THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2012 – 04383

BETWEEN

STONE STREET CAPITAL LIMITED

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Martin Daly SC leading Mr Rishi Dass and Mr Jason Mootoo instructed by Ms Sarah Sinanan for the Claimant

Mr Alan Newman QC leading Mrs Donna Prowell and Mr Wayne Sturge instructed by Ms Zelica Haynes for the Defendant

Dated: **28 November 2013**

JUDGMENT

1. The question to be decided in this claim is whether the **Central Bank (Amendment) Act, 2011** is unconstitutional.

2. The background to this claim can be stated shortly. The Central Bank of Trinidad and Tobago, under powers given by the **Central Bank Act, Chap 79:02**, assumed control of Clico Investment Bank Limited (CIB) on 31 January 2009. The Central Bank appointed a manager for CIB. On 16 April 2010 the manager petitioned the court to wind up the company. On 17 October 2011 the court ordered CIB be wound up and the Deposit Insurance Company was appointed as the liquidator. By an application filed 12 March 2012 in the winding up proceedings (CV 2010-01442) the claimant applied for leave to commence an action against CIB to protect its property and interest in the form of 5,708,893 shares in Flavorite Foods Limited which CIB held as security for a loan granted by it to the claimant. The claimant contended this loan had been paid off and submitted that it became entitled to the release of its shares before the company was placed in liquidation. This application was made under **section 364** of the **Companies Act, Chap. 81:01**.

3. However, on 15 and 17 September 2011, Parliament had passed the **Central Bank (Amendment) Act, No. 18 of 2011** (the Amendment Act). This Act was assented to and became law on 20 September 2011. The Amendment Act was passed by a special majority and declared that it was to have effect notwithstanding it was inconsistent with sections 4 and 5 of the Constitution.

4. In the claimant's application for leave in the winding up proceedings, CIB relied on the Amendment Act as a bar to the grant of leave. I held in that application that the Amendment Act was a bar to the grant of leave but had it not been for the Amendment Act permission would have been granted based on the evidence put forward in that application (judgment given on 4 October 2012). The claimant had also contended that the Amendment Act was unconstitutional and I directed that this claim be filed so the constitutionality of the Act could be properly considered. The claimant's application in the winding up proceedings was stayed pending the determination of this claim.

5. The Amendment Act provides at section 5 as follows:

> **5.** Section 44E of the Act is amended—
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> *(a)* in the marginal note, by inserting after the word "control", the words "and stay of proceedings";
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> *(b)* by inserting after subsection (4), the following subsections:
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> "(5) On and after the publication of a notification under subsection (1)—
>
> *(a)* no creditor, shareholder, depositor, policyholder or any other person shall have any remedy against the institution in respect of any claim, and without prejudice to the generality of the foregoing, no creditor, shareholder, depositor, policyholder or any other person shall commence or continue any action, execution or other proceedings or seek to enforce in any way whatsoever without limitation in Trinidad and Tobago, any judgment or order obtained in Trinidad and Tobago or any other jurisdiction, against the institution or its successor or the transferee of the whole or any part of any property, assets or undertaking of the institution for the recovery of any claim or in respect of any other liability, until the publication of a notification under section 44G(1) in relation to the institution;
>
> *(b)* where the Bank has not yet published a notification under section 44G(1) in relation to an institution, the Bank may where it deems appropriate publish a notification to lift the stay under paragraphs *(a)*, *(d*) or *(e)*, except that no person shall take any steps to

institute winding up, receivership, administration or any other related proceedings in relation to that institution;

(c) no creditor, shareholder, depositor, policyholder or any other person shall commence or continue any claim, action, execution or other proceedings or seek to enforce in any way whatsoever without limitation in Trinidad and Tobago, any judgment or order obtained in Trinidad and Tobago or any other jurisdiction, against the Bank, its directors, officers, employees or any person acting on behalf of the Bank or appointed by the Bank under section 44D in respect of any act, omission, claim, fact or matter connected with or arising out of the acts or omissions of the Bank in respect of the institution, until the publication of a notification under section 44G(1) in relation to the institution;

(d) no provision of a security agreement, lease or licence between the institution and a secured or other creditor that provides, in substance, that on—

(i) the winding up of the institution or any related entity or any insolvency restructuring or reorganization proceedings being commenced, continued or ordered in respect of the institution or any related entity; or

(ii) the default by the institution of an obligation under the security agreement, lease or licence,

the institution ceases to have such rights to use or deal with assets secured or dealt with under the agreement, lease or licence as the institution would otherwise have, or is given lesser rights or priorities in respect of any assets or property as the institution would otherwise have, has any force or effect until the publication of a notification under paragraph *(b)* or section 44G(1) in relation to the institution; and

(e) no provision in any contract or agreement or any other document whatsoever without limitation which gives any party a right to acquire any property or assets of the institution on the grounds of any change of control or on any analogous ground or on the grounds of insolvency shall have any effect until the publication of a notification under paragraph *(b)* or section 44G(1) in relation to the institution.

(6) For the purposes of subsection (5)—

(a) the rights, property and assets referred to in this section are taken to be the rights, property and assets located in Trinidad and Tobago or in any other jurisdiction; and

(b) the agreement, lease or licence referred to in this section are taken to be, not only an agreement or lease or licence governed under the laws of Trinidad and Tobago, but also an agreement, lease or licence governed by any other law.

(7) The Bank shall report quarterly to the High Court on—

(a) the proposals to restructure an institution in relation to which a notification has been published under subsection (1); and

(b) the progress of the proposals referred to in paragraph *(a)*, until a notification under subsection (5)*(a)* or section 44G(1) has been published in relation to that institution.

(8) Where, prior to the coming into force of the Central Bank (Amendment) Act, 2011—
(a) a notification under subsection (1) was published in relation to an institution; and

(b) a notification under section 44G(1) has not been published in relation to that institution since the publication of the notification referred to in paragraph *(a)*, the provisions of subsection (5) shall apply in relation to that institution with effect from the coming into force of the Central Bank (Amendment) Act, 2011."

6. Before the Amendment Act, the Central Bank had power under section 44D of the **Central Bank Act** to exercise emergency powers. Among other things this allowed the Central Bank to take over the operation of any financial institution under its purview. It did this by publication of a notice of the exercise of its special emergency powers over an institution. That it did in relation to CIB. What the Amendment Act did was to go further to provide for an automatic stay or suspension of all court proceedings by any "creditor, shareholder, depositor, policyholder or any other person" against the institution which has been the subject of the exercise of the special emergency powers. This stay occurs on publication of a notice of assuming control. The stay on court proceedings continues indefinitely until the Central Bank publishes a notification to lift the stay or where the Central Bank relinquishes control of the institution and publishes a notice under section 44G(1) of the **Central Bank Act**. Control need only be relinquished where the circumstances under which the Bank assumed control have ceased to exist; where the Central Bank is of the opinion that it is no longer necessary for it to remain in control of the institution; or where the Central Bank has sold or disposed of the

property, assets and undertakings of the institution. More than this, the Amendment Act barred all claims against the Central Bank arising out of its acts or omissions in respect of the institution until the publication of a notification under section 44G(1): see section 44E(5) (c).

7. The Amendment Act also provided for a quarterly report to be made to the High Court on proposals for restructuring the institution concerned and the progress in relation to the proposals until a notification is published. However, what the High Court is to do with this report, the Act does not say. It cannot ordinarily be supposed that this confers on the High Court any jurisdiction to oversee or supervise the restructuring process of the institution. That is a task the High Court would probably not be equipped to do anyway.

8. In summary then, the effect of the Amendment Act is to bar all claims in relation to the institution, against the institution and the Central Bank, until the Central Bank says otherwise.

Why was the Amendment Act passed?

9. In defence of the Amendment Act the defendant filed an affidavit of the Honourable Winston Dookeran MP, who was the Minister of Finance at the relevant time setting out the reasons for the passing of the Amendment Act.

10. The court looks primarily to the words of a statute to determine the intent of legislation and to judge its proportionality. However, the reasons may shed some light on the backdrop to the legislation and it is to this that I now turn.

11. Mr Dookeran first set out the background to the government's intervention in the affairs of CIB and the Central Bank's exercise of its powers. CIB was part of the Clico Financial Group Limited (CLF). CLF was the largest private conglomerate in Trinidad and Tobago and one of the largest in the Caribbean. The insurance company, CLICO, was part of the group accounting for 53.6 % of the insurance industry's liabilities in Trinidad and Tobago. CLF was therefore a significant part of the economy. CLICO and CIB also held 55% shareholding in Republic Bank Limited, the largest bank in Trinidad and Tobago. The Group's assets in 2007 were estimated at 100 billion dollars which was about 70% of the GDP for Trinidad and Tobago in 2009. Insolvency issues created a systemic risk to the financial system of Trinidad and Tobago. CLICO had about 250,000 clients including 15,000 pensioners and 100 credit and trade unions as clients.

12. Among the products issued by CLICO was an Executive Flexible Premium Annuity (EFPAs). The government intervention started in January 2009 when many customers began withdrawing their funds from CLF Group Companies. Liquidity support was required. A Memorandum of Understanding was arrived at on the basis that there was a real danger of disruption or damage to the financial system of Trinidad and Tobago. In May 2010 the

statement of affairs of CIB suggested an "insolvency margin of $4.7 billion". CIBs assets were adjusted to $6.4 billion.

13. The government was concerned that the CLF Group could collapse which would have a devastating effect on the economy. There was also concern for policyholders and depositors losing their investments. Various measures were taken by the government which have been set out in the Dookeran affidavit. A new board was constituted. $5 billion was provided to CFL initially. Since then $11.4 billion has been paid to EFPA policyholders.

14. While this was taking place, the government's financial situation became increasingly difficult with declining revenues. The government also had to contend with IMF visits and international credit rating agencies. A select committee of experts comprising Mr Steve Bideshi, Mr Wendell Mottley and Mr Soo-Ping-Chow was therefore constituted. Apart from financial options the Committee also recommended legislation to enable an automatic stay of adverse creditor claims. This was also consistent with IMF advice of the need to contain fiscal costs.

15. Before the enactment of the Amendment Act various claims had been filed by persons in the High Court. These were set out at paragraph 48 of the affidavit. Further, various judgments were obtained and other claims begun. At paragraph 52 Mr Dookeran stated that the government's "exposure to existing and pending litigation stands to the tune of TTD $3.79 billion". He noted that had such claims been allowed to continue this would lead to a 'disorderly

liquidation' of CLICO, CIB and British American. The stay was also to "enable systemically important regulated institutions to be re-organised in an orderly fashion": paragraph 54. It would also provide a breathing space and protect the Central Bank and the government "if such judgments were to be executed en masse": paragraph 54. Further Mr Dookeran noted that there was a risk of the disorderly dismantling of CLICO and CIB and a "fire sale" of the assets of those companies which could lead to a threat to the financial stability of the country's financial system and downgrading of credit rating by international agencies.

16. It was therefore decided, according to Mr Dookeran, "that the suspension of legal actions would provide the time to investigate the position within the company, to formulate an appropriate plan of action, and to take action to preserve the value of company assets without interference": paragraph 63. At paragraph 64 he noted: "... the purpose of the automatic stay is to prevent disruption in the event that the Central Bank is required to intervene in the affairs of an institution", consistent with its powers under the **Central Bank Act**.

17. Mr Dookeran also noted that detailed and careful consideration was given to including a provision under which individuals could make an application asking the High Court to lift the stay imposed but on "legal and technical advice it was decided that the inclusion of such a provision to lift the stay as mentioned above could well have negated the usefulness of the stay of proceedings provision": paragraph 66. The risk was there may have been "chaos", this would distract the Central Bank from having to defend multiple applications to lift the stay "and in the present case the efficacy of the liquidation process may have been severely compromised":

paragraph 67. At paragraph 68 Mr Dookeran stated that the "cost net of assets" to the government could be "as high as $13.6 billion (10 % of GDP), including the TT $7.3 billion already injected."

18. Mr Dookeran finally refers to the reporting requirement to the High Court and at paragraph 74 sums up the defendant's argument in favour of the Amendment Act as follows:

> "74. The CBAA does not deprive concerned citizens, depositors and creditors of CIB and policy holders in CLICO of a forum in which to bring proceedings to vindicate their rights. Further I say that the CBAA does not extinguish their right to bring a claim. It merely postpones their ability to launch – or continue – a claim until after the stay is lifted. Once the stay is lifted individuals may bring proceedings – and in this regard I reiterate what I said to the House of Representatives on 14th September 2011 to the effect that a stay of execution can be relinquished in defined circumstances (see section 44G of the CBAA)."

Thus he opined that the Amendment Act was both necessary and proportionate.

19. It should be observed that based on what is said at paragraphs 54, 60, 62 and 64 in particular, that owing to perceived deficiencies in the Central Bank Act, quite apart from the need to contain the consequences resulting from the CLF events, it has been contemplated that

this Amendment legislation is an important tool in the Central Bank's armoury which can be used where systemic risks are deemed to exist. Thus the powers were not being contemplated to be exercised for a limited time because of the present events only, but it was contemplated that it would be a valuable tool to be used whenever the Central Bank considered it necessary to make a section 44 notification. Thus, for example, no sunset clause was put in to give the legislation limited effect subject to renewal if needed.

20. At the same time the government and Parliament must have considered it necessary to implement this legislative framework to deal with what they were confronted with at the time of enactment. The court must of course accord a wide margin of appreciation to Parliament on matters of social and economic policy. Nothing said in this judgment seeks to take away from the force of what was presented in Mr Dookeran's affidavit that a major financial crisis was at hand and measures had to be quickly taken which could effectively prevent risks to the financial stability of the country. That a real crisis was existing cannot properly be doubted. One can well understand the approach. However, the court's role here is to test the legislative measures taken against the supreme law of the land, the Constitution. Howsoever calamitous the circumstances may be, any law passed must be able to pass the constitutionality test. Even when a state of emergency exists, the State must continue to act in accordance with the Constitution. Even in a state of emergency aggrieved citizens have some measure of recourse to the courts and to the protection of the law.

How has Stone Street Capital been affected?

21. On behalf of the claimant, Mr Louis Andre Monteil, a director, is saying that the company has a chose in action. It has a claim to advance. The **Companies Act** provides a filter mechanism for the court to evaluate and make a determination whether its claim should be allowed to go forward. The court must do so under criteria set out in the **Companies Act** which balances its right to advance a claim with the interests of the company in liquidation. He says the claimant company is prevented from doing so because of the Amendment Act. He says this Amendment Act removes the discretion from the High Court to make the determination whether the company's claim should go forward and places the timing of that discretion in the hands of the Central Bank which is part of the executive make up of the State. He also says that the court cannot even enquire into how the Central Bank chooses to exercise its discretion whether or not to publish a notification to lift the automatic stay. Thus he says, the company's rights have been infringed, including the right to property. He advances it is not reasonably justifiable.

22. Even more fundamentally, however, the claimant says the Amendment Act is contrary to the Constitution construed as a whole. It infringes the structure and framework of the Constitution. It has infringed the separation of powers which underlies the Constitution and it takes away from judiciary core functions and has placed them in limbo subject to the determination of the Central Bank as to when and if they can be exercised. The Act, the claimant says, attacks the rule of law and access to justice.

What does the Constitution say?

23. The Constitution is the supreme law. Any written law inconsistent with it is unconstitutional. Sections 4 and 5 are the fundamental rights provisions. Section 13 provides that a law may declare it is inconsistent with the fundamental rights and once passed with the requisite special majority it shall have effect unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

24. The first right the claimant submits has been infringed is the right to property. It is common ground that a chose in action is capable of protection under section 4(a). And it is sufficient to infringe section 4(a) if the claimant's right to enjoyment of property has been substantially interfered with: **Paponette v The Attorney General of Trinidad and Tobago [2010] UKPC 32**. The question is has it been substantially interfered with by a law which has imposed a stay which is expressed to be temporary even though indefinite. Such an interference would have to be of a nature which renders the right nugatory: **Boodoo v The Attorney General of Trinidad and Tobago [2004] 1 WLR 1689**.

25. A stay of proceedings by its nature will not necessarily infringe the section 4(a) right. The court under its general powers of case management can impose a stay of proceedings under the **Civil Proceedings Rules**. There is sometimes significant delay in the giving of a judgment or during the process of the progression of a case. It may happen, unfortunately, that a case

remains for hearing or decision over an extended period of time. None of this will ordinarily constitute a breach of a person's constitutional rights. Where the delay becomes unreasonable, however, and where through this delay the right has been substantially interfered with, a breach of the right may properly be found.

26. Unreasonable delay in removing the stay may be such as to render such a right nugatory. But the effect of the delay on each claimant would have to be examined. A temporary stay if it goes on too long may become such as to render a property right nugatory in relation to that person or party. This will thus lead to the stay being examined to determine if it is reasonably justifiable and therefore unconstitutional. The evidence before me in the Monteil affidavit does not persuade me that that delay threshold has as yet passed in relation to the claimant. There are no circumstances set out to suggest that there is a threat to the survival of the claimant or it is near insolvency itself or to suggest that the claimant's right is in danger of being wiped out. The effect described in the claimant's evidence is that the claimant simply cannot pursue its claim at this time. In the circumstances, I find that the claimant's right to the enjoyment of property and not be deprived of property without due process has not been infringed.

27. The second right concerned is the right to equality before the law and the protection of the law. The claimant submits that the Amendment Act vests the power in the Central Bank to stay any proceedings the claimant wishes to bring against CIB indefinitely but that CIB and other such institutions are permitted to bring and prosecute their claims or counterclaims. Thus, it may

happen that a claim brought against CIB is automatically stayed but a counterclaim by CIB is not so stayed. This it is submitted results in inequality of arms in the conduct of litigation.

28. Inequality of arms has to do with the conditions under which a claim is heard and determined. So in the hearing of a particular claim, one party cannot have free rein to do its case while the other party has its "hands tied behind its back". It concerns the rules which govern the claim. All parties must be afforded the same rules of evidence and cross-examination and the same opportunities to present its case. It does not concern a situation where different claims are being considered. Inequality before the law has to do with unfair discrimination. When considering inequality before the law, the court has to consider who is a proper comparator to the party concerned. Under the Amendment Act, all persons with claims against CIB are being treated in the same way. There is no inequality among like litigants; they are all similarly circumstanced, that is to say, persons with claims against CIB. CIB is in a different category. CIB's category is institutions over which the Central Bank has assumed control, in the exercise of its emergency powers.

29. The claimant also submits that by the Amendment Act its right to protection of the law and thus effective access to the court has been thwarted or impaired. Further, that the Act ousts the supervisory jurisdiction of the High Court over the Central Bank in the exercise of its special emergency powers specifically in relation to a section 44 notification. The claimant submits access to justice is so fundamental a right that a court ought to strike down any law that infringes it.

30. However, access to the court is not absolute. There may be limitations imposed. In respect of the European Convention on Human Rights it is accepted that a State would enjoy a certain margin of appreciation in relation to this matter. Thus any restriction must not be such that the restriction of access of the individual is in such a way or to such an extent that the very essence of the right is impaired; and "a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved": paragraph 17, **Ford v Labrador (Gibraltar) [2003] 1 WLR 2082**. As with the property right there may also come a time where the stay is so long that it may amount to a deprivation of access to the court. Again that is a matter that the claimant has to show and I find it has not so shown. In fact the defendant has submitted at paragraph 54 of their written submissions that section 44E (5) (c), as introduced by the Amendment Act, only suspends private law claims and does not oust the supervisory jurisdiction of the High Court to consider judicial review proceedings. This in itself is an important concession advanced by the defendant on behalf of the State.

31. The claimant also says sections 5(2) (e) and 5(2) (h) has been infringed in that the claimant's fair hearing of its claim has been affected, as well as the claimant has been deprived of the procedural provisions to give effect to its right to property in that it is being deprived of utilising the mechanism set out under the **Companies Act**. Like inequality of arms in litigation, the fair hearing of a claim relates to how the particular hearing is conducted and not necessarily whether the hearing of the claim has been postponed or suspended. Again, an unduly long postponement can impact on a fair hearing. Thus for the same reasons set out above this right has not been breached.

32. The automatic stay imposed by the Amendment Act, in my view, does not infringe the right to property and the right to equality before the law and the protection of the law and does not act as a hindrance to the claimant's eventual access to the court to pursue its claim. As set out before, a stay of proceedings is a device used by the court itself in a variety of proceedings. Thus a stay by its nature does not necessarily infringe a constitutional right. If it is to lead to a breach, it would have to be in the manner in which it is imposed or administered that may eventually cause this to happen. I have found no circumstance here which would suggest a breach of the fundamental rights, at this time. The claimant's claim is preserved. It however cannot be ventilated at this time. The circumstances do not signal that the rights have been rendered nugatory by the two year period that has passed. To the extent, however, that it prevents access to the court for an indefinite period and that the length of such period is to be determined by an executive body, the Central Bank, is another matter and will be considered below.

Reasonably Justifiable

33. Given my findings on whether the Amendment Act infringes section 4 and 5 of the Constitution it is not necessary to decide if it can be said to be reasonably justifiable. However, I make the following observations in the event a higher court has to decide on this matter and reaches a different conclusion to mine on whether any section 4 and 5 rights have been breached.

34. The test to determine justifiability has been laid down in **de Frietas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69** at page 80 as follows:

> "In determining whether a limitation is arbitrary or excessive, the court must ask itself: whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

The test has been modified, but essentially, the court has to balance the interests of society with those of individuals and groups. However, even where the **de Frietas** criteria have been met, the effect of the law may have such a disproportionate impact that it will be struck down.

35. In determining this issue of proportionality the court must look squarely to the legislation and evaluate it. However, in this case, the Dookeran affidavit has provided valuable background context for the exercise of the legislative option chosen and in my view it is helpful to look at it and consider what was advanced. Thus my approach has been to look primarily at the legislation, but to look at it in the background context of the factual matrix set out in the Dookeran affidavit much of which cannot really be in dispute.

36. The Amendment Act was to prevent claims being brought against CIB and other such institutions under the control of the Central Bank under its Special Emergency Powers. It was to prevent claims being brought until such time as the Central Bank deemed the stay should be lifted, that is to say, until the circumstances giving rise to the assumption of control over the institution had abated. The means was an indefinite stay on all claims brought against CIB.

37. The question is whether the means used to impair the right or freedom were no more than necessary to accomplish the objective.

38. In looking at the means used, an assessment has to be undertaken of competing means of achieving the legislative objective recognising that a margin of appreciation exists and that there must be some significant deference to the legislative choices employed. This proportionality assessment must be done in relation to reasonable competing choices. In **Human Rights: Judicial Protection in the United Kingdom**, **2008**, by **Sir Jack Beatson and Others**, the learned authors at para 3-68 state:

> "We suggest, however, that the following propositions can be asserted with a degree of confidence:
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> (1) the less intrusive means requirement requires attention by a court to whether there are lesser intrusive measures open to the authority even where these would be less effective;

(2) a public authority is not required to adopt the least intrusive means in every case, irrespective of the degree to which that measure would be less effective;

(3) the degree of justification required for a public authority not adopting a less intrusive measure will depend on the facts of the case, on the nature and degree of interference with individual rights and on the importance of the right in play."

39. A weighing of competing measures would thus be necessary. Less intrusive means are to be preferred although a legislature would not be bound to necessarily adopt the least intrusive means available. A good application of the principle and the analysis required is provided by the case of **R (on the Application of Laporte) v Chief Constable of Gloucestershire Constabulary [2007] 2 AC 105** where the constable had stopped a coach carrying 120 persons from attending a demonstration when his real issue was how to prevent 8 anarchists from attending the demonstration. The discussion at paragraphs 88 and 89 is helpful in showing the kind of analysis a court can engage:

"88. Despite this, Mr Lambert appears to have thought that his only options were either to stop the coaches at Lechlade or to allow them to go on to Fairford and arrest all 120 or so occupants there. He judged – correctly, I have no doubt – that making so many arrests there would not have been practicable, given the available forces and facilities. Therefore, if his assumption about the number of potential violent troublemakers had been correct and a breach of the peace had been imminent, stopping the coaches rather than letting them go on to Fairford would have been justified. But once his officers had

actually seen the passengers at Lechlade, he should not simply have assumed that something like 120 violent troublemakers, would have had to be arrested at Fairford. For some reason, however, Mr Lambert persisted in this false assumption which led him to stick to his preconceived plan to turn the coaches back without considering and less drastic alternative.

89. One less drastic step which Mr Lambert might have taken would indeed have been to allow the coaches to go on to Fairford where the forces assembled to deal with an anticipated demonstration of up to 10,000 protestors would surely have been able to prevent any breach of the peace which the eight known Wombles were planning. Another possibility would have been to target the known Wombles on the coaches and to remove them at Lechlade. There is no evidence to show that this would not have been practicable, given the forces and facilities available to the police there. Action of that kind would have materially reduced the threat of violence at Fairford."

40. At paragraph 67 of their submissions the claimant's attorneys have put forward what they consider to be the effect of the amendment in terms of access to the court. The factors set out include that the court loses its jurisdiction over claims without the Central Bank having to justify a stay; the Amendment Act ousts the court's power of judicial review over the Central Bank in the exercise of a "draconian power"; persons affected are left without access to the court to pursue their remedies; the automatic stay arises for all claimants regardless of the strength of their claim or personal circumstances; and the Amendment Act places the right of access to the

court for the purpose of pursuing a claim against CIB in the exclusive hands of the Central Bank, an arm of the executive component of the State.

41. Much of what the claimant submits on this aspect has force. On the one hand, there is the important right of persons to have access to the court to file and prosecute claims against CIB. On the other hand is the need to manage these claims in a way that would not cause systemic risk to the financial system and so that the government would not be faced with having to pay a number of judgments, in which their immediate exposure was estimated at $3.79 billion, all at once.

42. Conducting the balancing exercise, the imposition of a stay of proceedings while the liquidator and government could get some room to manoeuvre, as it were, cannot be seen to be disproportionate. The greater good (or risk) would temporarily trump the individual right of a litigant to pursue a claim. What could be disproportionate is the length of time the stay remains. The longer the stay remains in place the more difficult it would be to conclude that it is reasonably justifiable. In the crisis circumstances described in the Dookeran affidavit, the power to grant a temporary stay of proceedings can be seen as a proportionate response. As the duration of that stay lengthens, however, the proportionality of that stay gradually diminishes until it can become disproportionate. The reasonable time for this would be tied to how long it was reasonably necessary to have that stay continue to stabilise the financial system and to manage the systemic risks faced, and until negotiations and a framework could have been

satisfactorily worked out to manage the payment of claims, taking account of the various interests and policy considerations involved.

43. That exercise in itself would be a complex one upon which evidence of what the position is at the time when the assessment is being done and the steps taken up to then would have to be carefully considered. Based on the evidence available to the court at this time it is not possible to conclude on this issue at this time. Neither side advanced evidence or arguments on the position existing at the time of the court's assessment.

Separation of Powers and Rule of Law

44. The claimant has also advanced arguments relating to the structure and content of the Constitution as a whole. The Constitution is the supreme law. Any written law inconsistent with the Constitution is liable to be struck down. The Constitution establishes a sovereign democratic State. A fundamental principle on which it is based is respect for the rule of law. None of these ideas are controversial.

45. Separation of powers too is an integral part of the structure of our Constitution. That this is an underlying principle of our Westminster-styled Constitutions is not in doubt. The defendant has quite correctly accepted this. This has been powerfully articulated in both **Hinds v The Queen [1977] AC 195** PC and **Director of Public Prosecutions of Jamaica v Mollison**

[2003] 2 AC 411 PC. As recent as in 2007 in **State of Mauritius v Khoyratty [2007] 1 AC 80** the Privy Council noted:

> "12...The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.
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> 13. In *Director of Public Prosecutions of Jamaica v Mollison* [2003] UKPC 6, [2003] 2 AC 411 Lord Bingham of Cornhill examined the separation of powers under a Westminster constitution, viz the Jamaican Constitution. In a unanimous judgment of the board Lord Bingham observed [at para 13]:
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> > "Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as a 'characteristic feature of democracies': *R (Anderson) v Secretary of State for the Home Department* [2003] 1AC 837, 890-891, para 50".

What is critical from these observations is the acute separation of powers between the judiciary on the one hand as against the executive/legislature on the other. The executive and legislature cannot exercise core judicial powers and the judiciary must be careful not to overstep the mark to exercise executive/legislative powers, although part of the judiciary's responsibility is to review, in appropriate cases, the manner and exercise of executive and legislative powers. It tests the exercise of those powers against the Constitution and judicial review criteria such as fairness and reasonableness.

46. In **Toussaint v Attorney General of St Vincent and the Grenadines [2007] UKPC 48** Lord Mance at paragraph 27 noted:

> "The right of access to a court is basic to both sections 8(8) and 16. Fairness, publicity and promptness are (as the European Court of Justice said in *Mc Elhinney v. Ireland* (2001) 34 EHRR 322, para. 33, summarising its reasoning in the previous case of *Golder v. United Kingdom* (1975) 1 EHRR 524) "meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to court". Lord Hoffmann pursued the theme in *Matthews v. Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163, paragraph 29:
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> > "29. These principles require not only that you should be able to get to the court room door. The rule of law and separation of powers would be equally at risk if the executive government was entitled, as a matter of arbitrary discretion, to instruct the court to dismiss your action. There are different ways in which one could draft a law to give the executive such a power. It might say that the cause of action was not

complete without the government's consent. That would look like a rule of substantive law. Or it could provide that the government could issue a certificate saying that the action was not to proceed. That looks like a procedural bar. **But provided one holds onto the underlying principle, which is to maintain the rule of law and the separation of powers, it should not matter how the law is framed. What matters is whether the effect is to give the executive a power to make decisions about people's rights which under the rule of law should be made by the judicial branch of government**."

Mr Clayton submits that a like objection applies to an apparently unconstrained power over the pursuit of a claim given to the Speaker of a legislature."

(Emphasis supplied)

Lord Hoffman's statements are of special importance to this case.

47. It is to be noted that **Khoyratty** was a case where the law had impacted on the court's determination of matters relating to bail. **Mollison** was a case where sentencing of offenders was concerned. **Toussaint** was one relating to whether a statement made in Parliament could be prevented from being used in court proceedings by a decision of the Speaker.

48. Further, in **Liyanage v The Queen 1967 1 AC 259** at 289 to 290 Lord Pearce directed this caution to the courts when considering challenges to the constitutionality of parliamentary enactments:

> " …their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power … nor do they find it necessary to attempt the impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances including the true purpose of the legislation, the situation to which it was directed, the existence… of a common design and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings."

49. Additionally, it is to be noted that there is a presumption that legislation passed by Parliament is constitutional and he who alleges that it is not bears the heavy burden of showing that it is not constitutional: **Mootoo v The Attorney General of Trinidad and Tobago [1979] 1 WLR 1334**.

50. What then of a law which provides for an automatic stay on the exercise of certain powers by a Central Bank and which also provides that it is only the Central Bank which may determine when the stay is to be lifted and its decisions in relation to the exercise of those

powers are not reviewable by the courts? Does this take away a core judicial function from the courts? Does it matter that this removal of judicial oversight is temporary?

51. It is to be noted that different concepts are concerned and intertwined here. There is access to the courts, which is not an absolute right. There is separation of powers which is expressed to be fundamental. And it is the rule of law which the courts are duty bound to uphold.

52. There are several instances where certain circumstances may have the effect of limiting access to the courts. These will not ordinarily be considered to be unconstitutional. For example, there are rules of court which provide that if certain things are not done a claim may be struck out. This is a kind of denial of access since the party is being prevented from advancing a claim. There are provisions relating to limitation periods for bringing a claim. There are procedural rules which provide for a party to have to show standing to bring a claim.

53. But in none of those instances is access to the court denied to a wide range of persons by an automatic stay. And in none of these instances is the court deprived of adjudicating whether the claim can go forward or not. In other words, the court, in these instances, remains the ultimate arbiter as to whether the claim can go forward and when. As a result of the Amendment Act, the Central Bank has *de facto* been given this power as a consequence of the publication of

a notification and the exercise of this power is not reviewable by the court. Based on this formulation, the Amendment Act must be seen as being unconstitutional.

54. The power to stay a legitimate claim or to lift a stay has always been within the exclusive province of the judiciary. The Amendment Act places that power in the hands of an executive body. The Act also prohibits the court from hearing and completing pending proceedings indefinitely. It further deprives the High Court of any supervisory jurisdiction over the Central Bank in relation to the exercise of its powers which can impact on individuals and legal persons. It further places the determination of when to continue certain litigation in the hands of the Central Bank.

55. A person has a right to bring a claim before the court to vindicate his legal rights and the court's function is to determine his rights, obligations and duties. That is the position with this claimant as with any other person in this country. The claimant thus has access to justice. Such a claim can be brought at any time subject to limitation provisions or *laches* or other inordinate delay. But these restrictions are shields which may be held up when a claim is brought. They are not bars to litigation as such. The court will ordinarily adjudicate on if any limitation period applies or if there has been inordinate delay or if the claim is an abuse of process.

56. Further, a party may apply for a stay of court proceedings pending the payment of security for costs; or pending the determination of an arbitration; or pending the determination of

a mediation or judicial settlement conference; or pending the payment of a previous costs order, and so on. The parties may consent to a stay of proceedings pending some settlement mechanism being deployed. Indeed the **Companies Act** provides a filter mechanism itself by which a legitimate claim against a company in liquidation can be denied as part of the protection afforded to the company in liquidation. A claimant must meet a threshold to be allowed to go ahead with the claim. It may have also been open to the Central Bank to invoke the court's general powers of case management under Part 26.1(1) (f) of the **CPR** to seek to stay certain claims temporarily while it got its house in order.

57. But it is always the court which must determine whether a stay of a legitimate claim should be made. It cannot be for the executive to do so. It cannot be for the legislature to impose an automatic stay without recourse to the court. And it cannot be for a litigant, such as the Central Bank, against whom a claim may have been brought or who has supervisory jurisdiction over an institution against whom a claim has been brought, to determine whether that claim is stayed or for how long that claim should be stayed. That is taking away a core function of the judiciary and placing it in the hands of a litigant or potential litigant. A law which does that patently infringes the separation of powers which is a fundamental feature of our Constitution. It is an encroachment on the judicial function. Such a law must be unconstitutional.

58. It is to be noted further, that among the claims affected by the Amendment Act were claims already filed in court, which the court was seised of, and which the court was then

automatically prohibited from dealing with until the Central Bank advised otherwise. This emphasises in my view the trespass on the court's core functions by this Amendment Act. In this sense this case was different and distinguishable from the case of **Steve Ferguson v The Attorney General of Trinidad and Tobago, CV 2012 – 04052** (delivered 5 April 2013), per Dean-Armorer J. In the circumstances considered in that case, the court always had power to stay criminal proceedings on account of unreasonable delay and other considerations. The new Act there provided a new benefit to accused persons who had been charged over 10 years before. Then that Act was swiftly repealed so the accused persons were back to the same position as they had been before, that is, they could avail themselves of all the pre-trial protection mechanisms to seek to have the proceedings stayed. Parliament there took away a power that it had itself given (added) but in doing so the court's original power was never diminished.

59. In the present case the claimant always had the right to seek leave to bring his claim under the existing law, the **Companies Act**. That right has been automatically suspended and it is not known when an executive body will advise that the stay will be lifted. In that sense the court's judicial function to decide on when a stay would be suitable, and for how long, has been diminished.

60. The caution expressed in **Toussaint** that the law could be dressed up as a substantive or a procedural bar is of special significance to this case. It has been urged that the court should pay special attention to the temporary nature of the stay imposed by the law in question. Whether it is expressed to be temporary or not does not change whether the law has taken away a power to

be exercised by the judiciary and given it to an executive body. That is the central issue. The determination of when a claim is to go ahead is as much a part of the access to the court as the opportunity for a judicial determination of the merits of the claim. Suppose, for example, the Central Bank does not publish a notification lifting the stay for 10 or 15 years. And suppose during this time, all the assets of CIB were to be sold so there is nothing left for a litigant to recover. Doesn't that effectively take away the court's power to determine the case? Wouldn't it render giving a decision or remedy merely academic? I think it does, and would. The temporary nature of the stay, the duration of which is indefinite in any event, is not relevant to the fact that the power to stay has been taken away from the court.

61. Brennan C.J. in **Nicholas v The Queen 193 CLR 173** as cited by Dean-Armorer J in the **Steve Ferguson** case referred to above, at paragraphs 215 to 216 of her judgment, made the following point.

> "215. At page 186 of his judgment, Chief Justice Brennan reaffirmed the power of Parliament to prescribe the jurisdiction to be conferred on a court in this way:
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> > **"**Subject to the constitution the Parliament can prescribe the jurisdiction to be conferred on a court but it cannot direct the court as to the judgment or order which it might make in exercise of a jurisdiction conferred upon it…"
>
> 216. The Learned Chief Justice then quoted the following learning from the joint decision in ***Chu Kheng Lim*** :

> "In terms, s.54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament within the limits of the legislative power conferred on it by the constitution to grant or withhold jurisdiction. It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the constitution…entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Chapter III vests exclusively in the courts…."

62. What Parliament has done by this Amendment Act is to provide for an automatic stay which when shorn of its "temporary" cloak is to direct the court to stay pending matters or not hear claims which are validly brought until the Central Bank says so. Is this Amendment Act seeking to direct the "manner and outcome" of the exercise of the court's jurisdiction, as contemplated by the cases? The Act does not take away the jurisdiction to hear and deliver a judgment on the claims eventually, but it proscribes when those claims are to be heard. It "directs" that the proceedings be stayed. The stay is of an indefinite duration. In some instances, it may well be possible that the indefiniteness of the stay will determine the outcome. A party may die, or become bankrupt, or become so ill that he is unable to prosecute his claim. In the present case, the Amendment Act is in effect directing the court to postpone its management and determination of a case for an indefinite period where it would have granted leave to the claimant to bring a claim against CIB. That impacts on the outcome of the application insofar as it prohibits the court for an indefinite period from granting leave and from managing and

determining the case. At very least it impacts on the manner of the court's determination of the claim in that it prohibits the determination of the leave application until the stay is lifted. This in my view amounts to an impermissible direction to the court which infringes the separation of powers.

63. Various analogies were attractively put before me by lead counsel. Mr Daly said the Amendment Act locked the door on their access. Mr Newman said all it does is to close the window so the rain can be kept out temporarily. The true position, however, is that the Amendment Act locks the door and takes away the key from the gatekeeper, the judiciary, and gives the key to the Central Bank. Parliament may have a spare key which they can use by repealing the law. But the Constitution provides that the custodian of the access key must be the judiciary.

64. In the crisis circumstances described in Mr Dookeran's affidavit, Parliament may have considered that it had little choice but to enact the Amendment Act in the form in which it did to protect the financial system from collapse. This is especially so when the government's committee of experts had recommended this course. Notwithstanding this, the court would be failing in its duty if it does not uphold the constitutional principles upon which our nation is founded, and particularly the separation of powers and rule of law, which has been acknowledged to be a "characteristic feature of democracies".

65. As an alternative to the present law, an amendment could have been made to the **Companies Act** to make it more difficult to get leave to proceed against the company in liquidation in much the same way as Parliament can make changes to the Bail Act to make it more difficult for certain categories of persons to get bail. A parallel option may have been to amend the Central Bank Act to provide for the Central Bank, where it has assumed control over an institution, to apply to the court for a limited stay of any claim brought against the institution, for say 6 or 12 months, where there was systemic risk to the financial system. Criteria could have been laid down for the court to consider. Such a course would have expanded the court's power. The Amendment Act here, however, took away the judiciary's core function which infringed the separation of powers and ultimately the rule of law.

66. For the reasons set out above it is declared that the **Central Bank (Amendment) Act, 2011** breaches the separation of powers under the Constitution and is therefore unconstitutional and void.

67. The consequence of this decision is that the claimant can ventilate its claim in court for which appropriate remedies may be sought. I therefore do not consider that this is an appropriate case for the award of damages. If the claimant succeeds in its claim it will likely be granted reliefs. The making of a declaration is a sufficient remedy here.

68. On the issue of costs, the claimant has succeeded on one aspect of its arguments and has failed on another. Nonetheless it has succeeded in obtaining a declaration from the court on an important constitutional point. I would therefore hear the parties on costs.

69. I express my sincere gratitude to counsel on both sides for the excellent quality of their written and oral submissions in this matter.

Ronnie Boodoosingh
Judge