To the extent the Applicant is relying on fraud this ought to be pleaded and particularised and it was not.

d) The requirement of “immediately” preceding 6 months is not met in this case. This is because the act of bankruptcy relied on is the bailiff’s “nulla bona” return. The judgment therefore, having been executed, is a specific act of bankruptcy. There cannot therefore be an implied continuing demand.

e) The time requirements to commence proceedings of this nature are statutory and substantive. They do not constitute mere irregularities, **Bankruptcy and Insolvency Law 2nd edition by Roderick J. Wood at page 69** was cited.

f) There is no evidence to support allegations of a fraudulent preference which in any event ought to have been specifically pleaded.

g) The Respondent has no associated companies within the meaning of the Companies Act.

h) The Respondent has no property for the receiver to take possession of or control and therefore there is no basis to appoint a receiver. Any such appointment in those circumstances would not be justified or reasonable. In accordance with Rule 51. 3 the appointment of a receiver in the circumstances of this case is unreasonable.

i) The application to appoint a receiver was made for the improper purpose of applying pressure by way of damaging publicity on the Respondent.

j) The Interim Receiver has acted ultra vires to the order appointing him as he requested records for 2008 to 2018 although the Order references 2014 to 2018. He also requested information about all companies in the ARC group which were not “associate” companies to which the Order refers. Further, the interim receiver’s letters should be on the Respondent’s letterheads and the Applicant has not provided the undertaking required by section 67 (1)(b) of the Insolvency Act.

k) The directors of the Applicant had no authority to bring a summary judgment application against the Respondent in July 2014, or enforcement proceedings in March 2019, as the Applicant continues to be in liquidation and is not entitled to rely on the judgment obtained in July 2017.

l) The Trustee in Bankruptcy has taken no step to prosecute this claim. No undertaking has been given by the Claimant or the Receiver pursuant to section 67(1)(b) of the Insolvency Act.

m) The Applicant was present and therefore aware when the 2014 order for winding up was made and the application to stay denied, see Tab O exhibit OP3 to the affidavit of Okelia A. Parredon filed 2nd July 2019.There was therefore a failure to disclose it.

n) A Receiver/Trustee should not be appointed if appointment would be nugatory. In this case the Respondent has no assets except unsatisfied claims. The case of **Mercantile Investment and General Trust Company v River Plate Trust, Loan and Agency Company (1892) 2 Ch 303** was relied upon. Rule 51.3 of the CPR says the court must consider:

i. The amount of debt

ii. The amount likely to be obtained by the Receiver

iii. The probable cost of appointing and remunerating the Receiver.

The Respondent ceased trading from 2013. There is no potential revenue. The **Law Relating to Receivers, Managers, and Administrators 3d by Hubert Picarda** at **page 400** was relied upon. There is therefore no useful purpose in appointing a receiver.

o) The critical date pursuant to Section 58 of the Insolvency Act is when the Respondent ceased to "*meet its liabilities generally as they become due*" as per section 57 (1)(j). The application is to be by someone having personal knowledge of the facts alleged but there is no affidavit by anyone as to an act of bankruptcy within 6 months immediately preceding the date of filing. On the contrary:

i. The originating transaction relating to Atradius Credit Insurance's 2011 action

against the Respondent is in or about July 2008.

ii. In 2014 the Applicant commenced an action for a debt which was “unpaid for a long time.”

iii. The Interim Receiver says the originating transaction giving rise to that claim began in August 2008. The bailiff’s *nulla bona* return was because the Respondent had ceased trading for over 10 years,

p) The important issue is whether within the 6-month period prior to this application the debtor ceased to meet liabilities generally, see ***Re Cedarhurst Properties Ltd. (1980) 3 W.W.R 494.*** The final act of bankruptcy occurred when the writ of execution was returned *nulla bona* and, as Claimant knew the Respondent had stopped trading, could not be presumed to have made any further demand for payment **Wood on Bankruptcy and Insolvency (cited above) p. 62-69**.

q) The Interim Receiver’s provisional reports reference transfers to Hilda Corporation Limited but he admits mortgages were transferred with the title. So mortgages were taken over as part of the consideration. There is therefore no evidence of a fraudulent transfer of property. Properties transferred were burdened with debts whose creditors would be

paid in priority. The transfers satisfied secured creditors.

r) The transactions occurred in January 2012 but by virtue of section 117(1) of the Insolvency Act a fraudulent preference is only void if it occurs within 6 months of the initial bankruptcy event. If it is in favour of a related person it is void if within 1 year of the initial bankruptcy event, section 118. In this case the bankruptcy events all took place several years ago. The transfers to ARC Properties Ltd were done on or before October 25, 2017. There is also no evidence that the transfers were at an undervalue or fraudulent. The Claimant has the burden of proof, ***Stone & Rolls Ltd. (In Liquidation) v. Micro Communications Inc. (2005) EWHC 1052.***

s) The court's power to review whether a fair market value is given is limited to within one year of the initial bankruptcy event, sections 113 and 114 of the Insolvency Act.

t) Although the Applicant referenced section 57(1) (c), (e),(g) and,(j) in their written submissions none of these sections are referenced in the Fixed Date Claim. The Claim references section 58. Neither does the Fixed Date Claim refer to fraudulent preference or intent to defraud therefore rule 8.1 of the CPR is not complied with. The only allegation relates to execution of the warrant of levy, section 57 (1)(e), and the operative date for that is the date of the bailiff's nil return.

u) When construing the 6 months' time limit fixed by section 58 (2) (b) reference must be made to section 57 which defines acts of bankruptcy. The words "*immediately preceding*" are clear and cannot be ignored.

v) As regards the assertion that the winding up order against the Applicant has been stayed no evidence is before the court. The Respondent was not party to such proceedings. The stay cannot operate retrospectively.

w) As regards the submissions of the *amicus curiae,* Dr. Barnett urged that, the authorities on which they relied do not treat with a situation where the judgment is executed. Section 57(1)(e) treats directly with the situation where execution is returned and the bailiff can find no property on which to levy.

The Applicant's Submissions

[23] Mr. Gordon Robinson, for the Applicant, relied on closing submissions filed on the 12th September 2019. He also adopted the written submissions filed on the 18th June 2019. His submissions written and oral can be summarised thus.

a) The court has already ruled on the matter of the Applicant's standing to bring this application and it should not be revisited at this stage.

b) In any event a stay of the order to wind up the Applicant was obtained on application of the petitioning creditor which had never served the Order. The government trustee was present when the stay was granted.

c) If which is not admitted the court's permission was required this was granted in the Order of the 12th July, 2019.

d) The application is for a receiving Order under section 58 of the Insolvency Act. There is no longer a claim to wind up. The relevant provisions of the Insolvency Act are sections 57(1)(c), (e), (g) and/or, (j).

e) The 6 months' time frame must be construed with regard to sections 58 and 57, **JIM McConnon v Zurich Bank [2012] IEHC 587 (31st July 2012);**

f) The statement in the Fixed Date Claim that the grounds of the application include section 58 suffices to permit the court to rely on all evidence presented. The affidavits as well as the Interim Receiver's reports may be relied upon.

g) Section 57(1)(j) says where the debtor "*ceases to meet liabilities generally*, *as they become due*" is an act of bankruptcy. This does not crystallize upon entry of a judgment. It is a continuing act. It continues until the liability is paid. The evidence is overwhelming of the inability to pay its debts and judgments and its continuing inability to do so. This suffices to allow for the making of the order.

h) Additionally, or alternatively, the court may also rely on section 57 (1)(c) and (g). That is fraudulent preferences and dispositions of property "*with intent to defraud, defeat or delay creditors.*" The evidence of this is

outlined in Fred Smith's affidavit of the 13th June 2019. The Interim Receiver's reports also support these grounds.

i) No limitation period, including the six-month period under the Insolvency Act, starts to run until the event is discovered or could, with reasonable diligence, have been discovered. It was submitted that:

> *"As a matter of law and public policy, the Respondent ought not to be allowed to successfully implement this covert scheme on Exclusive or anyone else simply because Exclusive wasn't able to identify specifically or prove the fraud until an Interim Receiver was appointed."*

j) The scheme was summarised at paragraph 14 of the written submissions, the evidence of which is contained in the Receiver's reports;

> "*This scheme began shortly after the Respondent stopped payment of a cheque issued to Exclusive which formed the basis of subsequent legal proceedings and intensified when the co-applicant Atradius judgment was threatened. This scheme was obviously designed to defraud, defeat or delay creditors from collecting the debts due to them and to assist the Respondent to persist in its cessation of meeting its liabilities."*

k) It was contended that the Respondent filed a sham defence to delay the Applicant obtaining judgment until all the Respondent's assets were stripped away. He asserts the properties were transferred for fake

purchase prices to Hilda and then gifted from Hilda to ARC Properties Limited.

Interim Receiver's Further Evidence

[24] The matter was adjourned part heard on the 19th September 2019 and before all submissions were completed. Mr. Robinson was ill on the scheduled date for resumption being 20th July 2020. Thereafter we were further delayed by circumstances related to the Covid 19 pandemic. On the 3rd February, 2021 when we resumed, the Interim Receiver had completed and filed 3rd and 4th Interim reports. An application was made to have them tendered.

[25] I permitted the Interim Receiver to go into the witness box and put these reports in evidence. Dr. Barnett was the lone objector to the process. My reasons for doing so being:

a) The nature of these proceedings mean the court should have all relevant and up to date information about the Respondent.

b) Any disadvantage can and will be cured by offering the parties an opportunity to cross-examine or pose questions to the Interim Receiver and to further address the court.

c) I was advised that all parties had been served with the reports.

[26] The reports were tendered and admitted through the Interim Receiver as exhibits:

1 (c) Report filed 12th September 2019

1 (d) Report filed 14th January, 2020

Dr. Barnett declined an opportunity to cross-examine and stood on his objections. No other party sought permission to cross-examine the witness.

The Application to Amend

[27] Mr. Robinson's further submissions were as follows:

a. If which is not admitted the Fixed Date Claim did not conform with the rules he applied for permission to amend the Claim to insert the umbrella words "a*cts of bankruptcy."*

b. The evidence of fraud and fraudulent preference is to be found in the Interim Receiver's reports.

c. He invited, in light of all the evidence, the court to take steps to protect its own process. If the court agrees with the characterisation of the transactions, which he outlined in detail, this matter should be referred to other relevant authorities.

[28] I granted, over the objection of Dr. Barnett, Mr. Robinson's application to amend. My reason was because amendments may be granted at any time. It is a matter of discretion. In this case it is in the interest of justice to do so as the amendment goes to the form rather than the substance of the matter and would cause no prejudice. I offered all parties an opportunity to further address me in consequence of the amendment.

The Intervenor's Submission

[29] Mr. Howard Harris, for the intervenor, submitted that his client's judgment also remained unsatisfied. He wished if the Order is granted that his client be recognised as a judgment creditor. He adopted the submissions of the *amicus curiae.*

The Submissions of the Supervisor of Insolvency

[30] A*micus curiae* submissions were, at my invitation, made by counsel representing the Supervisor of Insolvency. They were put in writing and filed on the 13th September 2019 and 16th October 2019. That office has not exercised its right, pursuant to section 23 (3) of the Insolvency Act, to intervene in these proceedings. The submissions may be summarised thus:

a. The application has "*for the most part"* fulfilled Rules 77.5 and 77.7 of the CPR. However, neither the Fixed Date Claim nor the affidavit in support speak to an act of bankruptcy.

b. The debt owed exceeds the $300,000 threshold stipulated in Section 58 (2) (a) of the Insolvency Act

c. Section 58 (2) (b) speaks to an act of bankruptcy "*within six months immediately preceding the filing of the application*." Section 57 (1) (a) to (j) lists a number of acts of bankruptcy.

d. The omission to state an act of bankruptcy in the application is not a sufficient basis to invalidate the proceedings unless substantial injustice will occur. This is because of the provisions in S 278 of the Insolvency Act.

e. Section 59(4) of the Insolvency Act outlines circumstances in which the application may be dismissed. The evidence is that a substantial debt was owed and remains unpaid. Further that the Respondent ceased to meet its liabilities as they became due.

f. In considering the meaning of the Insolvency Act Canadian authorities are helpful, see ***Owen Grant and Israel Transport & Equipment Company Limited. v Herbert Hartwell and Stephen Moodie [2018] JMCC Comm 14*** **(unreported judgment of Laing J dated 26th April 2018).** In ***Re Bombardier 37 OR (3d) 641*** it was decided that the amount of the claim need not be proved only the fact that it exceeded the prescribed amount. In ***Re Directors of the Atlantic Winter Fair, 20000218 Docket S.H.161105 (unreported judgment of Davison J dated 18th February 2000, Nova Scotia)*** it was decided that the burden is on the Respondent to prove that it is able to meet its liabilities.

g. ***Re Bombardier (cited above)*** also decided that it is a matter of fact whether in each case an act of bankruptcy has been committed within the requisite period. Laing J in the ***Owen Grant*** case (cited above) decided that an existing unpaid judgment is a continuing act of bankruptcy. He relied on ***Platt v Malstrom 53 OR (3d) 502*** which decided,

> *"an express demand for payment by the judgment creditor within the six-month period is not necessary to establish the act of bankruptcy because a judgment is a continuing demand for payment by the judgment creditor."*

Laing J also gave very useful guidance on the considerations necessary to decide if the failure to pay one judgment debt is tantamount to a failure to meet liabilities generally. These I will examine later in this judgment.

h. Having regard to the following:

i. Size of judgment
ii. Time of judgment
iii. Examination of the debtor
iv. Other remedies available to the creditor
v. Other creditors

it was submitted that the application should not be dismissed as the ground had been made out.

i. The assertion that the Applicant was itself in liquidation is no longer a material particular as both liquidations have been stayed.

j. The effect of the receiving order is to place the Respondent in bankruptcy, Sections 2 and 60 of the Insolvency Act. The words "*receiving order*" rather than "*bankruptcy order*" were used to remove the stigma associated with the latter term. This procedure replaces the winding up orders, under the Companies Act, for non-payment of debt.

[31] Such was the evidence and, the submissions on that evidence, which were before me when I reserved to consider my decision. I am indeed grateful, and as will become evident particularly so to the Office of the Superintendent of Insolvency, for the able submissions presented.

Analysis of the Law and Findings of Fact

[32] The Insolvency Act of 2016 introduced a new regime for bankruptcies which replaced procedures under the Bankruptcy Act and, part of the procedure for winding up of Companies, under the Companies Act. Today winding up under the Companies Act applies where the decision to wind up is voluntary or, where it is for just and equitable grounds or, for reasons related to disputes concerning the

control of the company. Winding up at the instance of creditors is dealt with under the Insolvency Act. All bankruptcy issues, whether for individuals or companies, are now dealt with under the Insolvency Act. Rules for insolvency and winding up proceedings under the Insolvency Act were inserted as Rules 77.1 to 77.37 of the CPR see, The Judicature (Rules of Court) (Amendment) Rules 2016, Jamaica Gazette Supplement 27th July 2016.

[33] The new regime is geared towards utilising the bankruptcy process in a manner which does not unnecessarily punish or disadvantage the bankrupt. The idea is that the indebted entity or person is provided every opportunity to survive and/or recover from the state of bankruptcy even as the debt or debts are repaid. The law has extensive provisions allowing for compromise among creditors, training of the debtors and, rehabilitation of businesses if possible.

[34] This case, notwithstanding the broad content of the Fixed Date Claim, is concerned only with the appointment of a receiver pursuant to section 58 of the Insolvency Act. The relevant part of that section states:

> *"58 –*
>
> *(1) One or more creditors may file in Court, an application for a receiving order against a debtor.*
>
> *(2) The application filed under subsection (1) shall state –*
>
> *a. The debts or debts owing to the applicant creditor or creditors which shall amount in the aggregate to not less than the* (sic) *three hundred thousand dollars;*
>
> *b. That the debtor has committed an act of bankruptcy within six months immediately preceding the filing of the application for a receiving order;*

c. In the case of a secured creditor.…

(3) ….

(4) …

(5) An application under this section shall be verified by affidavit of the applicant or by someone duly authorised on his behalf having personal knowledge of the facts alleged in the application so filed.

(6) …

(7) When the applicant creditor cannot himself verify all the statements contained in his application, he shall file in support of the application an affidavit of some person who can depose to the statements contained therein.

(8) ….

(9) ….

(10) ….

(11) In sections 59 to 67, references to an application for a receiving order are references to an application for a receiving order filed under this section."

[35] An act of bankruptcy, referenced in section 58, is defined in section 57 of the Insolvency Act. It is I think instructive to set out this section in its entirety.

"57 (1) For the purposes of this Act a debtor commits an act of bankruptcy where the debtor-

(a) in Jamaica or elsewhere, makes an assignment in the form prescribed of his property to a trustee for the benefit of the creditors generally;

(b) makes any disposition of property, or incurs any obligation or takes any judicial proceedings in favour of any creditor or of any person in trust for any creditor, which falls to be treated as a fraudulent preference or enters into any other transactions referred to under Section 117;

(c) makes any conveyance, gift, delivery or transfer of his property as a fraudulent preference, in Jamaica or outside of Jamaica

(d) departs from Jamaica, or being outside of Jamaica remains outside of Jamaica, or departs from his dwelling house or otherwise absents himself, with intent to defeat or delay his creditors,

(e) permits any execution or other process issued against the debtor, under which any of the debtor's property is seized, levied or taken in execution, to remain unsatisfied for thirty days, or if any of the debtor's property has been sold by the bailiff, or if the execution or other process is returned endorsed to the effect that the bailiff can find no property on which to levy or to seize or to take;

(f) exhibits at any meeting of creditors any statement of assets and liabilities that indicates insolvency, or presents or causes to be presented to that meeting a written admission of the debtor's inability to pay debts;

(g) with intent to defraud, defeat or delay creditors –

i. assigns;
ii. removes;
iii. secretes or disposes of; or
iv. attempts to do any of the above in relation to,

any of his property;

(h) gives notice in writing to any of the debtor's creditors that he has suspended or is about to suspend payment of his debts;

(i) defaults in the performance of proposal (sic) *made under this Act; or*

(j) ceases to meet liabilities generally, as they become due

(2) Notwithstanding subsection 1 (e), where interpleader proceedings have been instituted in respect of the property seized, the time elapsing between the date at which the proceedings were instituted and the date at which the proceedings are finally disposed of, settled or abandoned, shall not be taken into account in calculating the period of twenty-one days."

[36] The Fixed Date Claim Form (in its amended form) references the failure to pay the judgment and the transfer of assets to related companies as the acts of bankruptcy. This is developed by the affidavit of Fred Smith, filed on the 29th March, 2019 in support of the application, which details that summary judgment in the amount of $25,835,040.00 was obtained and served by registered post on the 1st March 2018. Further that the judgment remains unpaid. That affidavit also asserts that there was reason to believe assets were being transferred to the Applicant's prejudice. In his affidavit, filed on the 13th June 2019 at paragraph 8, Mr Fred Smith also asserts that the Respondent has failed to meet liabilities generally as they became due. The relevant acts of bankruptcy are therefore those in section 57 (1) (b), (c) (g) and (j) of the Insolvency Act. In his submissions the

Applicant's counsel stated an intent to rely on sections 57 (1) (c) (g) and/or (j). Evidence to support ground 57(1) (e), that is an execution of process returned endorsed to the effect that the bailiff can find no property on which to levy, is to be found in the affidavit of Fred Smith filed on the 13th June 2019 at paragraph 8.

[37] The Respondent company has not taken issue with the existence of an act of bankruptcy. The company does not deny that it has ceased to meet its liabilities. Indeed, its witness admitted as much. Nor does the company deny that a judgment against it remains unsatisfied or that the bailiff's return was "*nulla bona*." The Respondent says however that any relevant act of bankruptcy occurred more than 6 months prior to the filing of this application for a receiving order. If so it means the court has no jurisdiction to make a receiving order because it is a statutory condition precedent that the or any act of bankruptcy was *"committed within six months immediately preceding the filing of the application for a receiving order."* It is manifest that as the application, i.e. the Fixed Date Claim, was filed on the 29th March 2019 any relevant act of bankruptcy will have had to occur in or after October of 2018.

[38] The or any alleged disposition or transfers of property, alleged to be by way of a fraudulent preference section 57 (1) (b) and (c) or, assignment, removal or, disposition with intent to defeat creditors pursuant to section 57 (1) (g), all occurred in the period 2009 to 2012. There were also transfers of large amounts of money from the Respondent's accounts but these occurred in a period ending in 2013.As regards section 57 (1) (e), the execution and return by the bailiff nulla bona, this is also outside of the relevant period. The bailiff's letter making the return is dated 31st May 2018 see, exhibit FS 5 to the affidavit of Fred Smith filed on the 13th June 2019.

[39] The only act of bankruptcy, on the evidence before me, which might have occurred within the relevant 6-month period is that found in Section 57 (1) (j). That is that the Respondent "*ceases to meet liabilities generally as they become due*." In this regard it is clear from the decided cases that, failure to pay a judgment or debt

after demand within the relevant period is evidence to support the fact that a debtor has ceased to meet liabilities generally as they become due. Where there is a continuing demand, and the debt remains unpaid, the act of bankruptcy continues to occur. In this regard I prefer the decision of Laing J in the ***Owen Grant case (cited at paragraph 30(f) above*****)** to that of Wallace J in ***Re Cedarhurst Properties Ltd (cited at paragraph 22(p) above)*** and to the decisions in other cases cited by the Respondent's counsel**.** An unpaid judgment long outstanding, and for a considerable amount, can reflect a continuing demand. Its existence can suffice to prove that the debtor has ceased meeting liabilities generally as they become due. Insofar as it remains unpaid, within 6 months of the date the application is filed, it goes to show there is an act of bankruptcy within the period. I adopt the words of Laing J in the ***Owen Grant case (cited above)****:*

> *" [11] In* ***Platt v Malmstrom 53 OR (3d) 502****,a case from the Court of Appeal for Ontario, Canada ,as the headnote indicates, the Court had to consider whether:*
>
> > *"a judgment or order entered more than six months before the issuance of a petition for bankruptcy is sufficient evidence of an act of bankruptcy having been committed within the six months of the filing of the petition"*
> >
> > *The Court held that:*
> >
> > *"An express demand for payment by the judgment creditor within the six-month period is not necessary to establish the act of bankruptcy because a judgment is a continuing demand for payment by the judgment creditor"*
>
> *[12] In the Judgment of the Court delivered by Finlayson JA, he stated at paragraph 16 as follows:*

> *"[16] In Re Kaussen, supra, the bankruptcy judge, Gomery J., who was affirmed by the Quebec Court of Appeal, put it even more broadly at p.119:*
>
> > *"The reason for the six-month rule was to prevent a petitioning creditor from invoking a stale default as an act of bankruptcy. Where there is no purpose to be achieved in making fresh demands because it is apparent that the debtor cannot or will not pay, the creditor is entitled to consider that default once clearly established, continues in effect. His recourse should not be excluded because he fails to perform the empty gesture of demanding payment from someone who has already demonstrated his inability to respond"*
>
> *[13] In the Claim herein, I do not find that the application fails by reason only of the judgment debt on which it is based, having been entered more than six months before the filing of the Application herein".*

[40] In this case there is evidence of not one but two judgment creditors who have remained unpaid. Further, the amounts are large and have been outstanding for a considerable time. These are not, as I indicated earlier, facts in issue. The Respondent concedes that it has not been meeting its obligations. The only question for this court is whether this act of bankruptcy occurred within the 6-month statutory period. I have no doubt that it has. This is because, as per the authorities cited above, the failure to honour a judgment is evidence of an inability to meet liabilities as they become due. The existence of this unpaid judgment is a continuing demand which I find as a fact reflects the Respondents inability to meet liabilities generally as they become due. It is a continuing state of affairs

[41] Dr. Barnett urged me to distinguish the authorities cited on the basis that in this case, the judgment has been executed and therefore, a continuing demand for payment cannot be presumed. He submits further that there is an expressed

provision, section 57 (1) (e), treating with executed judgments in which the bailiff's return is *nulla bona*. Therefore, the argument goes, the judgment once executed cannot be used to establish section 57 (1) (j) grounds. I disagree. The court must be satisfied that the Respondent is not meeting its liabilities as they become due. The unpaid judgment, whether or not there has been an attempt to execute, is admissible evidence in proof of that Section 57 (1) (j) state of affairs. Indeed, the fact that there was an attempt to execute, and the bailiff returned it "*nulla bona",* is even stronger evidence of the inability to meet liabilities as they become due. The return also explains the reason no repeated demand for payment is made as that "*empty gesture*", in the words of Gomery J, would be futile. The fact that the judgment remains unsatisfied, as at the date the application is filed, goes to support the section 57 (1) (j) assertion. The fact that there was an effort to execute the judgment is not a materially distinguishing feature. A bailiffs warrant of levy returned "nulla bona" does not discharge a judgment or the debt it represents. Other means of execution are possible. Therefore, the unpaid judgment, with respect to which there has been a failed levy, can be evidence of a continuing demand.

[42] In this case there are two judgment creditors who remain unpaid. I accept, and find as fact, that the Respondent within the 6-month period immediately preceding the filing of the claim continued to cease to meet liabilities generally as they became due.

[43] Dr. Barnett's other complaints are of a procedural rather than a jurisdictional nature. These related to the content of the Claim Form. There is no doubt that the rules of court and procedure exist for a reason. So too do the statutory prerequisites for filing in Insolvency. The Claim Form was, on Mr. Robinson's application, amended rather late in the day. This was to insert the words,

> "*that the Respondent has committed an act or acts of bankruptcy within six months immediately preceding the filing of this Application in that"*

The amendment is expressly permitted by section 279 (c) of the Insolvency Act. It creates no prejudice as the claim was for the appointment of a Receiver pursuant to Section 58 of the Insolvency Act. The Respondent, even without those words inserted, would therefore be aware that an act of bankruptcy was being alleged. The particulars of which are stated in the grounds contained in the Claim Form and in the affidavits filed. It is noteworthy that, (a) the Respondent did not seek further or better particulars of the act or acts of bankruptcy relied upon, (b) The failure to pay the judgment was clearly alleged and, (c) the Respondent admitted it had stopped meeting its liabilities.

[44] Dr. Barnett endeavoured in his closing submissions to again argue that the Applicant was incompetent to bring this claim because at the time of filing the Applicant was in liquidation. He submitted that the court had not given anyone permission to commence the action as is required when a company is in liquidation. It is a matter on which I ruled as a point in limine. I have reviewed my decision, and the facts and circumstances of this case, and see no reason to change my ruling or to decide otherwise now.

[45] It was contended that the failure to extract an undertaking when appointing an Interim Receiver pursuant to section 67(1) (b) somehow affects the validity of these proceedings. I hold it does not. The Respondent although represented when the Interim Receiver was appointed, and in the years since then, had not brought it to the court's attention. If the omission affects anything it is the appointment of the Interim Receiver not the validity of this claim. Insofar as the law requires such an undertaking I could of course impose one now. However, given that the law requires security to be given at this stage, it should suffice to protect the interest of the bankrupt.

[46] Dr. Barnett also urged me to dismiss this claim because at the time the judgment was obtained, on which reliance is placed to establish the act of bankruptcy, the claim on which that judgment was based was void. It was void because the Applicant was in liquidation at that time and had received no permission to

commence that claim. It was submitted that a stay of liquidation, which the Applicant and the Trustee both say has now been granted, cannot relate back to make the judgment valid. An invalid or void judgment, it was submitted, cannot be relied on to prove the act of bankruptcy. The argument fails because its premise is not a good one. A judgment or order of the court remains valid until and unless set aside, see ***Swatch AG (Swatch SA) Swatch Ltd v Apple Inc. [2019] JMCC Comm 52*** upheld on appeal in ***Apple Inc. v Swatch AG (Swatch SA) Swatch Ltd SCCA 119 of 2018 (decided 11th October 2019)*** and, ***Fritz Pinnock et al v Financial Investigations Division [2020] JMSC Full 2 (unreported judgment dated 2nd March 2020 at paragraph 9 (b)].*** These are not proceedings of an inferior tribunal whose processes are sometimes deemed void ab initio. A judgment of the court, particularly one which as in this case was acted on by the bailiff, is not automatically void, or void ab initio, or treated as if it never existed. The effect of a breach, whether it is jurisdictional or a mere irregularity, is always a discretionary matter for the court, as per Lord Phillips in ***Mossel (Jamaica) Ltd (T/A Digicel) v OUR [2010] UKPC 1 P.C. Appeal No. 0079/2009*** at paragraph 44:

> "What *it all comes to is this, subordinate legislation, executive orders and the likes are presumed to be lawful. If and when however, they are successfully challenged and found ultra vires, generally speaking it is as if they had never had any legal effect at all. Their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders, or acts are found to have legal consequences for some at least (sometimes called "third actors") during the period before their invalidity is recognized by the court – see for example* ***Percy v Hall (1977) QB 924****. All these issues were left open by the House in Boddington"*

[47] In this case the order to wind up was never served. The debt was repaid and that judgment creditor satisfied a long time ago. The order for liquidation was stayed conditionally on the 22nd July 2019, on an application brought before me by the judgment creditor at which the Trustee in Bankruptcy was represented, in the matter of **ASE Metals N.V. v Exclusive Holidays of Elegance Limited 2013 HCV 06734**. Dr Barnett complained that he was unaware of the stay and I am somewhat surprised his colleagues had not told him it was granted. His client of course had no interest in that claim but the application to stay the liquidation was, in any event, heard in open court.

[48] There is, in all the circumstances of this case, no rhyme or reason to motivate a court to set aside as void ab initio either, the claim filed or, the summary judgment obtained by the Applicant against the Respondent. Any such application, and although not formally made I understood Dr. Barnett to be saying that it should be declared void, would be and is hereby refused. This therefore means that, for the purpose of establishing that the Respondent has failed to meet its obligations generally, the judgment remains valid.

[49] Dr. Barnett argues further that when regard is had to the size and age of the debt, the likelihood of recovery and the cost of remunerating the Receiver I should in my discretion refuse the application. He relies on Part 51 of the CPR.I think the role and rationale for a receiver in Part 51 of the CPR may at times differ from that of a receiver under the Insolvency Act. The latter approximates to a liquidator under the old winding up rules. The former to a receiver, properly so called, who is appointed under powers in a debenture. The relevant rules are to be found in Part 77 of the CPR. Under the Insolvency Act once an act of bankruptcy has been found, within the statutory period, the court is unlikely to refuse the order for bankruptcy. The inability to meet obligations, which Dr Barnett invites me to use as a basis not to make the appointment, is a ground for appointing a Receiver under the Insolvency Act. There is in any event evidence, to be found in the Interim Receiver's reports, that there are possible recoveries given the prospect of

transactions being set aside as being fraudulent preferences. There is also evidence from the Respondent's witness of tax credits and other receivables. Although there is an assertion, there is no evidence, that the claim before me is being used for an improper purpose or is otherwise an abuse of process. If I do have a discretion it will not, in the circumstances of this case, be exercised to refuse the application on this ground.

[50] As regards Dr Barnett's other complaints I reference sections 278 of the Insolvency Act. No substantial injustice has been caused by any of the defects or irregularities complained of. The Respondent was in no doubt about the reasons for this application and has had every opportunity to challenge the evidence presented. These proceedings are not therefore invalid, or to be invalidated, by reason of any formal defect or procedural irregularity.

Conclusion

[51] It therefore means that an order for receivership will be made. Section 60 of the Insolvency Act mandates the court upon a receiving order being made, to appoint a trustee of the property of the bankrupt. I bear in mind also that the Interim Receiver has filed four reports, admitted into evidence as Exhibits 1 (a) to (d). The reports contain details suggestive of fraudulent preference and systematic efforts to hide assets rather than to pay lawful debts. In this regard I will reference only two portions. The first is in Exhibit 1(c):

> *"On review of data in relation to an NCB J$ operational account #304551186 of ARC SYSTEMS Limited, covering the period January 2012 to May 7, 2013 (when the account was closed), there were payments to ARC Manufacturing Limited totalling J$822,494,585.92. Kindly refer to Exhibit #1 for the Schedule of these payments accompanied by copies of the statements exhibited.*

> *The $822,494,585.29 represents liquid assets of ARC Systems Limited that were transferred to a related company, with the Directors fully knowing (Please see extract of signed Audited Financial Statements for the 2013/2014 period – Exhibit #2) that there were huge liabilities to unsecured creditors from 2008, that still remained unsettled.*
>
> *To date we have seen no evidence that ARC Manufacturing Limited assumed these liabilities on behalf of ARC Systems Limited."*

My second reference is to the Interim Receiver outlining in his report several properties which were transferred from the Respondent to a St. Lucian Corporation which then in turn transferred those same properties to ARC Properties Limited. He says, in relation to the stated consideration for the transfers, Exhibit 1 (b) "*To date we have not been presented with any evidence of the total consideration of J$189 million being received by ARC Systems Limited or being paid by Hilda Corporation, hence Hilda Corporation could be a creditor of ARC Systems Limited."* In Exhibit 1 (c) (his third Interim report) the interim Receiver points out that when regard is had to the terms and conditions of a "*Reconstruction and Merger Agreement,*" between Hilda Corporation and ARC Properties Ltd. the latter company ought to have the relevant proof of payments. I remind myself that these reports are interim not final.

[52] The commonality of directors of these various companies, and the fact that they all use a Bell Road address, add to the real possibility that there has been a fraudulent preference or other unlawful effort to evade payment of lawful debts. The question therefore is what, if anything, is this court to do given the content of the interim reports of the Receiver.

[53] I have decided that, save to express my concern in this judgment, it would not be appropriate to do more at this stage. Dr Barnett has raised issues related to the duty to plead fraud, statutory provisions as to time and the setting aside of a fraudulent preference and, whether the various companies are associated or related to the Respondent. I do not need to consider those issues because the reports, of the Interim Receiver, played no part in my decision that a section 57 (1) (j) act of bankruptcy has been proved. This judgment is a public document and any relevant agency or department may take such steps as, on the information revealed, its duty demands. The Insolvency Act, in sections 254,263 and 299, empowers the Trustee/Receiver to take other or appropriate action upon completion, or in the course, of his assignment. In that regard section 296 renders certain individuals liable for certain acts of the corporation. I need say no more.

[54] It is the Order of this court that –

1. A Receiving Order is made against ARC Systems Limited pursuant to Sections 58 and 60 of the Insolvency Act.

2. Subject to the provision of security, in accordance with section 249 of the Insolvency Act, the Interim Receiver Mr. Kenneth Dave Tomlinson is hereby appointed the Receiver and Trustee of the property and estate of ARC SYSTEMS LIMITED (in Bankruptcy).

3. Costs to the Applicant, the Interim Receiver and, the Intervening creditor to be taxed or agreed and paid from the estate of the bankrupt.

4. Liberty to Apply is granted.

David Batts
Puisne Judge.