COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

BANKRUPTCY SIDE

2001 No. 511

IN THE MATTER OF THE BANKRUPTCY ACT 1870

AND IN THE MATTER OF SHEIKH FAHAD MOHAMMED AL SABAH, A BANKRUPT

BETWEEN

BONSAI INVESTMENT AG

Appellant

AND

G.CLIFFORD CULMER (in his capacity as Trustee in Bankruptcy of the property of Sheikh Fahad Mohammed Al Sabah)

Respondent

Before: The Hon. Madam Justice Indra Hariprashad Charles

Appearances: Mr. Brian Moree QC with him Mr. Oliver Liddell and Mr. Sean Moree of McKinney Bancroft and Hughes for the Appellant

Mr. Colin Callender QC of Callendar & Co instructed by Mr. Scott Ward of Roberts, Isaacs and Ward for the Respondent

Hearing Dates: 2, 3, 4, 6, 19 and 20 September 2013

Bankruptcy law – Trustee in bankruptcy applies for lifting of stay order granted in June 2008 - Have there been material changes of circumstances since order was made - No prejudice to new creditors – No inordinate delay

Swiss proceedings in progress - present proceedings dependent on outcome of Swiss proceedings – Waste of judicial time and resources to lift stay order and embark on parallel proceedings – Whether the Swiss Proceedings will conclude before the impending Bahamian Proceedings.

The Trustee in Bankruptcy ("the TIB") filed a Summons seeking, in the main, to lift the Stay Order granted by Lyons J. on 16 June 2008 on the basis that there have been material changes of circumstances since the Stay Order was made namely (i) prejudice to the New Creditors

admitted in the Bankruptcy; and (ii) inordinate delay. Alternatively, that the Stay Order be lifted pursuant to section 59 of the Act on the basis that it is expedient and necessary in the interests of doing justice in this case and in making a complete distribution of the Bankrupt's Estate. Bonsai says that the TIB only suggests two circumstances but there is a third and more relevant circumstance, that is, the issuance of the Swiss Judgment dismissing the claims of GT and THL against Bonsai.

The TIB submits that he has converted into money the Bankrupt's Estate and is in a position to declare a final dividend and to give notice of a final distribution to all admitted creditors. However, he is unable to do so because of the Stay Order. He further says that the lifting of the Stay Order would cause no prejudice whatsoever to Bonsai in having its own appeal determined imminently rather than awaiting the determination of the Swiss Proceedings. The TIB is of the view that Bonsai's opposition is purely tactical because it recognizes that its Proof of Debt is untenable and hopes that GT/THL will withdraw their claims in Switzerland if it is able to delay the final distribution of $92 million from the Bankrupt's Estate for an indefinite period.

Bonsai opposes the application and submits that the Bahamian Court should not embark upon a protracted and expensive exercise which might be rendered moot by the outcome of the Swiss Proceedings. The TIB concedes that the Bonsai Appeal would be rendered moot if GT/THL is unsuccessful in its appeal in the Swiss Proceedings. Bonsai has always maintained that its claim in the Bankruptcy is subject to the outcome of the Swiss Proceedings.

Bonsai says that the Summons is in reality a lawyer-driven process to posture this latest attack on the Stay Order as an initiative led by disgruntled creditors based on changes in material circumstances. Bonsai submits that cross-examination revealed that the actions of the TIB and the New Creditors did not match their rhetoric with regard to their concern for delays and that the alleged prejudice was more feigned than genuine. Additionally, the Spanish Creditors who alleged to have been prejudiced by delay have done nothing to advance their own claim for over ten years. Furthermore, the TIB who was claiming to be so concerned about completing the Bankruptcy had in fact taken four years to admit the GT claim and over ten years to press the Spanish creditors to put their respective claims in a proper form.

HELD:

1. The court has jurisdiction to lift the Stay Order either under section 59 of the Bankruptcy Act, 1870; paragraph 2 of the Order of Lyons J and/or pursuant to its inherent jurisdiction.

2. It is an elementary principle of law that a stay may be reversed upon a material change of circumstances: **General Electric Company v Enercon GmbH and Others [2003] EWHC 3089 (Pat), 2003 WL 23014739**. The admission of the New Creditors is not a material change of circumstances since they make up less than 1% of the Bankrupt's Estate. The changed circumstance must be significantly material to warrant the court reversing an earlier decision. Minor changes would not suffice.

3. A further application for substantially the same relief should not be entertained unless it is founded on a material change of circumstances since the original application was heard or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application. The TIB had knowledge of the claims of the New Creditors at all of the three hearings before the respective courts. Neither the

TIB nor any of the admitted creditors drew that to the Court's attention. The fact that the TIB only admitted the New Creditors recently (eight or nine years after their claims were submitted) without giving any reason for the delay does not change the circumstances relied on by Lyons J. when he made the Stay Order. See: **Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen [2003] EWHC 1740(Ch)** and **Gomez v Syntex Pharmaceuticals International Limited and others [2009] 4 BHS J No. 23.**

4. On the issue of delay, the short answer is that the TIB and GT have substantially contributed to the delay by the way they conducted their litigation both in Switzerland and The Bahamas. Additionally, the TIB took over ten years to press the Spanish Creditors to properly submit their respective claims. They themselves took no urgent steps to attend to routine simple formalities. The claims of the New Creditors were admitted in October 2011. Consequently, any payment of dividend, final or interim, could only have been paid from 5 October 2011. It is misleading to state that the delay was from June 2008.

5. The New Creditors are not prejudiced by the Stay Order. The inexplicable delay by the Spanish Creditors cannot be reconciled with their recent protestations over the delay in receiving the final dividend in the Bankruptcy. As such, their reprehensible conduct belies their claim to be seriously prejudiced by the Stay Order. In any event, paragraph 2 of the Stay Order provides an effective mechanism for the payment of dividends to all creditors.

6. Bonsai would not oppose an application for interim dividend provided that an appropriate provision is made for its claim in the Bankruptcy. Any suggestion that an interim dividend is not possible because the TIB cannot calculate the provision for Bonsai claim is untrue. Contingent claims and pending appeals of rejected claims are conventional in liquidation and bankruptcy cases.

7. The Swiss Proceedings have already commenced. The appellate process is likely to be finally determined in early to mid-2015. The Bonsai Appeal has not yet commenced in The Bahamas. Realistically, the entire process will take approximately 2 ½ years. There is a notable difference of one year.

8. If the Bonsai Appeal is heard, the Bahamian Court will have to decide issues of Swiss law. There is a real possibility of conflict between the Bahamian Court and the Swiss Court.

9. An important factor for consideration is that in the Swiss Proceedings the claims by GT and THL against Bonsai have been dismissed. On that basis, it would be unnecessary to have any further litigation in The Bahamas. The only circumstance which would change this position is if the Swiss Judgment is overturned on appeal. As a result, the future conduct of the Bonsai Appeal is dependent on the final outcome of the Swiss Proceedings.

10. Effective and efficient case management dictates that the Stay Order ought to be maintained pending the outcome of the appeal process in Switzerland. Any other approach could result in waste of precious judicial time and resources.

JUDGMENT

Introduction

[1] The sole issue before this court is whether or not the Order made by Lyons J. on 16 June 2008 ("the Stay Order") should be lifted.

Historical perspective

[2] On 30 July 2001, Mr. G. Clifford Culmer ("the TIB") was appointed the Trustee in Bankruptcy of the property of Sheikh Fahad Mohammed Al Sabah ("the Bankrupt").

[3] Bonsai Investment AG ("Bonsai") submitted a Proof of Debt on 22 August 2005. The TIB rejected Bonsai's Proof of Debt on 9 January 2007 giving full reasons for his refusal.

[4] On 24 January 2007, Bonsai appealed the TIB's decision on its Proof of Debt to the Supreme Court ("the Bonsai Appeal"). At the heart of the Bonsai Appeal is whether Bonsai's claim as a creditor of the Bankrupt's Estate is contractual in nature and therefore falls within the definition of section 29 of the Bankruptcy Act of the Commonwealth of The Bahamas ("the Act"). The answer to this question turns on Swiss Law (which was conceded by the TIB in the Bonsai Appeal) and is dependent upon the outcome of proceedings commenced by Grupo Torras S.A. ("GT") against Bonsai in Switzerland on 26 September 2000 ("The Swiss Proceedings").

[5] On 16 June 2008, Lyons J. heard the Bonsai Appeal. After hearing Counsel, the learned judge ordered that (i) the hearing of the Bonsai Appeal be stayed pending the final judgment by the Courts in the Swiss Proceedings; (ii) the TIB shall not made any payments to any creditors of the Bankrupt's Estate without the leave of the Court and (iii) the costs of both parties are to be paid out of the Bankrupt's Estate.

[6] On 26 September 2008, the TIB appealed the Stay Order. On 17 March 2010, the TIB Appeal was withdrawn and dismissed with costs to Bonsai.

[7] During the intervening period of the hearing of the TIB Appeal, GT entered the picture. On 16 January 2009, it applied to be joined as a party in the TIB Appeal. The Court of Appeal dismissed GT's application on the ground that it had no *locus standi* before the Court. Bonsai was awarded costs.

[8] On 30 July 2010, GT made an application seeking the payment of the final dividend out of the Bankrupt's Estate ("the GT application"). The TIB appeared with his Counsel. The GT application was heard by Adderley J (as he then was). The learned judge dismissed GT application on 28 January 2011. On 11 February 2011, GT filed a Notice of Appeal seeking to appeal the ruling of Adderley J. Subsequently, GT withdrew the Notice of Appeal.

[9] GT was the only admitted creditor of the Bankrupt's estate until 2011 when the TIB unconditionally admitted the claim of Torras Hostench London Limited (in liquidation) ("THL") and admitted four Spanish Creditors (the "New Creditors").

[10] On 28 June 2013, a decision was delivered in the Swiss Proceedings in favour of Bonsai ("the Swiss Judgment"). Pursuant to the Swiss Judgment, all of the claims by GT and THL against Bonsai in the Swiss Proceedings were dismissed. At the time of the hearing of this Summons, GT was in the process of filing an appeal against the Swiss Judgment.

Application before the Court

[11] The present application before the Court is a Summons, filed on 17 October 2012. The Summons seeks, among other things, to lift the Stay Order on the basis that there have been material changes of circumstances since that Order was made namely (i) prejudice to the New Creditors admitted in the Bankruptcy; and (ii) inordinate delay. Alternatively, that the Stay Order be lifted pursuant to section 59 of the Act on the basis that it is expedient and necessary in the

interests of doing justice in this case and in making a complete distribution of the Bankrupt's Estate.

[12] The TIB says that he has converted into money the Bankrupt's Estate and is in a position to declare a final dividend and to give notice of a final distribution to all admitted creditors but the sole stumbling block on a way forward is the Stay Order. He further says that the lifting of the Stay Order would cause no prejudice whatsoever to Bonsai in having its own appeal determined imminently rather than awaiting the determination of the Swiss Proceedings. According to the TIB, Bonsai has not advanced any evidence or suggested in any way that it will be prejudiced if the Stay Order is lifted and its own appeal heard as soon as practicable. The TIB is of the view that Bonsai's opposition is purely tactical because it recognizes that its Proof of Debt is untenable and hopes that GT/THL will withdraw their claims in Switzerland if it is able to delay the final distribution of $92 million from the Bankrupt's Estate for an indefinite period.

[13] Bonsai trenchantly opposes the application and says that it is a 'third bite of the cherry." Bonsai submits that it was Lyons J., an experienced and insightful commercial judge, who decided that, as a matter of case management, the Bahamian Court should not embark upon a protracted and expensive exercise which might be rendered moot by the outcome of the Swiss Proceedings. The TIB concedes that the Bonsai Appeal would be rendered moot if GT/THL is unsuccessful in its appeal in the Swiss Proceedings.[1] Bonsai has always maintained that its claim in the Bankruptcy is subject to the outcome of the Swiss Proceedings (conceded by the TIB). It is for these reasons that Bonsai says it does not wish to waste valuable judicial time or to incur substantial costs in determining its appeal when it may be unnecessary to do so.

[14] Bonsai says that the Summons is in reality a lawyer-driven process to posture this latest attack on the Stay Order as an initiative led by disgruntled creditors

[1] See Transcript dated 2 September 2013 –Culmer –page 51-52 line 4.

based on changes in material circumstances. Bonsai submits that cross-examination revealed that the actions of the TIB and the New Creditors did not match their rhetoric with regard to their concern for delays and that the alleged prejudice was more feigned than genuine. Additionally, the Spanish Creditors who alleged to have been prejudiced by delay have done nothing to progress their own claim for over ten years. Furthermore, the TIB, who is claiming to be so concerned about completing the Bankruptcy, had in fact taken four years to admit the GT claim and over ten years to press the Spanish Creditors to put their respective claims in a proper form.

[15] From the outset, let me state that this Summons is not a *de novo* hearing. It is not a hearing to consider the merits of Bonsai Appeal or the merits of the Stay Order. To do the latter, would effectively mean that this Court would be sitting as an appellate court. This Court can only entertain an application to lift the Stay Order if there has been material change of circumstances since the Order was made.

The evidence

[16] The Summons for lifting the Stay Order was supported by two affidavits of the TIB filed on 17 October 2012 and 11 April 2013; the two affidavits of Laureano Roldan filed on 1 March 2013 and 15 April 2013; and the affidavits of Myles Culmer, Laurence Pagden, Elisa Hurtado Perez and Fernando Huidobro Escalante, and Valentin Cortez Dominguez, all filed on 1 March 2013.

[17] The TIB presented himself for cross-examination. He struck me as a respectable gentleman in The Bahamas. He was very calm, composed and candid. That said, the present Summons appears to be yet another ‘bite of the cherry” given the procedural history of this matter.

[18] Mr. Oliver Wehrli, the attorney for GT and THL in the Swiss Proceedings, also presented himself for cross-examination. His main focus was on the Swiss Proceedings and its projected determination. He said that the earliest realistic

date on which all appeals will have been finally determined in Switzerland is early to mid-2015.

[19] The evidence of the Spanish Creditors and Mr. Laurence Pagden, liquidator of THL (in liquidation) were received by live-link. The sum total of the evidence of the Spanish Creditors is that they are prejudiced by the Stay Order, more so now, given the economic recession in Spain. It is plain, however, that they sat nonchalantly for over ten years without taking any active steps to properly submit their respective claims. They were also unaware of an interim dividend which can be paid pursuant to paragraph 2 of the Stay Order.

[20] Bonsai opposes the application to lift the Stay Order and relies on two affidavits of Mr. Bernard Lachenal filed on 24 April 2013 and 2 September 2013 respectively. Mr. Lachenal, a partner in the firm of Meyerlustenberger Lachenal in Switzerland, represents Bonsai in the Swiss Proceedings. He presented himself for cross-examination. However, the learned Mr. Callender QC did not to cross-examine Mr. Lachenal as his evidence, narrow in scope, relates to the significant delays largely caused by GT and THL in joining the wrong party in the Swiss Proceedings.

[21] From the evidence adduced, I made the following factual findings:

1. The TIB had not demonstrated any real urgent interest in the Spanish Creditors between 2001 and 2011;

2. The Spanish Creditors themselves had taken no steps to properly submit their respective claims in the Bankruptcy for over ten years;

3. Rather than the Spanish Creditors pressing the TIB for the final dividend, it was the TIB himself, acting under the influence of GT and THL, who orchestrated the events leading to the filing of the Summons to lift the Stay Order. On the false premise that the Stay Order prevented the TIB from paying a dividend in the Bankruptcy, the TIB invited each Spanish Creditor to support the application at the meeting held on 21 October 2011 and resolutions adopted at that meeting were intended to be used at a platform by the TIB for the application to lift the Stay Order;

4. The TIB had never discussed with the individual Spanish Creditor paragraph 2 of the Stay Order or the possibility of seeking an interim dividend notwithstanding their apparent interest in urgently receiving a payment out of the Bankruptcy;

5. The TIB's evidence that the Stay Order was the only impediment preventing him from completing the Bankruptcy was inaccurate and untrue;

6. GT and THL in error joined the wrong party as a defendant in the Swiss Proceedings and this caused a considerable delay of between six to seven years in those proceedings;

7. The Stay Order has had no prejudicial effect on the Swiss Proceedings and Bonsai had not applied for a stay in those proceedings;

8. The Stay Order has had no prejudicial effect on the Bankruptcy or on the payment of dividends to the admitted creditors prior to October 2011.

Material change of circumstances

[22] It is common ground that the court has jurisdiction to lift the Stay Order either under paragraph 2 of the Stay Order itself, section 59 of the Bankruptcy Act, 1870 and/or pursuant to its inherent jurisdiction. This was helpfully encapsulated in the written submissions of the TIB in support of this application: see paragraph 5 of Skeleton Argument of the Respondent Trustee in Bankruptcy.

[23] In order to set aside a stay, an applicant must show that:

(i) there had been a substantive change in the law under which the stay was granted;

(ii) there has been a significant material change of circumstances;

(iii) the continuance of the stay would cause or produce injustice or prejudice; or

(iv) the stay includes a condition precedent which has been met or a time period which has expired.

[24] In the present Summons, the TIB relies on sub-paragraphs (ii) and (iii).

[25] Learned Queen's Counsel Mr. Callender appearing for the TIB submitted that there have been two material changes of circumstances. Firstly, he contended that more than five years have elapsed since the Stay Order was granted with no immediate prospect of it being lifted unless the court exercises its case management powers and lifts the stay. He submitted that five New Creditors (who have nothing to do with the Swiss Proceedings) have been admitted and the Bankruptcy has remained paralyzed.

[26] Secondly, Mr. Callender QC submitted that when the Stay Order was made on 16 June 2008, only one creditor, GT, had been admitted in the Bankruptcy. Since then, the TIB has admitted the claims of four Spanish Creditors who are unconnected with the Swiss Proceedings, in respect of debts that existed for services rendered before the date of the Bankruptcy in June 2001. These creditors are:

(i) Gomez, Acebo & Pombo (a Spanish law firm and former advisors to the Bankrupt);

(ii) Professor Valentin Cortes (a Spanish Professor of Law and former advisor to the Bankrupt);

(iii) Elisa Hurtado (a Spanish Barrister- at- Law and former barrister to the Bankrupt) and

(iv) Todd Feldman (a Spanish translator and former assistant to the Bankrupt).

[27] These four claims amount to US$1,221,750.

[28] Additionally, in October 2011, the TIB unconditionally admitted the claim of THL for the sum of £1,980,290.43 with respect of debts that existed before the date of the Bankruptcy in June 2001. Previously, the TIB had only conditionally admitted THL as a creditor.

[29] Mr. Callender QC argued that since their admission, all six admitted creditors are suffering prejudice caused by the delay in the determination of the Bonsai Appeal. They have all requested that the TIB pays final dividend to them.

[30] They have also unanimously resolved in General Meeting that the TIB issues this Summons to lift the Stay Order with a view to clearing the way for the Court to determine the admissibility of Bonsai's Proof of Debt and permit the TIB to seek leave to pay a final dividend to all proven creditors.

[31] The TIB is of the view that the prejudice suffered by all admitted creditors is sufficient to justify the lifting of the Stay Order. In their respective affidavit, each of the Spanish Creditor stated that they are suffering serious prejudice since they are unable to receive the payment of their final dividends. As it turned out, the Spanish Creditors did not prepare their affidavits. Rather, their affidavits were carefully crafted by the team of lawyers who, it appears, spearheaded this Summons to lift the Stay Order. Despite that fact, it appears to me under cross-examination, that the Spanish Creditors were not overly concerned if and when they will be paid their respective dividend. They have no objections to receiving interim dividend until such time that the Bonsai Appeal is determined.

[32] It is an elementary principle of law that a stay may be reversed upon a material change of circumstances. In **General Electric Company v Enercon GmbH and Others [2003] EWHC 3089 (Pat), 2003 WL 23014739** Mr. Justice Laddie, at paragraph 7, stated:

> **"It seems to me that an order for a stay of an action or a refusal of an application to stay, can always be reversed if there is a material change in circumstances. It may be that reasons which made it appropriate to stay an action at one stage no longer apply when there is a change of material facts. In the changed circumstances a continuation of a stay will not be the most just or effective course to pursue. Similarly, whereas it may be appropriate to refuse a stay in one set of circumstances, on a material change of those circumstances a stay may become appropriate….It also seems to me that the court should only entertain an application like this if there is a <u>significant material change in circumstances</u>. Minor changes would not normally be sufficient to justify reversal of an earlier decision."**

[33] Mr. Moree QC submitted that the admission of the New Creditors is not a material change of circumstances since overall, they make up less than 1% of the Bankrupt's Estate. He next submitted that there is adequate provision in paragraph 2 of the Stay Order to make an interim payment to these parties. I agree. The changed circumstance must be significantly material to warrant the court reversing an earlier decision. Minor changes would not suffice.

[34] Learned Queen's Counsel further submitted that the evidence adduced by the New Creditors shows that the TIB was aware of all of their claims at least by 2002[2]. This was long before the Stay Order was granted.

[35] It is trite law that a court may revisit its earlier order when there has been a discovery of new material, which could not have been discovered prior to the original hearing at which the stay was made or if there has been a material misrepresentation at the initial hearing. In **Lloyds Investment (Scandinavia) Limited v Christen Ager Hanssen [2003] EWHC 1740 (Ch)**, the applicant made a second application for the same relief as had been sought at an earlier hearing in the same proceedings. In dealing with the second application, Patten J stated (at paragraph 7):

> **"…[I]t seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly, it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ."**

[2] See page 318 of the Trial Bundle.

[36] In the Bahamian case of **Gomez v Syntex Pharmaceuticals International Limited and Others [2009] 4 BHS J No. 23**, Evans J, at paragraph 31 had this to say:

> **"Generally speaking the interest of justice as between the parties, fortified by the public interest in the finality of litigation and the efficient employment of judicial resources, require that where an application for interlocutory relief has been made, heard on its merits and refused, a further application for substantially the same relief should not be entertained unless it is founded on a material change of circumstances since the original application was heard or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application."**

[37] It cannot be disputed that the TIB had knowledge of the New Creditors at the initial hearing before Lyons J.; at the hearing of the TIB Appeal and at the time of the GT Application before Adderley J. Neither the TIB nor any of the admitted creditors drew the claims of the New Creditors to the Court's attention. The TIB has not given any explanation for the inordinate delay in admitting the claims of the New Creditors. The fact that the TIB only admitted the New Creditors recently (eight or nine years after their claims were submitted) without giving any reason for the delay does not change the circumstances relied on by Lyons J. when he made the Stay Order.

[38] On the issue of delay, Mr. Callender QC contended that over five years have elapsed since the Stay Order was granted and that, by itself, ought to weigh heavily in favour of the lifting of the Stay Order.

[39] Mr. Moree QC forcefully argued that the Spanish Creditors who complained of being prejudice by delay did nothing for over ten years to advance their own claim. In addition, the TIB took four years to admit GT claim and over ten years to press the Spanish Creditors to put their respective claim in a proper form.

[40] At first blush, the issue of delay appears to be a very attractive one. The TIB contends that more than five years have elapsed since the Stay Order was made

and there appears to be no immediate prospect of that order being lifted. The TIB further contends that innocent creditors who have no connection with the Swiss Proceedings are being penalized.

[41] The short answer is that the TIB had not shown any urgent interest in the Spanish Creditors between 2001 and 2011. He took in excess of ten years to press them to properly submit their respective claims. They themselves took no urgent steps to attend to routine simple formalities. As a result of those delays, the claims of the Spanish Creditors were not admitted until 5 October 2011. THL's claim was conditionally admitted in 2005 and then unconditionally admitted on 5 October 2011. The TIB proffered no reason for the delay. Consequently, any payment of dividend, final or interim, could only have been paid from 5 October 2011. Therefore, it is misleading to state that the delay was from June 2008.

[42] According to the TIB, any delay is unwarranted. I agree. It is my firm view that the Swiss Proceedings may have been concluded had it not been for GT/THL joining the wrong party to those proceedings. Then, the TIB fought hard in The Bahamas since the Stay Order was imposed. The reality is that the TIB and GT have substantially contributed to the delay by the way they conducted their litigation both in Switzerland and The Bahamas.

Prejudice to New Creditors

[43] The TIB claims that all creditors are being prejudiced by the inordinate delay in the distribution of any dividend. He says that the Spanish Creditors, all of whom are individuals who provided legal and translation services to the Bankrupt, have Proofs which have been admitted in October 2011 ranging from US$38,000 to US$741,000. On the assumption that the Bonsai Appeal is successful and based on the amount currently available in the Estate, the Spanish Creditors would receive amounts ranging from US$5,000 to US$104,000. These are significant sums for the Spanish Creditors and each of them detailed the prejudice that

he/she is suffering, namely the deprivation of access to funds to which they are entitled.

[44] The TIB states that, similarly, GT and THL's admitted Proofs are significant. GT's Proof is for more than US$ 650 million and THL's Proof is for more than US$3 million. On the assumption that Bonsai Appeal is successful and based on the amount currently available in the Estate, GT and THL will receive more than US$91 million and US$435,000 respectively. According to the TIB, these are substantial sums of money for any business. The prejudice that they are suffering is the deprivation of the funds to which they are entitled.

[45] Bonsai correctly submitted that the "so-called" prejudice of the Spanish Creditors must be viewed in the context of the conduct of the parties throughout the life of the Bankruptcy. The evidence of the Spanish Creditors confirmed that while they each claimed to be prejudiced by not receiving the final dividend from the Bankruptcy, it took them in excess of ten years to attend to the simple assignment of putting their claims in the proper form.

[46] I agree with Bonsai that the inexplicable delay by the Spanish Creditors cannot be reconciled with their recent protestations over the delay in receiving the final dividend in the Bankruptcy. As such, their reprehensible conduct belies their claim to be seriously prejudiced by the Stay Order.

[47] With respect to GT/THL, they orchestrated the delay in the Swiss Proceedings. Had they initiated their claims properly, the Swiss Proceedings would not have been as protracted as it is presently.

[48] Be that as it may, paragraph 2 of the Stay Order provides an effective mechanism for interim payment. It reads:

> **"The Respondent shall not make any payments to any creditors of the estate of Sheikh Fahad Mohammed Al Sabah without first applying for leave of this Honourable Court, on not less than ten (10) days' notice of**

such application to the Appellant and obtaining an Order of the Court authorizing the payment."

[49] Bonsai says that it would not oppose such application for interim dividend provided that an appropriate provision is made for its claim in the Bankruptcy. I agree that any suggestion that an interim dividend is not possible because the TIB cannot calculate the provision for Bonsai claim is untrue. Contingent claims and pending appeals of rejected claims are conventional in liquidation and bankruptcy cases. The Spanish Creditors have all admitted that they are prepared to accept an interim dividend as "half a loaf is better than none."

Which Court will get to the finishing line first?

[50] If this Court lifts the Stay Order and proceeds to case-management, the TIB submits that Bonsai Appeal is likely to be determined by March 2014. If the stay remains in place (until after the Swiss Proceedings have been finally determined) then Bonsai Appeal is likely to be determined by 2015 or 2016, at the earliest. In his evidence, Mr. Wehrli stated that the earliest realistic date on which all appeals will have been finally determined in Switzerland is early to mid- 2015.

[51] The argument advanced by the TIB is fallacious. If the Stay Order is lifted, it would be necessary to obtain a four or five day fixture for the hearing of the Bonsai Appeal. In scheduling the fixture, provision will have to be made for the testimony of foreign experts on both sides who would have to give evidence on Swiss law. Given the Court's calendar and the necessity to find a convenient date for all parties, it is likely that a hearing could commence during the second quarter of 2014. Given the amount of money involved, an appeal to the Court of Appeal and perhaps, Her Majesty's Privy Council, would be almost inevitable. Realistically, it may take at the very least, two years to exhaust the appellate process. In other words, Bonsai Appeal may finally be determined by mid- 2016.

[52] The Swiss Proceedings have already commenced. Bonsai has won the first round. Strictly speaking, there are two more rounds to go. Mr. Wehrli estimated that the Swiss Proceedings will have been finally determined in early to mid-

2015. Even on this raw data, a difference of one year between the Swiss Proceedings and the Bonsai Appeal is significant.

[53] It is worthy to note that in deciding the Bonsai Appeal, the Bahamian Court will have to decide issues of Swiss law and there is a real possibility of conflict between the Bahamian Court and the Swiss Court.

[54] Another important consideration is, in the Swiss Proceedings, the claims by GT and THL against Bonsai have been dismissed. On that basis, it would be unnecessary to have any further litigation in The Bahamas. The only circumstance which would change this position is if the Swiss Judgment is overturned on appeal. As a consequence, the future conduct of the Bonsai Appeal is dependent on the final outcome of the Swiss Proceedings. It seems to me that effective and efficient case management dictates that the Stay Order ought to be maintained pending the outcome of the appeal process in Switzerland. Any other approach could result in waste of precious judicial time and resources.

[55] For all of these reasons, I would dismiss the Summons with Costs to Bonsai. I hereby certify that the Costs in this Summons are fit for two Counsel.

[56] Lastly, I am immeasurably grateful to both Mr. Moree QC and Mr. Callender QC for their tenacity and their enlightening written as well as oral submissions.

Dated this 3rd day of December 2013.

Indra Hariprashad-Charles
Supreme Court Judge