SUPERIOR COURT

(Commercial chamber)

CANADA

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

N°: 500-11-036045-090

DATE: September 11, 2009

THE HONOURABLE CLAUDE AUCLAIR, J.S.C., JUDGE PRESIDING

IN THE CASE OF THE BANKRUPTCY OF:

STANFORD INTERNATIONAL BANK LIMITED
Debtor
and

NIGEL JOHN HAMILTON-SMITH
and
PETER WASTELL
Petitioners - Liquidators
and
L'AUTORITÉ DES MARCHÉS FINANCIERS
Intervener

REASONS AND DECISION RENDERED ORALLY

[1] By their motion dated April 22, 2009, Petitioners Nigel John Hamilton-Smith and Peter Wastell ("Vantis") seek:

> 1. By this Motion, Petitioners Nigel Hamilton-Smith and Peter Wastell, licensed insolvency practitioners and partners at Vantis Business Recovery Services (the "**Liquidators**") are seeking the following reliefs:

a) a recognition of the Winding-Up Order pursuant to Sections 267 and *seq.* of Part XIII, *International Insolvencies,* of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**");

b) a recognition that their status as Liquidators of Stanford International Bank Limited (in liquidation) (the "**Bank**") in Antigua and Barbuda granted under the Winding-Up Order is similar to the status of a "foreign representative" of an estate in a "foreign proceeding" pursuant to section 267 and *seq.* of the BIA;

c) a recognition of their powers as Liquidators through the issuance of an order *inter alia*:

i. staying any present or future proceedings against the Bank or any of its property in Quebec, and generally in Canada, and authorizing the Liquidators to institute or continue any present legal proceedings initiated by the Bank in Quebec, and generally in Canada;

ii. ordering the turnover to the Liquidators of any property, assets and any documents, computer records, electronic records, programs, disks, books of account, corporate records, minutes, correspondence, opinions rendered to the Bank, documents of title, whether in an electronic media or otherwise held in the name of or traceable to the Bank; and

iii. availing the Liquidators of the facility to discover and trace any assets or property of the Bank that are located in Quebec and generally in Canada, (whether such assets or property are possessed in the name of the Bank or have in any way been misappropriated, fraudulently transferred and/or otherwise concealed from the Liquidators);

d) any further relief necessary to assist the Liquidators in the due carriage of their duties under the Winding-Up Order and under Sections 267 and *seq.* of the BIA;

[2] The motion is opposed by the Receiver appointed in the United States, Mr. Ralph S. Janvey, the American Receiver ("Janvey").

[3] Janvey first argues that the Antiguan Petitioners Vantis do not come with clean hands and that therefore, their petition is inadmissible.

[4] From the chronology prepared by Janvey's attorneys, the Court considers the following:

14. On February 16, 2009, the SEC obtained a Receivership Order from the U.S. District Court naming Ralph Janvey as receiver of the Stanford Group, which order was amended on March 12, 2009.

15. On the same date, the U.S. District Court issued a Freeze Order enjoining the members of the Stanford Group from committing any further violations of the U.S. *Securities Act* and from dealing with the assets of the Stanford Group Ltd.

16. On February 19, 2009, the FSRC issued an order naming Messrs. Wastell and Hamilton-Smith of Vantis as the joint Receivers-Managers of SIB and STC. A similar order was rendered by the High Court of Antigua on February 26, 2009.

17. On February 20, 2009, the Antiguan Liquidators retained the services of Stroz Friedberg Ltd., a U.K. registered company (the "**IT Specialist**"), for the purpose of having it attend of the offices of SIB in Montreal to review, collect and copy SIB's electronic records.

18. On February 23, 2009, the AMF commenced an investigation into the affairs of SIB.

19. On February 25, 2009, the AMF wrote to Vantis advising it of the commencement of the investigation into the affairs of SIB and requesting information regarding the status of the Montreal office and the records of SIB therein.

20. On February 26, 2009, Mr. Hamilton-Smith "Vantis" prepared a report regarding the status of his work as co-Receiver-Manager of SIB and STC (**RSJ-53**).

"The Receivers-Managers arranged for members of their team to attend the offices of SIB along with legal counsel from Ogilvy Renault on Monday 23rd February 2009 for the purposes of securing the records and IT equipment held at the office and to advise the staff that operations are to cease. The offices are now shut with access under the control of the Receivers-Managers and their lawyers."

22. On March 3, 2009, Vantis responded to the AMF's letter of February 25, 2009 (**I-1**) by way of Mathew Peat's email (**I-2**), advising that the employees at the Montreal office had been terminated on February 27, that SIB's landlord had "agreed that no action would be taken against the Company's property without notice to the Receivers", and that the services of CapCon Holdings had been retained "to provide data recovery services".

23. In an earlier email on the same date from Nick O'Reilly (**I-2**), the AMF was advised by Vantis that "the office was closed last Monday. No client file was found on site and no one has dealt with the computers since the closure." (Garon's affidavit, par. 7; **I-2**).

24. On March 5, 2009, Vantis' IT Specialist attended SIB's Montreal office to carry out his mandate, which was completed by March 8 (Admissions, par. 3 to 7).

25. On March 8, 2009, the IT Specialist personally brought the imaged electronic data from SIB's Montreal office to the U.K. and eventually forwarded one of the copies of this imaged data to the Antiguan Liquidators in Antigua.

26. On March 27, 2009, Dan Roffman, an IT specialist whose services were retained by Ralph Janvey, attended at the Montreal office of SIB and saw that some servers appeared to be in the process of being deleted.

28. On March 30, 2009, representatives of the AMF held a telephone conversation with Vantis' attorneys, during which conversation they were informed that one of their colleagues had attended at the offices of SIB on March 27th "to do an inventory of the property and that she was not aware of the request for information that the Autorité had sent on February 25, 2009 to the Antiguan receiver" (Garon's affidavit, par. 11).

29. On March 30, 2009, the AMF also spoke to one of Janvey's attorneys, William Stutts, and was advised (based on Dan Roffman's above-described observations of March 27th) that the Antiguan Liquidators were erasing electronic information in the Montreal office of SIB (Garon's affidavit, par. 12).

30. On March 30, 2009, Janvey's counsel wrote to Ogilvy Renault regarding Mr. Roffman's visit to the Montreal office on March 27, 2009 and requested that any information destroyed or otherwise erased by Vantis from the servers at the Montreal office be immediately restored to the relevant servers (Janvey's Motion to Revoke and Rescind, par. 30; see **R-9** attached to same).

31. On March 31, 2009, the AMF wrote to Vantis requesting a follow-up to Vantis' email of March 3, 2009 (**I-2**), because the AMF had still not received the list of Canadian investors, and requesting information as to what had happened to the documents and electronic information of SIB (Garon' s affidavit, par. 13; **I-3**).

32. On April 1, 2009, Ogilvy responded to Janvey's letter (R-9) by stating that "The information on the Bank's servers located in its Montreal premises has been imaged onto hard disks and have been preserved to the standards required in the criminal investigation matter. This was done by our client to make sure that this data would be securely maintained and that no one entering the Bank's Montreal premises could in any way tamper with said data or take a copy thereof or take a copy thereof without any right" (Motion to Revoke and Rescind, par. 37; **R-10**).

33. On April 1, 2009, Baker Botts replied to Atty. Himo's letter of April 1st (**R-10**) by email (Motion to Revoke and Rescind, par. 37; **R-12**) requesting Atty. Himo confirm "that there was no erasure or deletion of data from the servers in the Montreal office...in other words, Vantis representatives have done nothing to remove data from those servers". A follow-up email was sent by Baker Botts on the same date, requesting that Atty. Himo confirm whether "Vantis representatives have in fact removed data from the Montreal servers, please advise promptly where the data currently is - - including in what country - - and whose possession... Also, are the servers still in the Montreal office?".

34. On April 1, 2009, Peat of Vantis responded to the AMF's email of March 31st (**I-3**) that he would refer the AMF's request to his colleague, Julian Greenup.

35. On April 1, 2009, a conference call was held between representatives of the AMF and Vantis' attorneys, who informed the AMF that they were not authorized to send the list of investors to the Autorité and that an order of the Court in Antigua would probably be necessary.

36. On April 2, 2009, Atty. Himo responded tersely to Mr. Stutts' foregoing email of April 1st (**R-12**) as follows: "I will get back to you as soon as possible."

37. On April 3, 2009, Hamilton-Smith of Vantis signed an affidavit in support of the Motion for Recognition of the decision of the FSRC (**P-1**) and the Receivership Order of the High Court of Justice of Antigua (**P-2**), which he presents on April 6 before the Registrar Flamand.

38. On April 6, 2009, the Antiguan Liquidators presented their Motion for Recognition as Receivers-Managers of SIB and STC, dated April 3, 2009, which Motion was presented on an *ex parte* basis to Registrar Chantal Flamand, without notice to the AMF or Ralph Janvey.

39. On April 15, 2009, Vantis' attorneys wrote to Mr. Stutts, responding to his email of April 1st, advising him for the first time that the servers, desktops and laptops in SIB's Montreal office had been "wiped", that "there were no client records on the computers that were imaged and erased since the servers in Montreal were for designed for recovery purposes and all tests had client data removed, given the need to preserve client confidentiality and privacy", and that "the imaged drives are currently held in Antigua under the control of the Antiguan Receivers-Managers" (Motion to Revoke and Rescind, par. 38).

40. On April 16, 2009, Janvey filed and served his Motion to Revoke and Rescind the decision and the order of the Registrar Flamand.

> 41. On April 22, 2009, Vantis served and filed its Motion Seeking the Recognition of the Winding-Up Order of the High Court of Antigua dated April 17, 2009 (**P-7**).
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> 42. After learning at the hearing of July 15, 2009 in this case that there were three servers at the Montreal office which ostensibly contained information relating to other members of the Stanford Group which were apparently not copied or deleted by Vantis' IT Specialist (**Admissions - 5**), Janvey's attorneys requested access to said servers, as appears from an exchange of correspondence between the parties' attorney on August 12, 14 and 18, 2009. No access to said servers had been granted until the hearing of August 25.
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> 43. Until the hearings on August 25, 26 and 27, the Antiguan Liquidators have refused to provide to the AMF the list of Canadian investors as well as any information regarding the documents and records of SIB which were taken from its Montreal office, despite the repeated requests of the AMF (Garon, par. 21).
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> 44. The Antiguan Liquidators have also refused to give Janvey's representatives the imaged records of SIB.
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> (Emphasis added)

The discretionary nature of the remedy or application of the doctrine of estoppel

[5] Part 13 of the *BIA* entitled: *International Insolvencies* allows a petitioner to qualify as a foreign representative by requesting the Court's authorization and thus facilitating the coordination of proceedings in regards to insolvent persons.

[6] The powers of the Court are extremely broad, as are the powers requested by the petitioners Vantis. Section 268(6) BIA states that:

> Nothing in this part 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.

[7] In the case of *Les Immeubles Port Louis ltée*[1], a decision of the Supreme Court, Justice Gonthier relied on the holding in *Homex* and found that a judge may in addition look to the conduct of the parties in order to rule on whether to deny a motion, without ever ruling on the merits. It is understood that the Court must exercise judiciously its power to grant or deny review, and respect applicable principles.

[1] *Les Immeubles Port Louis ltée* v. *Corporation municipale du Village de Lafontaine*, [1991] 1 S.C.R. 326, p. 364.

[8] Thirteen years later, in *Société de la Place des Arts*[2], Justice Gonthier, discussing the granting of an injunction, writes:

> 13 (...) The power of the Quebec Superior Court to grant injunctions rests on statutory footing. Yet it is a discretionary power of the sort exercised by common law jurisdictions in equity. In Quebec as elsewhere, it is an exceptional and discretionary form of relief. The court will not grant an injunction under arts. 751 *et seq.* simply because the applicant is strictly entitled to one. The applicant must also demonstrate that the circumstances warrant such a potentially intrusive remedy, and that he is deserving of it.
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> (References omitted)
> (Emphasis added by the Court)

[9] A party seeking to have the Court grant a discretionary measure must have acted in good faith and all of its actions must be beyond reproach in regards to the object of its motion.

[10] Denis Lemieux, the author of *Le contrôle judiciaire de l'action gouvernementale*[3], (*Judicial control of governmental action)* writes:

> [TRANSLATION] A similar reasoning is used in regards to judicial review, notably in cases of interlocutory injunctions. This principle, often described as the clean hands theory, means that a petitioner who, by his conduct, was party to an illegal act, by either acquiescing to it or committing a liable or illegal act himself, may not obtain the relief sought even if he meets the general conditions for the remedy sought to be granted. Thus, the Honourable Justice Sopinka recently stated that ""in the exercise of the discretion whether or not to grant a declaration, the court may take into account certain equitable principles such as the conduct of the party seeking the relief." This discretionary power of the Court is based on the principle of estoppel. It is a general principle of civil law which applies broadly, and may also find support in Sections 6, 7 and 1375 of the Civil Code, which sanction unreasonable conduct and bad faith.
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> (Emphasis added by the Court)

[11] The Court has, by way of section 268(6) BIA, great discretion in deciding whether to recognize a foreign representative.

[12] The conclusions sought by Vantis' petition are as follows:

> **6. GRANT** the Liquidators the power to take possession of, gather in and realise all the present and future assets and property of the Bank, including without limitation, any real and personal property, cash, choses in action, negotiable

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2 *I.A.T.S.E., Stage local 56* v. *Société de la Place des Arts de Montréal*, [2004] SCC 2, par. 13.

3 Denis LEMIEUX, *Le contrôle judiciaire de l'action gouvernementale*, looseleaf edition, Brossard, CCH, par. 15-135.

instruments, security granted or assigned to the Bank by third parties including property held in trust or for the benefit of the Bank, and rights, tangible or intangible ("**Property**"), wheresoever situate and to take, such steps as are necessary or appropriate to verify the existence and location of all the assets of the Bank, or any assets formerly held whether directly or indirectly or to the order of or for the benefit of the Bank or any present or former subsidiary or company associated with the Bank, including the terms of all agreements or other arrangements relating thereto, whether written or oral, the existence or assertion of any lien, charge, encumbrance or security interest thereon, and any other matters which in the opinion of the Liquidators may affect the extent, value, existence, preservation, and liquidation of the assets and property of the Bank;

7. ORDER that all assets, tangible and intangible and wheresoever situated, shall vest in the Liquidators, who shall collect and gather in all such assets for the general benefit of the Bank's creditors and as may be directed by the High Court of Antigua;

11 ORDER that the Liquidators shall be at liberty, and without the necessity of any further order, to summon before this Court for examination under oath any person reasonably thought to have knowledge of the affairs of the Bank or any person who is or has been a director, officer, employee, agent, shareholder, accountant of the Bank, or such other person believed to be knowledgeable of the affairs of the Bank and to order such person(s) liable to be examined to produce any books, documents, correspondence or papers in his or her possession or power relating to all or in part to the Bank, its dealings, property and assets and the Liquidators are authorised to issue writs of subpoena ad testificandum and duces tecum for the compulsory attendance of any of the persons aforesaid required for such examination;

12 ORDER that the Bank and any person holding or reasonably believed to have in their possession or power any assets or property of the Bank including without limitation, computer records, programs, disks, documents, books of account, corporate records, minutes, opinions rendered to the Bank, documents of title, electronic or otherwise (collectively called "**Papers**") relating in whole or in part to the Bank or such persons, dealings, or property showing that he or she is indebted to the Bank may be required by the Liquidators to produce or deliver over such property forthwith to the Liquidators notwithstanding any claim or lien that such person may have or claim on such assets and property and the Liquidators shall have full and complete possession and control of such assets and property to the Bank including its premises. In the event of a bona fide dispute as to ownership and legal entitlement to such property and Papers, the Liquidators shall take away copies of such Papers;

13 ORDER that (i) the Bank; (ii) all of its current and former directors, officers, managers, employees, agents, accountants, holders of powers of attorney, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise

the Liquidators of the existence of any Property in such Person's possession, power, control, or knowledge, shall grant immediate and continued access to the Property to the Liquidators, and shall deliver all such Property to the Liquidators upon the Liquidators' request, subject only to any privilege attaching to solicitor-client communications or statutory provisions prohibiting such disclosure;

14 ORDER that all persons shall forthwith advise the Liquidators of the existence of and grant access to and deliver to the Liquidators or to such Agent or Agents they may appoint, any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Bank, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the forgoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Liquidators or permit the Liquidators to make, retain and take away copies thereof and grant to the Liquidators unfettered access to and use of accounting, computer, software and physical facilities relating thereto, subject only to any privilege attaching to solicitor-client communications or statutory provisions prohibiting such disclosure;

15 ORDER that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all persons in possession or control of such Records shall forthwith give unfettered access to the Liquidators for the purpose of allowing the Liquidators to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Liquidators in their discretion deem expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Liquidators. Further, for the purposes of this paragraph, all Persons shall provide the Liquidators with all such assistance in gaining immediate access to the information in the Records as the Liquidators may in their discretion require including providing the Liquidators with instructions on the use of any computer or other system and providing the Liquidators with any and all access codes, account names and account numbers that may be required to gain access to the information;

16 ORDER the Persons are hereby restrained and enjoined from disturbing or interfering with the Liquidators and with the exercise of the powers and authority of the Liquidators conferred by this Order;

21. ORDER that no person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, license or permit in favour of or held by the Bank, without written consent of the Liquidators or leave of this Honourable Court;

22 ORDER that all persons having oral or written agreements with the Bank or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation

and freight services, utility or other services to the Bank are hereby restrained until further Order of this Honourable Court from discontinuing, altering, interfering-with or terminating the supply of such goods or services as may be required by the Liquidators; and that the Liquidators shall be entitled to the continued use of the Bank's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Liquidators in accordance with normal payment practices of the Bank or such other practices as may be agreed upon by the supplier or service provider and the Liquidators, or as may be ordered by this Honourable Court;

23 RECOGNIZE that the Liquidators shall have the authority as officers of the High Court of Antigua to act in Antigua and Barbuda or any foreign jurisdiction where they believe assets, property or Papers of the Bank may be situated or traced at equity or otherwise, and shall have the right to bring any proceeding or action in Antigua and Barbuda and/or in a foreign jurisdiction for the purpose of fulfilling their duties and obligations under the Winding-Up Order and to seek the assistance of any Court of a foreign jurisdiction in the carrying out of the provisions of the Winding-Up Order, including without limitation, an order of examination of persons believed to be knowledgeable of the affairs, assets, property and Papers of the Bank and to assist the Liquidators in the recovery of the assets and property of the Bank;

24 ORDER that the Liquidators shall have the authority to initiate, prosecute and continue the prosecution of any and all proceedings, and to defend all proceedings for the benefit of the Bank's creditors now pending or hereinafter initiated with respect to the Bank and, upon receiving the approval of this Court, to settle or compromise any such proceeding;

30 ORDER that all actions, proceedings and any claims whatsoever and wheresoever initiated against the Bank, its assets and property, are hereby stayed and no person, which shall include a body corporate, shall bring or continue with a claim or proceeding in Antigua and Barbuda or elsewhere as against the Liquidators or the Bank without leave of this Honourable Court;

32 ORDER that the Liquidators, in their names or in the name of the Bank, shall be at liberty to apply for any permits, licenses, approvals or permissions as may be required by or deemed necessary pursuant to any laws, governmental or regulatory authority, in the pursuit and performance of their duties hereunder;

34 ORDER that the Liquidators shall exercise, perform or discharge their duties independently or jointly and in doing so shall be deemed to act as agents for the Bank and they act solely in their capacity as Liquidators and without personal liability if they rely in good faith upon the financial statements of the Bank or upon an opinion, report or statement of any professional adviser retained by them;

37 ORDER the provisional execution of this Order, notwithstanding any appeal and without the necessity of furnishing any security;

[13] These conclusions are injunctive and in some cases, declaratory, and the powers sought are extremely broad.

[14] In *Saargummi*[4], the Superior Court confirmed that the *BIA* is a law of equity and that the exercise of discretionary powers provided for in said legislation is subject to the application of the theory of clean hands:

> [TRANSLATION]
>
> [92] A seventh criteria which is not taken from the Bankruptcy Act, but rather from the general exercise of discretionary powers of the Superior Court, is that a party which comes before the Court asking it to exercise judicial discretion must be in good faith, and have "clean hands".
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> [...]
>
> [117] When an applicant requests that the Superior Court exercise its judicial discretion, he must present himself with "clean hands".
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> [118] This theory of clean hands dates from the 18th century and has been applied many times in Canada and in Québec. The theory developed in the search for equity and the Bankruptcy and insolvency Act is precisely that, a law of equity.

[15] In this case, Vantis seeks not only the recognition of a foreign judgment. Rather, it seeks that this Court grant it considerable powers within the territory of Canada and even to be allowed to act as an officer of the court.[5]

[16] Vantis seeks to exercise important powers in Canada. Its conduct must be considered by the Court in exercising its discretion.

[17] Collaboration between various jurisdictions must not constitute an obstacle to the Court's exercise of discretion. What is at stake is safeguarding the interests of Quebec and Canadian creditors and upholding the foundations of the Canadian judicial system.

[18] In regards to the nomination of a foreign representative by operation of the *BIA*, the Court has broad discretion, similar to that which it exercises in issuing injunctions or declaratory judgments, and nothing demonstrates that the conduct of the Petitioner must not be part of the factors considered by the court, quite the contrary, since the receiver and/or trustee are officers of the Court.

[19] Among the principles outlined in *Holt Cargo*[6], the Court notes that although it is generally desirable for the courts of various jurisdictions to cooperate in cases of

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4 *Saargummi*, at par. 91, and *Murphy (Syndic de)*, 2006 Q.C.C.S. 989, par. 24.

5 We note that at conclusion [11] of its Motion, Vantis seeks the power to emit *subpoenas*.

6 *Holt Cargo* v. *ABC Containerline*, [2001] 3 S.C.R. 907.

international insolvencies, a "*Canadian bankruptcy court has a responsibility to consider the interests of the litigants before it and other affected parties in Canada*"[7].

[20] In *Holt Cargo*, the Supreme Court also ruled that Canadian courts must inquire as to whether the recognition of a foreign proceeding and assistance in enforcing such rulings would cause an interested party to lose some juridical advantage it would have had under Canadian laws. Even though it isn't that the protection of any type of advantage will bar collaboration with one jurisdiction (Antigua) rather than another (U.S.), the *"extent of juridical advantage for the various parties [i]s clearly an important factor to throw into the balance."*[8]

[21] The Supreme Court in *Holt Cargo* writes that the pluralist approach requires that a court coordinate with, but not be subordinate to, foreign courts.

[22] In *Menegon* v. *Philip Services Corp.*[9], Justice Blair of the Ontario Superior Court of Justice, citing Section 18.6(5) of the *Companies Creditors Arrangement Act*[10], ("**CCAA**") (which is identical to Section 268(6) *BIA*), explains that "*comity and international co-operation do not mean that one Court must cede its authority and jurisdiction over its own process or over the application of the substantive laws of its own jurisdiction.*"[11]

[23] It is thus clear that this Court has broad discretion under section 268(6) BIA and that this discretion should not be subordinated to a desire for procedural uniformity.

[24] The Supreme Court of Ireland, ruling in the case *In the Matter of Eurofood IFSC Ltd. & In the Matter of the Companies Act 1963-2001*[12], liberally interpreted the public policy exception provided for in Section 26 of *Regulation (EC) 1346/2000 of the Council of 29 May 2000 on insolvency proceedings*[13] ("**EC Regulation**") to refuse recognition of the decision of an Italian court on the grounds that the special administrator had disregarded the principle of fairness.

[25] Section 26 of the EC Regulation is similar to Section 6 of the Model Law, in that it reads as follows:

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7 Ibid. par. 33. See also par. 68 to 70.

8 Ibid. par. 34.

9 *Menegon* v. *Philip Services Corp.*, (1999) 11 C.B.R. (4th) 262.

10 L.R.C. 1985, c. C-36.

11 At par. 48.

12 [2006] IESC 41e.

13 [2000] J.O.L. 160/1 at p. 9.

> Any Member State may refuse to recognise insolvency proceedings opened in another member state or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

[26] Although that Section 26 is narrower than our *BIA* Section 268(6), the Supreme Court of Ireland was nevertheless shocked by the circumstances before it.

[27] In this case, the special administrator failed to advise the creditors of *Eurofood* of the hearing before the Italian court. Moreover, he only provided the provisional liquidator the documentation relating to the application after the hearing had taken place.

[28] Similarly, Vantis failed to inform Janvey as well as the AMF of its actions in the Montreal office and of the presentation of its motion before Registrar Flamand.

[29] The Supreme Court of Ireland stated the following in regards to the importance of equitable procedures:

> I regret to say that it is quite shocking that the appellant should have deliberately refused to provide the Provisional Liquidator with the documents necessary for his appearance before the Parma Court in February 2004. (...) This Court is fully conscious of the important role now accorded to the principle of mutual recognition of judicial decisions in many contexts of European Community and Union law. It is based on a principle of mutual trust. This Court respects those principles. They must, therefore, entail respect for principles of fairness that are common to the traditions of the Member States and which have been affirmed again and again by the European Court.
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> (Emphasis added)

[30] As was argued by the attorney's for the AMF in the course of the hearing, the Antiguan judgment explicitly deprives Canadian and foreign governmental and regulatory authorities of the benefits of cooperation from the Antiguan liquidators, except in cases where mutual disclosure obligations exist, which is not the case in this instance.

[31] The conclusions of the Antiguan judgment naming Vantis as Receiver stated in paragraph 12 as follows:

> 12. Without prejudice to the provisions of Section 373 of the Act, the Joint Receiver Managers be and are hereby authorized to disclose information concerning the management, operations, and financial situation of the Respondents/Defendants as they consider appropriate in the performance of their functions PROVIDED ALWAYS THAT:

> (1) no disclosure of customer specific information is authorized without further or other order of the Court; and
>
> (2) no disclosure of information is permitted under this Order to any foreign governmental or regulatory body unless such disclosure is subject to mutual disclosure obligations.
>
> (Emphasis added)

[32] This is a major irritant in this case. This provision is not restated in the judgment naming Vantis as liquidator, but Vantis' attorneys wrote the following in their Notes and Authorities:

> 78. (...) This confidentiality provision was made by the High Court of Antigua in the Antigua Receivership Order at paragraph 12 and the Flamand Order simply recognized it. It further results from the existence of Section 244 (as amended) of the IBCA, which provides the Bank's duty of confidentiality in favour of its customers. Although this duty is not repeated in the winding-up order, it still applies and the liquidators cannot disclose any customer information without an order by the High Court of Antigua.

[33] The Court notes that the Antiguan Court shows no deference for our regulatory authorities. However, SIB did in fact operate an office in Montreal.

[34] In *Exchange Bank & Trust inc.* v. *British Columbia Securities Commission and Bank of Montreal*[14], the Court of Appeal of British Columbia writes:

> EBT stressed that its ability to present evidence was hampered by the privacy laws of Nevis. That may be so. However, the property subject to the Orders is in British Columbia and it is the securities laws of British Columbia, and those of the United States, that are alleged to have been contravened. EBT chose to locate assets outside the jurisdiction of Nevis and must accept that those assets are subject to laws of the jurisdiction in which they are located, in this case British Columbia. It would be an utter abandonment of the public interest if we were to conclude that a party subject to secrecy laws in another jurisdiction could use those laws to shield themselves from the legitimate exercise of powers to enforce securities regulation in British Columbia. In short, the Nevis privacy laws are not relevant.[15]
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> (Emphasis added)

[35] Vantis had an obligation to obey the laws of Canada and Quebec.

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[14] 2000 B.C.C.A. 389.

[15] Ibid. p. 12.

[36] In the matter of *Richter* v. *Merrill Lynch*[16], the Court of Appeal of Québec writes:

> [*TRANSLATION*]
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> [54] I am of the opinion that the application of a party cannot be lawfully heard when it is based above all on the misconduct and false representations made by that party to its contracting partners from whom it seeks compensation for damages for which it is principally responsible.
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> (...)
>
> [57] Québec's legal doctrine instead finds its basis in certain principles of estoppel which are likened to judicial sanctions applied to the wrongful conduct by one party.
>
> (...)
>
> *The principle of estoppel sanctions conduct that is unfair or non cooperative by refusing to grant an application presented by the very author of the problem.*
>
> *The principle of estoppel therefore allows the Court to reject an application, otherwise well founded in law, when the applicant's highly objectionable conduct is precisely what gave rise to the dispute*.
>
> (...)
>
> [60] Here, the principle of estoppel which is invoked is above all founded on the obligation of good faith that must guide the conduct of any person in the exercise of its rights and particularly in its contractual relationships (Sections 6, 7 and 1375 C.C.Q.).
>
> (...)
>
> [62] This is foremost a question of fact that must be reviewed applying the doctrine of good faith and equity.
>
> (Footnotes omitted)
> (Emphasis added)

[37] Vantis does not deserve the trust of the Court, as its own reprehensible conduct in no way offers any assurances for the future in this case. The conduct by Hamilton from Vantis is unacceptable and the circumstances are such that its motion is inadmissible.

[38] Following the appointment in the United States of the American receivers for all of the corporations, the *Financial Service Regulatory Commission* of Antigua, whose president was then Leroy King, --who was also criminally accused at some point prior to the proceedings of conspiracy with Allen Stanford, President of the Stanford Group, for having, among other things, assisted in money-laundering operations— requested on

[16] *Richter & Associés inc.* v. *Merrill Lynch Canada inc.*, 2007 Q.C.C.A. 124.

February 26, 2009, that the Antiguan Court appoint a receiver for SIB and STC; that is, one week after the American Receiver had been named in the United States to act as receiver for all the corporations of the Stanford Group, including SIB and STC.

[39] The Antiguan Receivers presented before Registrar Chantal Flamand an *ex parte* motion for the appointment of a foreign representative, for recognition of a foreign order, for judicial assistance and for the appointment of an interim receiver, yet failed to do the following:

a) Notify AMF and Janvey of the filing of said motion.

b) Mention that approximately one month (that is on March 8, 2009) before the filing of the motion, Vantis' representatives had gone to the Montreal offices of SIB, took possession of its records and assets (without prior authorization of the Canadian Court) and deleted the original electronic data after having made copies and having taken all such copies out of the country.

c) Report that the AMF had begun an investigation into the business dealings of SIB on February 23, 2009 and had requested that the Antiguan Receivers provide documents and data from the Montreal office no later than February 25, 2009.

d) Note that they were not authorized trustees in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, which therefore rendered illegal any acts committed by the Antiguan Receivers in Canada with regard to the assets and records of SIB prior to this date, as Section 271 *BIA* provides that such actions may only be carried out by a bankruptcy trustee – as defined in Section 2 of the *BIA*–, which Vantis is not according to the definition of the *BIA*.

e) Expressly mention the role of Janvey for the whole of the corporations, and in their motion merely referenced the freeze order rather than the American order instituting the receivership.

[40] The moving party must fully and faithfully divulge all important facts[17].

[41] By failing to divulge key information, the Antiguan Liquidators succeeded in obtaining the *ex parte* order they sought.

[42] As Justice Dufresne, at the time sitting on our Court, the Court may subsequently revoke an *ex parte* order if the applicant has failed to reveal facts which are important for its decision:

[17] *Microcell Solutions inc. v. Telus Communications inc.*, J.E. 2004-738.

[TRANSLATION]

> [19] The party whose *ex parte* motion is granted by a Court is then exposed to the possibility that it will subsequently be dismissed upon a showing that significant facts on which the Court based the decision to grant the authorization were omitted, either deliberately or as part of a strategy of the party seeking the motion. The omission must obviously be blatant.[18]

[43] The omissions of the Antiguan Receivers in the present matter are blatant and inexcusable.

[44] In *TMR Energy Ltd.* v. *State Property Fund of Ukraine*, the Federal Court had to rule on the validity of the decision by a Prothonotary to accept a request for registration *ex parte,* and recognition and enforcement of a foreign arbitral award. On appeal, the Federal Court quashed the decision of the Prothonotary on the grounds that the latter did not have the power to render such a decision and that the petitioner had in any event not fully disclosed to the Prothonotary the impediments of the registration and enforcement of the award.

[45] The Federal Court of Appeal upheld the decision of the Federal Court and declared as follows:

> [63] I have found no reviewable error in Martineau J.'s conclusion that "where a motion or application is made *ex parte*, the moving party or applicant has a duty of full and fair disclosure with respect to all material facts."[19]

[46] The circumstances in the present case are similar given that the Antiguan Receivers failed to fully and openly disclose material information to the Court.

[47] The Antiguan Receivers have refused all demands for repatriation of the imaged records of SIB to Québec or to disclose or provide a copy of these records to Janvey or to the AMF.

Deletion of the Data from the Servers

[48] One month before the issuance of the April 6 recognition order in Quebec, representatives of the Antiguan Receivers went to SIB's Montreal office and deliberately "erased" the SIB servers found there, without advising the American Receiver, the AMF or this Court. To the American Receiver's request, through counsel, that the Antiguan Receivers explain these actions, their own counsel replied only after two weeks (April 1 to 15) acknowledging that the servers had been erased, that the data had been transformed into imaged data and that said copies were now in Antigua. The Antiguan

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[18] Ibid., par. 19.

[19] *TMR Energy Ltd.* v. *State Property Fund of Ukraine* (F.C.A.), 2006 F.C.A., par. 63.

Receivers removed all of the electronic data from Canada to Antigua, and therefore removed the data from the jurisdiction of Canadian courts and regulatory authorities prior to obtaining their *ex parte* recognition order.

[49] Hamilton-Smith's statements claimed that in a report he informed Janvey of his intention to image the data on the hard drives at the Montreal office, to delete them and to send the copies out of Canada, that is, to Antigua, on February 26, 2009, and that Janvey did not reply objecting in any way, is unfortunately, questionable. Hamilton-Smith's and Janvey's version of this account contradict each other.

[50] Vantis states that the basic terms of its plan were disclosed to the American Receiver. However, their report states that: "*The Receiver-Managers arranged for members of their team to attend the offices of SIB in Montreal along with legal counsel from Ogilvy Renault on Monday 23rd February 2009 for the purposes of securing the records and IT equipment held at the office and to advise the staff that operations are to cease. The offices are now shut with access under the control of the Receiver-Managers and their lawyers."* The Court adds: without having been authorized by a Canadian Court.

[51] James Coulthard admissions, filed by the Antiguan Receivers on August 19, 2009, indicate at paragraph 6 that the "*Antiguan Liquidators were concerned that the electronic data be preserved to a criminal evidential standard for use in any subsequent legal proceedings against Mr. Allen Stanford or others involved in the Stanford fraud*". Instead of preserving the evidence in Canada and the originals, the Antiguan Receivers made copies, deleted the original version and sent the copies to Antigua, out of the reach of the Canadian authorities, and refused to provide a copy to the American Receiver until the time of the hearing.

[52] The Antiguan Receivers also refused to provide a copy of the imaged data to the AMF. In fact, according to Sébastien Garon, the AMF was sent certain documents, but not the list of Canadian investors nor information pertaining to the documents that were removed from SIB's Montreal office, and this despite the repeated requests made of the representatives of the Antiguan Receivers after February 25, 2009.

[53] The argument that these did not constitute formal orders was only made very late. If this was Vantis' argument, it should have been raised early on, and it was not. The Court considers this argument a pretext or justification after the fact.

[54] Counsel for Vantis informed the AMF that they were not authorized to disclose the list of investors and that an order of the Antiguan Court would likely be necessary. The necessity of an order from the AMF was not raised.

[55] At paragraph 6 of James Coulthard's statement, the Antiguan Receivers justified the process of erasure in this way:

> "... the servers were to be left at SIB's Montreal premises and the Antiguan «Liquidators» were concerned that the Landlord may repossess the premises and/or exercise powers of distraint on the servers, potentially giving access to any data left on them."

[56] As if safes were not available in Canada where files could be protected and safeguarded!

[57] If the Antiguan Receivers had genuinely feared that someone could have unauthorized access to the original servers found at SIB's Montreal office, they had only to remove the servers from the office and place them in a safe place, thus allowing the AMF and Janvey, as well as any other interested person, to have access to them in order to verify whether the copies made by the IT specialist were authentic and complete. It was entirely unnecessary to destroy the original servers which contained SIB's electronic data in Montreal. Where was the urgency? The concern is not a justification but rather a pretext.

[58] What motives --unspoken and unspeakable-- justify the *Blue Water* operation, i.e. destroying the originals making imaged copies, before even obtaining Court authorization and moving all information out of the country to Antigua?

[59] The Court concludes that Vantis' conduct, through the Petitioners, disqualifies it from acting and precludes it from presenting the motion, as it cannot be trusted by the Court, given that:

a) It acted in Canada before even obtaining the necessary permission from the Court;

b) It destroyed the servers from which it claims to have made copies, and removed such copies from Canada making it impossible for the Court to ever confirm their accuracy;

c) The Antiguan Receiver, personally and/or through its representatives, repeatedly ignored requests from the AMF, or when they did, responded by replying that: "Proceedings should be instituted in Antigua," while knowing that these will be dismissed as no treaty exists between the two countries;

d) It is unacceptable for the applicant and/or his representatives to now argue: "We will provide you with a copy of what we destroyed as it does not contain any confidential information", and yet claim to have destroyed and made copies for the very purpose of protecting confidential matters;

e) They failed to disclose everything to Registrar Chantal Flamand, and furthermore the lease termination was merely a screen and a pretext used by them to obtain the *ex parte* order of April 6, 2009;

f) In addition, they obtained an order against the AMF without notice to the AMF, and without disclosing to the Registrar the repeated requests from the AMF,

which is after all the Quebec regulatory organization which has jurisdiction over SIB's operations in Montreal;

g) The fact that Janvey had already been appointed by the American Court as receiver of the debtors, the Respondents and the entities related to them and that he had the power to control all their assets and this, wherever they were located;

h) The fact that they were not authorized trustees in bankruptcy pursuant to the *BIA*;

i) The fact that Janvey and the Antiguan Liquidators were engaged in a dispute for the control and the possession of the assets belonging to the debtors and the Respondents (valued at more than $20 million U.S.), which are in the possession of the TD Bank, in Toronto.

[60] The Court does not believe Vantis when it claims to have informed Janvey of the operation of the destruction of the servers, as Vantis's written report refers only to protection and not destruction, for which reason the Court will rely on Vantis' written documents rather than its testimony.

[61] Even if the liquidator's motion was well-founded on the merits, it does not deserve the confidence of the Court, an essential element enabling it to submit its motion, and this, because of the absence of good faith and of respect towards the Canadian public interest, represented by the Court and the regulatory authorities.

FOR THESE REASONS, THE COURT:

[62] **DECLARES** inadmissible the Antiguan Liquidators' motion of April 22, 2009;

[63] **DISMISSES** the motion of the Antiguan Liquidators;

[64] **THE WHOLE WITH COSTS**.

[*stamp:*] *TRUE COPY*
[*signature*] Clerk of the Court

[*signature*]
CLAUDE AUCLAIR, S.C.J.

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Date of hearing: August 26, 27, 28, 2009. Supplementary arguments: September 2, 4 and 8, 2009