IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 03:09-CV-0298-N**
	§	
STANFORD INTERNATIONAL BANK, LTD., *et al.*	§	
	§	
Defendants.	§	
IN RE	§	
	§	
STANFORD INTERNATIONAL BANK, LTD.	§	**Civil Action No. 3:09-CV-0721-N**
	§	
	§	
Debtor in a Foreign Proceeding.	§	

APPENDIX TO NOTICE OF FILING

Dated: December 18, 2009

Respectfully submitted,

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

On December 18, 2009 I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Kevin M. Sadler
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EXHIBIT A

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-020001-095
(500-11-036045-090)

DATE: DECEMBER 17, 2009

CORAM: THE HONOURABLE JACQUES CHAMBERLAND, J.A.
ANDRÉ FORGET, J.A.
YVES-MARIE MORISSETTE, J.A.

IN THE MATTER OF THE LIQUIDATION OF :

STANFORD INTERNATIONAL BANK LIMITED
and
STANFORD TRUST COMPANY LIMITED
Debtors
and
NIGEL JOHN HAMILTON-SMITH
and
PETER NICHOLAS WASTELL
APPELLANTS – Liquidators
and
RALPH S. JANVEY
RESPONDENT – U.S. Receiver
and
AUTORITÉ DES MARCHÉS FINANCIERS
IMPLEADED PARTY - Intervener

JUDGMENT

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[1] The Court is seized with two motions, one by respondent Ralph S. Janvey (Janvey) to dismiss the appeal (article 501(2) and (4.1) of the *Code of Civil Procedure* (C.C.P.); the other, *de bene esse*, by appellants Nigel John Hamilton-Smith and

Peter Nicholas Wastell (H-S/W) for leave to appeal (section 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3) (BIA).

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[2] The appeal involves two judgments rendered orally by Auclair J. of the Quebec Superior Court (Commercial Division) on September 11, 2009, with written reasons subsequently issued on September 14, 2009.

[3] In the first of the these two judgements, Auclair J. dismissed H-S/W's request to have a winding-up order issued by the High Court of Antigua and Barbuda and the liquidator appointed by that court recognized as a "foreign proceeding" and a "foreign representative" within the meaning of the BIA, Part XIII/International Insolvencies.[1]

[4] In the second judgment, Auclair J. granted Janvey's request to have a receivership order made by the United States District Court for the Northern District of Texas, Dallas Division and the receiver appointed by that court recognized as a "foreign proceeding" and a "foreign representative" within the meaning of Part XIII of the BIA.

[5] In short, the two judgements relate to the recognition of a "foreign representative" within the meaning of s. 267 of the BIA; one of the judgments also relates to the appointment of an interim receiver under Part XIII of the BIA.

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[6] Janvey's position on the Motion to dismiss is a) that the appellants have no *de plano* right to appeal (article 501(2) of the C.C.P.) and b) that the appeal has no reasonable chance of success (article 501(4.1) of the C.C.P.).

[7] H-S/W's position is that they can appeal as of right and without leave by virtue of s. 193(c) of the BIA:

> **193.** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

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[1] The relevant provisions of the BIA have recently been modified by both the *Wager Earner Protection Program Act*, S.C. 2005, c. 47, s. 122 and *An Act to Amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wager Earner Protection Program Act and Chapter 47 of the Statutes of Canada*, 2005, S.C. 2007, c. 36, ss. 59 and 60, modifications which came into force on September 18, 2009.

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

(emphasis added)

[8] H-S/W argue that, in any event, leave to appeal ought to be granted because a) the point of appeal – namely determining the principles that should guide Canadian courts in deciding whether to recognize "foreign proceedings" and "foreign representatives" within the meaning of the BIA – is of great significance to the practice of bankruptcy and insolvency since there is sparse judicial guidance with respect to the interpretation of the provisions of Part XIII of the BIA; b) the point of appeal is of significance to the action itself since the decisions definitively recognize one foreign representative at the expense of another in multi-jurisdictional proceedings; c) the appeal is *prima facie* meritorious since the judge of first instance made a number of manifest errors of law; d) the appeal will not unduly hinder the progress of the action since the parties are already involved in appeal proceedings in two other jurisdictions (namely the UK and Antigua).

[9] With regard to H-S/W's Motion for leave to appeal, Janvey replies that the threshold question is whether the appeal is *prima facie* meritorious, and this in light of the elevated standard of review applicable to the proposed appeal. Janvey argues that the issues raised by H-S/W with regard to both judgments do not disclose any reasonable chance of success.

[10] As can be seen, one argument is common to both motions and is determinative as to the fate of each of them: the appeal, according to Janvey, has no reasonable chance of success. The answer to this question, should it be affirmative, would carry with it the dismissal of the appeal formed by H-S/W and the dismissal of their application for leave to appeal, without the Court having to express any firm and final opinion as to the interpretation and application of subsections 193(c) and (e) of the BIA.

[11] In this context, the question of whether H-S/W's appeal has any reasonable chance of success is the first one the Court ought to study.

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[12] At the outset, it is appropriate to make two preliminary observations.

[13] First, in their application to the Quebec Superior Court, H-S/W were not simply asking that the decision of the High Court of Antigua and Barbuda appointing them as liquidators of SIB be recognized, but rather that they be named the "foreign

representative" of SIB in Canada, with powers similar to those of a licensed trustee – an officer of the Court – in Canada.

[14] Second, while H-S/W are not incorrect in alleging that their application was summarily dismissed in light of their wrongful behaviour, it would be more accurate to state that the trial judge also concluded that the "centre névralgique" of SIB was located in Houston, U.S. (rather than in Antigua or Barbuda) and that, given all the circumstances of this multi-jurisdictional financial fiasco, it was "plus équitable" to appoint Janvey as the "foreign representative" of SIB. Auclair J.'s reasoning thus goes well beyond the behaviour of H-S/W.

[15] The Court if of the view that H-S/W's appeal from the two judgments rendered by Auclair J. is bound to fail.

With regard to the judgement dismissing H-S/W's request for the recognition of the order issued by the High Court of Antigua and Barbuda and for their appointment as the "foreign representative" of SIB in Canada

[16] The discretion vested in the judge seized with such a request is broad. Subsection 268(6) of the BIA provides that:

> Nothing in this Part [Part XIII] requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign Court.
>
> (emphasis added)

[17] In the case at bar, it is plainly wrong to argue that Auclair J. failed to consider the purpose of Part XIII of the BIA. His decision is based on *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Syndics de)*, [2001] 3 S.C.R. 907, a binding authority on the issue; he thoroughly canvassed and properly weighed the appropriate factors, as required by this decision.

[18] In his reasons, Auclair J. recognizes that Part XIII of the BIA exists in order to foster cooperation between jurisdictions. However, he concludes that this goal cannot set aside the discretion vested in the court by subsection 268(6) of the BIA; Part XIII seeks to protect the interests of Canadian creditors by facilitating cooperation amongst jurisdictions where it is in their interests, while affording Canadian courts the discretion to refuse cooperation where it is not.

[19] Auclair J. examined whether, in the case at bar, cooperation with the High Court of Antigua and Barbuda was possible and in the interest of the Canadian creditors of SIB and he determined, in the light of all the evidence placed before him, that it was not.

[20] This approach is in line with the approach dictated by the Supreme Court of Canada in *Holt* (especially, par. 33, 34, and 80) and it constitutes a proper exercise of Auclair J.'s judicial discretion.

[21] Furthermore, the question of what is or is not in the interests of the Canadian creditors is a question of fact within the exclusive purview of the trial judge. Faced with two competing insolvency regimes (Antigua and U.S.), Auclair J. came to the conclusion that it was the cooperation with the U.S. receivership that was in the best interests of the Canadian creditors of SIB. This conclusion is supported by the evidence and, as such, is unassailable.

[22] Auclair J. also came to the conclusion that SIB's real and substantial connection is with the United States and not Antigua. Again, this conclusion is supported by the evidence and, in the absence of any palpable and overriding error, is unassailable.

[23] All of these considerations are independent of any question pertaining to H-S/W's behaviour and they constitute, in and of themselves, sufficient grounds for Auclair J.'s conclusion, in the very exercise of his judicial discretion, that cooperation with the Antigua and Barbuda authorities was not, in this instance, in the interest of the Canadian creditors.

[24] Furthermore, the argument that the trial judge erred in relying on the clean hands doctrine in the exercise of the discretion vested in the Superior Court by subsection 268(6) of the BIA is ill-founded.

[25] As noted above, H-S/W were not simply asking for the recognition of the order rendered by the High Court of Antigua and Barbuda but rather were asking to be designated as the "foreign representative" of SIB in Canada and thus, to be granted powers similar to those of a licensed trustee, an officer of the court under the BIA.

[26] In this context, it is difficult to imagine any principle or authority supporting the proposition that, when exercising its statute-conferred discretion pursuant to the BIA, the Superior Court is not entitled to apply the clean hands doctrine – or its equivalent in civil law, "la fin de non-recevoir" (article 6,7 and 1375 of the *Quebec Civil Code*) – while it can be applied in the exercise of any other statute-conferred discretionary powers.[2]

[27] In the case at bar, Auclair J. held that H-S/W did not come before the Court with clean hands. This characterization of petitioners' conduct is amply supported by the evidence and, failing any palpable and overriding error, is unassailable.

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[2] In fact, specific authority exists to the contrary: *Saargummi Quebec Inc. (Proposition de)*, [2006] R.J.Q. 1644 (Dumas J. Q. Sup. Ct,).

With regard to the judgment granting Janvey's request for the recognition of the receivership order made by the United States District Court and for his appointment as the "foreign representative" of SIB creditors in Canada

[28] The issue, as framed by H-S/W, rests solely on whether Auclair J. erred in determining that a Receivership Order made by the U.S. District Court for the Northern District of Texas, under various U.S. securities laws and the common law, falls under the terms "foreign proceeding" as they are defined in section 267 BIA:

> **267.** In this Part,
>
> "debtor" means an insolvent person who has property in Canada, a bankrupt who has property in Canada or a person who has the status of a bankrupt under foreign law in a foreign proceeding and has property in Canada;
>
> "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor, under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;
>
> "foreign representative" means a person, other than a debtor, holding office under the law of a jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee, liquidator, administrator or receiver appointed by the court.

[29] The judge of first instance reached the conclusion that the U.S. receivership was a "foreign proceeding" after conducting a detailed analysis of the content and substance of the Receivership Order and of the powers vested in Janvey, as receiver, over the entities of the Stanford Group and their assets.

[30] He also conducted a comparative analysis of the Antiguan and U.S. Receivership Order, concluding that the powers given to Janvey pursuant to the U.S. Receivership Order were much broader in scope than those given to H-S/W under the Antiguan Receivership Order which, in passing, H-S/W had asked Registrar Chantal Flamand (of the Quebec Superior Court, Bankruptcy Division) to recognize as a "foreign proceeding".

[31] In light of the foregoing, the Court is of the view that petitioners' efforts to have this conclusion set aside shows no reasonable chance of success.

[32] FOR ALL THESE REASONS:

[33] Respondent's Motion to Dismiss the Appeal is granted, with cost, and the appeal is dismissed, with cost; and

[34] Appellants' *de bene esse* Application for Leave to Appeal is dismissed, without cost.

JACQUES CHAMBERLAND, J.A.

ANDRÉ FORGET, J.A.

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Date of hearing: December 14, 2009