IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2025

CORAM: LOVELACE-JOHNSON (MS.) JSC (PRESIDING)

AMADU JSC

ASIEDU JSC

DARKO ASARE JSC

ADJEI-FRIMPONG JSC

CIVIL APPEAL

NO. J4/68/2018

29TH APRIL , 2025

CLIPPER LEASING CORPORATION ……. PLAINTIFF/RESPONDENT/ RESPONDENT/APPELLANT

VRS

1. THE ATTORNEY-GENERAL ……. 1ST DEFENDANT

2. GHANA AIRWAYS LIMITED (IN OFFICIAL LIQUIDATION) ……. 2ND DEFENDANT/ APPELLANT/ APPLICANT/RESPONDENT

JUDGMENT

ADJEI-FRIMPONG, JSC :

This appeal raises an issue of corporate law importance. In the main, can a company which has been struck off the Register of companies exercise any legal capacity or standing to commence an action in court? And what happens if having commenced the action, that company is subsequently restored to the register? Now, the company in question is Clipper Leasing, the Plaintiff/Respondent/Appellant/Applicant (hereinafter, "the Plaintiff"). This was not a Ghanaian company. It was incorporated under the laws of Antigua and Barbuda. The origin of the Plaintiff and the issues arising in the case appear to limit the application of pure Ghanaian law to the matter. In the happenings however, the question of the application of a foreign law to a case in Ghana also comes to the fore in this appeal.

The suit itself has not arrived in this Court by a straight route. We shall however recount the following as sufficient to place the issues in perspective.

The Plaintiff, an aircraft leasing company leased a McDonnell Douglas DC-10-30 aircraft to the 2nd Defendant/Respondent/Appellant/Respondent (hereinafter "2nd Defendant") by an agreement dated 7th March 1997. Alleging that the 2nd Defendant breached the agreement, the Plaintiff took various steps to seek remedy which culminated in the Plaintiff commencing the suit in the Commercial High Court, Accra.

The Attorney General was joined in the suit as 1st Defendant. This was on account of certain commitments/undertakings supposed to have been made by the Government of Ghana as the sole shareholder of the 2nd Defendant which the Plaintiff claimed amounted to the assumption of the 1st Defendant's liability. The events which also led to the 2nd Defendant being placed in liquidation are not worth rehearsing unless it becomes necessary later in this discourse to do so. The Plaintiff's action in the Commercial High Court was for the following reliefs:

a. *Recovery of the sum of thirty-five million and twenty-one thousand, four hundred and eighty-eight dollars (US$35,021,488) being outstanding rent for the lease of the McDonnell Douglas DC-10-30 series Aircraft and replacement engines.*
b. *Interest on the sum of thirty-five million and twenty-one thousand, four hundred and eighty-eight dollars (US$35,021,488) from 20th June 2001 to date of final payment.*
c. *Return of the aircraft McDonnell Douglas DC-10-30 series Aircraft with Manufacturer's Serial Number 46554 and Registration Number GH-PHN and the replacement engines fixed on them by the Plaintiff in accordance with the conditions of return under section 9 of the lease agreement or in the alternative, the cost of the aircraft and engines.*
d. *Damages for breach of contract by the 2nd Defendant.*
e. *Costs.*

The Plaintiff's action succeeded in part. The Commercial High Court on 5th February 2009, decreed judgment in its favour to recover from the 2nd Defendant the sum of US$27,000,000 being the value of the aircraft in question. It was also awarded GHC10,000 in damages for breach of contract and costs of 15,000.

Both the Plaintiff and the 2nd Defendant were not satisfied with the judgment. The 2nd Defendant, aggrieved by the whole judgment appealed, and the Plaintiff also appealed (which the Court of Appeal designated as cross-appeal) against parts of it at the Court of Appeal. The Court of Appeal heard the cross-appeal and dismissed same as unmeritorious by its judgment of 10th May 2012. Somehow, the 2nd Defendant's appeal remained undetermined.

Subsequently, the Court of Appeal granted the 2nd Defendant leave to file written submissions out of time to have the appeal determined. The 2nd Defendant and later the Plaintiff, filed their respective submissions and the appeal was pending a hearing.

Around this time, the Official Liquidator of the 2nd Defendant caused a search to be conducted in the Registry of Companies in Antigua and Barbuda about the status of the Plaintiff particularly at the time it commenced the action. The search revealed that the Plaintiff was incorporated on 31st May 1995 pursuant to the International Business Corporation Act of the Revised Laws of Antigua and Barbuda, Cap 222 (hereinafter "Cap 222") as an International Business Corporation. The Plaintiff's name had however been struck off the Register of Companies on 18th June 2004. This was a little over two years prior to the issuance of the writ in the Commercial High Court on 13th July 2006.

Armed with the search results, the 2nd Defendant launched an application in the Court of Appeal to stay execution of the judgment and further have the originating writ itself struck out for want of capacity on the part of the Plaintiff.

According to the 2nd Defendant in the said application, under Cap 222 (as amended) it was a condition of the incorporation and licensing of a corporation that an annual fee be paid in an amount and for a period prescribed under the law. In default of such payment (among other obligations) the Director of the Registry had power to strike off the name of a defaulting corporation from the Register. The Plaintiff had defaulted in paying the prescribed fee by reason of which its name had been struck off the Register.

The 2nd Defendant had contended that under the law, a company struck off the Register had no existing legal rights and status to maintain an action in court. Consequently, as at the time the Plaintiff commenced the action in the Commercial High Court on 13th July 2006, it had no capacity as a legal entity to sue.

The 2nd Defendant's initial application came before a single Justice of the Court of Appeal. The Plaintiff in an affidavit opposing the application argued that since it was only struck off

the Register and not wound up to be followed by issuance of a certificate of dissolution, it maintained its legal status to commence the action in the High Court.

The Plaintiff's argument found favour with the single Justice. She determined that although the Plaintiff had been struck off the Register, not having been wound up or dissolved, it continued in existence and could therefore commence the action against the Defendants in the High Court.

Dissatisfied, the 2nd Defendant applied to the duly constituted panel of the Court of Appeal. Their Lordships however did not determine the merit of the application. In their view, the single Justice had no jurisdiction to determine the application, being an issue involving a decision in a cause or matter before that Court (vide Article 138 of the 1992 Constitution).They therefore set aside the ruling of the single Justice without more.

Following this, the 2nd Defendant applied to the duly constituted Court to determine the matter by itself. And by its unanimous decision of 25th February 2016, the Court of Appeal allowed the application. Their Lordships adjudged that, for being struck off the register of companies under Cap 222, the Plaintiff had no capacity to issue the writ in the Commercial High Court. In their view, not even the fact that the Plaintiff was much later restored to the register was sufficient to revive the suit. They therefore set aside the writ of summons and all the proceedings brought upon it including the judgment(s) that had been obtained. The following was how their Lordships concluded their decision:

> *"Having ruled that the respondent company which was struck off the register of companies of Antigua and Barbuda ceased to have legal existence, we further hold that it lacked the capacity to bring the suit it prosecuted at the court below, while it remained struck off the register. The subsequent restoration to the Register did not have the effect of validating acts such as the*

institution of the suit at the court below. In the circumstances, we go ahead to grant the application to set aside the writ of summons, the proceedings thereon, including the judgment entered thereon. We make a further order for the refund of monies paid under the judgment to be made by the respondent to the applicant."

This is the decision the Plaintiff appeals in this Court and the following are the grounds:

a. *That the Court erred and occasioned a miscarriage of justice by wrongly interpreting s. 335(1) of the International Business Corporation Act CAP 222 where it held that the Applicant company being struck off the register of companies of Antigua and Barbuda, meant that the company ceased to have legal existence once it was struck off.*
b. *That the Court erred and occasioned a miscarriage of justice by wrongly concluding that the Applicant company ceased to have legal existence once it was struck off the register, and that it did not matter that it was subsequently in 2014, restored to the Register.*
c. *That the Court erred and occasioned a miscarriage of justice by failing to consider the totality of evidence when it held that the Applicant company did not have legal capacity to commence the suit.*
d. *The Court erred and occasioned a miscarriage of justice when it set aside the writ of summons and the proceedings thereon including the judgment.*
e. *The Court erred and occasioned a miscarriage of justice by ordering that the monies paid under the judgment be refunded to the Respondent.*

Later in the written statements of case of the parties, a new ground of appeal emerged which was argued as ground (f). We shall in the course of this delivery, attend to how the ground emerged and deal with it as appropriate.

Preliminary comments

Before turning to the grounds of appeal, we think one procedural matter must not escape our attention and comment. We are here referring to the procedure by which the learned Justices of the Court of Appeal entertained and disposed of the application which in effect terminated the substantive appeal before it or rendered it otiose. Could the Court of Appeal whilst seized with the appeal itself properly entertain the application, the determination of which caused the virtual demise of the appeal itself?

Significantly, the issue of capacity contained in the application was not canvassed in the High Court and was therefore not part of the record before the learned Justices. It appears their Lordships themselves recognized the oddity of their own venture. Towards the end of their decision, they conceded:

> *"We must however express our misgivings as well as displeasure regarding the manner in which this matter has been raised. Seeing that the applicant has lodged an appeal against the decision of the High Court, it seems to us that a challenge to jurisdiction (such as a challenge to capacity is), ought properly to have been raised as a ground in the appeal proper. The court could have taken it as a preliminary matter following which consequential orders could have been made that would have had the same effect as what we have been called upon to do. The effect of this ruling is that the appeal before this court has been overtaken, and that is not the route we would have preferred or encouraged."*

The law clearly frowns on an appellate court's use of interlocutory applications to determine matters that dispose of a pending appeal. In REPUBLIC VRS HIGH COURT, TEMA; EX PARTE KOFI [1999-2000] 1 GLR 61, the Court of Appeal was determining an application for stay of execution in a contempt matter. Counsel for the applicant urged upon the court to hold that the trial court had erred in deciding that the conduct of the applicant amounted to

a criminal contempt. Resisting Counsel's contention, Wood J.A. (as she then was) at page 65 of the report questioned the propriety of the practice as follows:

> *"I think we should resist any temptation to draw firm conclusions either of law or facts on points which ought properly to be argued at the appeal hearing. To draw the firm conclusion that he has invited us to, namely that the trial judge fell into error in wrongly convicting the applicant for a pure civil contempt would amount to a determination of and consequently to a prejudgment of the appeal. Certainly, we cannot at this state pronounce on the soundness or otherwise of the judge's decision. A cardinal principle of law is that an appellate court, hearing interlocutory applications during the pendency of a substantive appeal, ought to be extremely careful not to prejudge that appeal. It ought therefore to guard against making definitive findings on questions or issues which properly could be made at the hearing of the substantive appeal and when the court would be in receipt of the full record of appeal."*

In MENSAH VRS GHANA FOOTBALLL ASSOCIATION [1989-90] 1 GLR 1, a decision of the Supreme Court which the Court of Appeal in EX PARTE KOFI followed, the Court of appeal in determining an application for stay of execution proceeded to make definitive pronouncement on the locus standi of the parties. The Supreme Court disapproved of the position in the following decision captured in holding (2) of the report:

> *"2. The statements on the capacity of the parties could properly be made by the Court of Appeal at the conclusion of hearing in proceedings where the court had the record of appeal before it and not when it was dealing with an interlocutory matter such as stay of execution. The Court of Appeal had erred, in the absence of the record, in holding that the finding of the trial court that the action had been brought by the Plaintiff in a representative capacity was wrong."*

The opinion of Taylor JSC at page 10 of the report was instructive. He said:

"In granting it, [the stay of execution] it seems to me that the court took the view that the appellant lacked locus standi to institute the action in the High Court. This question of locus standi was clearly not before the Court of Appeal as the material for it must be in the appeal record which was not before it. In the circumstances of this case, a decision on locus standi completely disposes of the case and renders the appeal otiose. It therefore becomes necessary for any court dealing with it to be extremely careful not to prejudge the appeal without having all the facts in the record of appeal."

The admonition contained in the cases bear reiterating. It is trite that Appeal is a creature of statute and the rules governing the exercise of appellate jurisdiction ought to be followed at all times in the determination of appeals. Appellate Courts ought to resist the temptation of determining interlocutory applications in a manner that results in prejudging pending appeals or rendering them otiose as has happened in this case. The appeal procedure risks being abused if such approach is not resisted.

That said however, it appears the facts and circumstances of this case, different as they were from EX PARTE KOFI and the GHANA FOOTBALL ASSOCIATION will allow a different treatment. Here, not only was the 2nd Defendant's application for stay of execution of the judgment of the High Court, but was also, specifically, for challenging the Plaintiff's capacity which in a sense raised questions of jurisdiction. It was therefore an issue that went to the root of the action and bore the likelihood of rendering the entire proceedings a nullity. The learned Justices of the Court of Appeal described it as a challenge to capacity amounting to a challenge to jurisdiction. We are agree with them.

Again, the record shows that at the material time, the record of appeal had been transmitted to Court of Appeal with the consequence that the High Court was left with no jurisdiction to entertain any issue about the suit including the capacity question. See Rule 21 of the Court of

Appeal Rules (C.I 19) (as amended). It was therefore an issue the Court of Appeal unavoidably had to determine.

Most significantly, when the application was mounted, there was no objection from the Plaintiff against the procedure adopted. Indeed, both sides filed processes to argue the application on the merits before the Court of Appeal made a determination. No miscarriage of justice appears to have been occasioned to allow this Court's intervention in the matter beyond expressing these comments. In the event, we shall proceed to determine the appeal on the merits.

Determination of the Grounds of Appeal

We shall deal with the grounds of appeal this way. The first three grounds, (a), (b) and (c) revolve around the interpretation of the relevant provisions of Cap 222. A distillation of the three grounds reveals the main issues in this case which we referred to. That is, whether the Plaintiff company which had been struck off the register of companies under Cap 222 had capacity to commence the action in the Commercial High Court and whether the subsequent restoration of its name revived the action. We shall therefore resolve the three grounds together. The third and fourth grounds which arise from the outcome of the determination of the first three, will be dealt with together as appropriate. The final and 'late comer' ground will be discussed in the end.

To start with, let us here set out the provisions under Cap 222 which are central to the controversy. They are contained in excerpts of the law tendered by affidavit evidence and relied on by both sides in their arguments.

> *"REMOVAL FROM REGISTER*
>
> *335. (1) The Director may strike a corporation off the register, if*

(a) the corporation fails to send any return, notice, document or prescribed fee to the Director as required pursuant to this Act;

(b) the corporation is dissolved;

(c) the corporation is amalgamated with one or more other corporations or bodies corporate;

(d) the corporation does not carry out an undertaking given under subparagraph (i) of paragraph (a) of section 339 or

(e) the registration of the corporation is revoked pursuant to this Act.

(2) Where the Director is of the opinion that a corporation is in default under paragraph (a) of subsection (1), he must send it a notice advising it of the default and stating that, unless the default is remedied within thirty days after the date of the notice, the corporation will be struck off the register.

(3) Section *337* applies *mutatis mutandis* to the notice mentioned in subsection (2).

(4) After the expiration of the time mentioned in the notice, the Director may strike the corporation off the register and publish a notice thereof in the Gazette.

(5) *When a corporation is struck off the register, all licenses issued to that corporation to engage in international banking, trust or insurance business are simultaneously rendered null and void.*

(6) When a corporation is struck off the register, the Director may, upon receipt of an application in the prescribed form and upon payment of the prescribed fee, restore it to the register and issue a certificate in a form adapted to the circumstances

336. *"Where a corporation is struck off the register, the liability of the corporation and of every director, officer or shareholder of the corporation continues and may be enforced as if it had not been struck off the register"*.

How did the learned Justices of the Court of Appeal interpret the above provisions? The relevant portions of the judgment are as follows:

"We are not persuaded by the arguments of the respondent, including those regarding the differences in the dictionary definition of the words "dissolution" and "striking off' (as applied to companies), nor do we hold the view that until a certificate of dissolution is issued under S. 299, the company although struck off under S. 335 continues in existence with its concomitant rights, including having the capacity to institute suits. The said interpretation, we intend to demonstrate, does not find support in the Act itself. It seems to us that the intendment of S. 335 is to move from operation and existence, a company which is struck off the register. In our view, the drafters of the legislation, intending to remove from such company (as long as it was off the register), the legal status of a company with its accompanying rights and responsibilities, placed S.336 thereat to preserve the company's liabilities, thereby preserving the rights of third parties.

In our judgment, there would have been no need for S. 336 if the drafters did not intend a striking off from the register to affect the company's legal status with the capacity to sue and be sued. Indeed, S. 336's sub-paragraph: " …may be enforced as if it had not been struck off the register", suggests that a striking off would, but for that provision have had an adverse consequence on such company's liabilities to third parties…

We have arrived at this opinion, mindful of the cardinal rule of interpretation of statutes, that the statute must be read to find the intention of the lawmakers of the statute by considering it as a whole and in its context, see: Halsbury's Laws of England (4th Ed.) Vol.44 p 856; also per Lord Davey, construing some clauses under the English Employers' Liability Act, 1880 in Canada Sugar Refining Co. v. R. [1898] A. C. 735 at p. 741, P. C. "Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter…

It is for these reasons that we hold the view that the respondent company ceased to have legal existence once it was struck off the register, and it matters not that it was subsequently in 2014 restored to the register… This then raises the capacity of the respondent to sue at the court below in July 2006, when its name had been struck off the register in June 2004, and it had consequently ceased to have legal existence..." (Page 157—163 ROA]

Summary of the Plaintiff's arguments

The Plaintiff argues that striking off a company's name from the Register does not mean it ceases to exist. Thus, striking off the company from the register does not bring an end to its existence. The Plaintiff relies on the dictionary meaning of *"dissolution"* and *"striking off"* to draw this distinction. It is pointed out that Cap 222 clearly provides for separate procedures for striking off and dissolution and that it is only dissolution backed by a certificate that brings the life of a company to an end and hence terminates the right to sue.

Furthermore, that a company which has failed to pay the requisite fee as provided for by the law is not automatically dissolved. Steps must be taken under Section 299 to dissolve the company.

Referring to Section 336 of CAP 222, which essentially states that on striking off, the liability of the corporation, its director's, officer's or shareholders shall continue, the Plaintiff contends that, this presupposed the company continued to exist and could rightfully maintain an action. This is because an individual or entity defending an action must have capacity to do so and that capacity must include the right to sue.

Further, relying on the legal opinion contained in the letter of ROBERTS & CO, ATTORNEYS-AT-LAW AND NOTARIES PUBLIC the Plaintiff has urged on this Court thus:

"Indeed, the appellant led evidence by an opinion from a lawyer from Antigua and Barbuda, which has been reproduced at page 97-1000 of the Record of Appeal. Th opinion states that a corporation ceases to be a legal entity only after a certificate of dissolution has been issued and publication of the notice of dissolution in the Gazette. Note should be made of the fact the above opinion was never challenged by the Respondent nor did they lead evidence contrary to this. Based on the fact the Respondent did not object to the opinion or provide any evidence contrary to the to the position of the law in Antigua and Barbuda, this Honourable Court should find that the opinion is the correct position of the law of Antigua and Barbuda."

As a further demonstration that it is only a dissolution that brings the life of a company to an end and not striking off, the Plaintiff cites GEMSTAR LTD VRS ERNST & YOUNG (ARIZONA SUPREME COURT; MAY 7, 1996) which decided that when a company was struck off the register it could upon an application be restored to the register and shall be deemed not to have been struck off. That the striking off was for administrative purposes which did not amount to a dissolution and loss of legal capacity. The Plaintiff also invoked Section 50 (1), (3) and (4) of the Bodies Corporate (Official Liquidations) Act (Act 180) to argue thus: *"Even if for the sake of argument, the Appellant company can be said to have been dissolved, once it was restored to the register, the company will be deemed to have continued in existence as if it had not been dissolved".*

Again, it was contended that the Plaintiff's right was not taken away by the striking off. If the law wanted to do so, it would have specifically provided for it. ISSOFOU VRS GPHA [1991] 1 GLR 500 cited.

On the issue of restoration of its name on the register in October 2014, the Plaintiff had this to say:

"A restoration to the register means that the striking off has been cured and thus the company is entitled to have certain reinstatements such as its licences previously issued. It is the Appellants' case that even if its capacity was in question during the period it remained struck off the register, its subsequent restoration on 15th October 2014, before the Respondent's application was heard and determined, reaffirmed its capacity, allowing it to continue operations as if it had never been struck off."

The Plaintiff also sought support in Section 371(1) and (2) of Cap 222 essentially to say that the whole purpose of Cap 222 was to promote trade. Therefore, an interpretation which keeps the legal personality of a struck off company better serves that purpose and ought to be preferred.

Summary of the 2nd Defendant's Response

Responding, 2nd Defendant contends that the rightful interpretation of the provisions in Cap 222 is that although a struck off Company did not cease to exist until dissolved, its legal capacity including the power to commence legal proceedings is suspended whilst it remains struck off. It is also contended that upon restoration, all acts purportedly carried out whilst the company was struck off is not revived, they remained void.

Referring to Sections 335 and 336, which the 2nd Defendant urges ought to be construed harmoniously, it is argued that when a company is struck off, the only thing Section 336 allows to continue, is liability of the company and that of every director, officer or shareholder as if it had not been struck off. If a struck off company continued in existence without any loss of capacity, it would not have been necessary for the law-maker to specifically provide for the continuation of such liabilities.

It is further argued that every company upon incorporation has rights and liabilities which include the right to sue. By the law-maker excluding all rights (including the right to sue) from continuing whilst the company remained struck off meant the law-maker did not intend that right to continue under Section 335.

Additionally, the 2nd Defendant argues that the interpretation the Plaintiff is urging upon the Court will result in Section 335 running counter to such other provisions of the Act as Section 335(5) which specifically provides that when a company is struck off, all licenses issued to that company to engage in international banking, trust or insurance business are simultaneously rendered null and avoid. The question is posed: how can it be argued that when a company is struck off the register, its licences to engage in international business are rendered void and yet that same company is entitled to carry on its business as if nothing has happened to its status?

Touching on the rationale behind section 336, the 2nd Defendant submits:

> *"The rationale behind continuing the liability of the company and of every director, officer or shareholder of the corporation removed from the Register as if it had not been struck out is to preserve creditor rights and not to render the removal of a corporation off the Register ineffectual for all purposes. The provision in Section 336 of Cap 222 was inserted to ensure that companies do not escape their liabilities incurred whilst they were on the register, by intentionally causing their company to be removed from the register. It was not inserted to enable a company carry on business as usual."*

On the question of the legal opinion of ROBERTS & CO, ATTORNEYS-AT-LAW AND NOTARIES PUBLIC, 2nd Defendant submits that the opinion was not binding on the Court. Being a matter of fact, it is for this Court to decide on its probative value. In any event, the

argument continues, the opinion did not address the real question before this Court. It is pointed out that the opinion the Plaintiff sought was whether a company ceases to exist only after it has been dissolved and a certificate of dissolution is issued and published in the gazette. However, the real question for the court was whether under Cap 222, a company whilst it remained struck off the Register can commence legal proceedings and whether the action commenced will be valid. In effect, both sides failed to adduce expert evidence on whether a company whilst struck off could maintain an action in court. That being the case, the Section 40 of the Evidence Act kicked in for the Court to presume the law of Antigua and Barbuda to be the same as Ghana law. It is however observed that there was no equivalent provision in Section 336 under Ghana law. In the event, it was open for the court to consider the law of other jurisdictions which have equivalent provisions of Section 336. GEMSTAR LTS VRS ERNST & YOUNG 185 Ariz 493 cited. With this approach, provisions in the laws of such jurisdictions as Monserrat and New Zealand supported by case law were cited. The following conclusion was submitted:

> *"It is clear from the above decisions that although a company which has been struck off the register does not cease to exist as a legal entity because it has not been dissolved, its capacity to perform any act, which not struck off the company can perform are suspended for the entire period that it remains struck off."*

On the effect of the restoration of the Plaintiff to the Register in 2014, the 2nd Defendant contends that the restoration did not relate back to resurrect void acts done whilst the company remained struck off. There was no provision in Cap 222 as it obtains in such other jurisdictions as the United Kingdom and the British Virgin Island Code which states: *where the name of a company is so restored, it shall be deemed never to have been struck off [the register]*". Thus, in the absence of 'a deeming provision' in Cap 222, Section 336 cannot have the effect contended by the Plaintiff.

Foreign Law

A court in any jurisdiction is expected to know the law of its jurisdiction. However, no such expectation exists when it comes to the law of another jurisdiction, there arises the need to prove that law. Under our law, whenever it becomes necessary for a court to know or apply a foreign law, the foreign law must be proved as a question of fact. This was a received common law. The Evidence Act, (NRCD 323) has however given it a statutory recognition under Section 1(2). It is there provided:

> *"(2) The determination of the law of an organization of states to the extent that the law is not part of the law of Ghana, or of the law of a foreign State or sub-division of a foreign State, is a question of fact which shall be determined by the Court."*

The burden of proof is on the party asserting the foreign law. The essence of the proof is the demonstration that the foreign law differs from the domestic law. This is underscored by the presumption that the foreign law is the same as the domestic law. See UNIVERSITY OF GLASGOW VRS ECONOMIST (1990) Times, 13th July. Section 40 of the Evidence Act enacts this common law prescription by providing: *"The law of a foreign country is presumed to be the same as the law of Ghana"*.

The usual method of proof is to call an expert to give evidence as to the meaning and effect of the foreign law. The standard of proof like any other fact is on a balance of probabilities. Writing on the "*Mode of proof*" of foreign law, the esteemed authors of Halsbury's Laws of England have noted:

> *"Where it is necessary for an English court to know and apply the law of any country or territory outside the United Kingdom…that law may be proved in civil proceedings by a person suitably qualified to give expert evidence of such law on account of his knowledge or experience.*

It is immaterial whether he has acted as a legal practitioner in the country concerned. A court is not generally entitled to construe a foreign code itself without expert assistance. But where any question as to the law of any country or territory outside the United Kingdom… with respect to any matter has already been determined, and any finding made or decision given, and reported or recorded in citable form, then if such a finding or decision is adduced before the court (which must be done on notice), the law will be taken to be in accordance with the finding or decision unless the contrary is proved, [or] unless there are conflicting decisions on the same question adduced by virtue of the same provision in the same proceedings." Vol 17, 4th ed., para 93, page 68.

On the duty of the court in determining the question of foreign law, the authors prescribe:

"The effect of the evidence given with respect to foreign law must be decided by the judge alone…If experts' evidence is unsatisfactory or conflicting the court will itself examine the decisions of foreign courts, textbooks, codes and other documents in order to arrive at a satisfactory conclusion on the question. Even if that evidence is uncontradicted, the court in deciding a foreign law as a fact is not bound to accept the construction put upon it by the expert, nor is it bound to accept the decisions of foreign courts as correctly setting out the law of a foreign state. If the witness produces any textbook, decision, code or other legal document as stating or representing the foreign law, the court, on looking at or dealing with those books and documents, is entitled to construe them and form its own conclusion on them." See Para 94.

In this case, beyond tendering the letter of the lawyers, ROBERTS & CO, ATTORNEYS-AT-LAW AND NOTARIES PUBLIC, no expert appeared to testify. What is certain however is that both sides agree that the excerpts tendered represent the true and authentic text of the law of Antigua and Barbuda. They have both relied on the provisions to advance their arguments in this Court. The authors of Halsbury's have again noted:

"If no witnesses are called to give expert evidence on the foreign law concerned, the court itself may in exceptional circumstances and with the consent of the parties construe and apply that law on the assumption that the rules of construction applicable are the same as the English law." See Para 94, Vol. 17, 4th ed.

In JABBOUR VRS CUSTODIAN OF ISRAELI ABSENTEE PROPERTY [1954] ALL ER 145 at 152-153 Pearson J in determining the applicable law to an insurance dispute delivered himself:

"It was assumed and expressly or impliedly by Counsel for both parties at the hearing, and should be taken as established, that all the facts Nos. 1 to 4 are admitted, and therefore, that the regulations were valid and effectual part of the law of Israel from Dec.2, 1948, to Mar.31, 1950, and that the Law has been a valid and effectual part of the law of Israel since Mar.31, 1950 and that the translations supplied are true and accurate. No witness was called to give expert evidence of Israeli law. The plaintiffs' Counsel did not raise any objection on that ground or contend that the defendant necessarily failed to prove his case by reason only of no such witness having been called. When I asked what the position was in that respect, I understood that both Counsel on behalf of the parties desired that the regulations and the law should be construed and applied without expert assistance, and it was their view that that course could properly be taken. I have thought it right to verify by reference to the authorities…

Also there is a passage at p. 868 of DICEY'S CONFLICT OF LAWS, where it is said:

"How far can judges examine foreign laws for themselves? On this point it is impossible to lay down any absolute rule, the courts wisely having avoided any pronouncement which might unduly fetter their discretion. They recognize as obvious the impossibility in normal cases of judges forming any opinion on foreign law except on the basis of expert evidence, but by a prudent exercise of common sense, they have shown themselves willing to waive proof by experts where such is manifestly unnecessary, as, for instance, on points which must be

formally proved, but need really no expert testimony, which may be costly or difficult to procure"

In the circumstances, I think it right in accordance with the wishes of the parties to face the task of construing and applying the regulations and the Law without the assistance of an expert in Israeli law… It must be assumed that the Israeli rules of construction are the same as the English rules of construction."

In Parkasho v Singh [1968] P 233, p 250 Cairns J opined:

"Now we are asked … to say … that the justices were wrong in their interpretation of the foreign law. The question of foreign law being a question of fact in our Courts, must this Court regard itself as bound by the findings of the justices on this matter? In my view the question of foreign law, although a question of fact, is a question of fact of a peculiar kind and the same considerations do not apply in considering whether and to what extent this Court should interfere with the decision of the magistrates, as in the case of the ordinary question of fact which come before a magistrates' Court. … I think it is our duty in this case to examine the evidence of foreign law which was before the justices and to decide for ourselves whether that evidence justifies the conclusion to which they came"

In MCC PROCEEDS VRS BISHOPSGATE INVESTMENT (No 4) [1999] CLC 417, Lord Justice Evans confirming that it is open to a Judge to form an independent opinion as regards the construction of a foreign law stated as follows:

"…*Sometimes the foreign law, apart from being in a foreign language, may involve principle and concepts which are unfamiliar to an English Lawyer. The English Judge's training and experience in English Law, therefore, can only make a limited contribution to his decision on the issue of foreign law. But the foreign law may be written in the English language; and its concepts may not be so different from English law. Then the English Judge's knowledge of the*

common law and of the rules of statutory construction cannot be left out of the account. He is entitled and indeed bound to bring that part of his qualifications to bear on the issue which he has to decide, notwithstanding that it is an issue of foreign law. There is a legal input from him, in addition to the judicial task of assessing the weight of the evidence given. The same applies, in our judgment, in the Court of Appeal. When and to the extent that the issue calls for the exercise of legal judgment, by reference to principles and legal concepts which are familiar to an English Lawyer, then the Court is as well placed as the trial judge to form its own independent view."

On this point too POSNER in the case of BODUM USA, INC VRS LA CAFETIERE INC 621F. 3D 624 (7th Cir. 2010) at 633 opined:

"Because English has become the international lingua fanca, it is unsurprising that most American, even when otherwise educated, make little investment in acquiring even a reading knowledge of a foreign language. But our linguistic provincialism does not excuse intellectual provincialism. It does not justify our judges in relying on paid witnesses to spoonfeed them on foreign law that can be found well explained in English treatises and articles."

On our evaluation of the authorities, it seems to us right to hold that, generally, the proper course to receive and apply evidence of foreign law is through expert testimony. Nonetheless a court is not helpless in the absence of such testimony. In deserving cases, the court seized with the text of the foreign law may construe and apply it on the assumption that the rules of construction applicable to both systems are the same.

Before us, learned Counsel for the 2nd Defendant in addressing the absence of expert testifying on the law of Antigua and Barbuda first invokes the provision in Section 40 of the Evidence. However, on finding that our law does not have equivalent provision in Section

336, he considered it open for the court to consider the law of other jurisdictions which have equivalent provisions of Section 336 citing GEMSTAR LTS VRS ERNST & YOUNG supra.
We appreciate the legal soundness of Counsel's approach. However, we shall approach the issue by giving the presumption in Section 40 a liberal and broader interpretation. In our considered opinion and given the trend of persuasive judicial thinking, some captured in the authorities above referred to, the provision in Section 40 ought to be interpreted to include not only the text of the law but also the rules of interpreting them. That is to say, when Section 40 says *"The law of a foreign country is presumed to be the same as the law of Ghana"*, the presumption must be extended to cover the rules of interpreting the foreign law. Simply put, the rules of interpreting the foreign law and the rules of interpreting Ghana law must also be presumed to be the same unless the contrary is shown. Accordingly, unless there is evidence to show that the rules and principles of interpreting the laws of Antigua and Barbuda are different from our own rules and principles of interpretation, there is the presumption that they are the same. From our viewpoint, this approach will allow this court to deploy the rules of interpretation known in this jurisdiction and also make reference to principles and legal concepts familiar to other jurisdictions particularly those of the commonwealth. This way, the judicial decisions from those jurisdictions relative to the law in question become more meaningful.
Proceeding, we shall be guided by the illuminating path set by the following passage from the Memorandum to the Interpretation Act, 2009, (Act 792):

> *"The general rules of construction or interpretation used by the Courts were formulated by the judges and not enacted by Parliament. From the Mischief Rule enunciated in Heydon's Case [1584 3 Co Rep. E.R 637] to the Literal Rule enunciated in the Sussex Peerage Case [1844] 11 Co & F 85 [1857] 6 H.L. C 61; 10 E.R. 1216] the courts in Commonwealth have now moved to the Purposive Approach to the interpretation to the interpretation of legislation and indeed of all written instruments. The judges have abandoned the strict constructionist view of*

interpretation in favour of the true purpose of legislation. The Purposive Approach to interpretation takes account of the words of the Act according to their ordinary meaning as well as the context in which the words are used. Reliance is not placed solely on the linguistic context, but consideration is given to the subject matter, the scope, the purpose and, to some extent the background…"

Interpreting Sections 335 and 336 of Cap 222.

In interpreting the provisions in Sections 335 and 336 of Cap 222, one thing should be said at once, that a company is a creature of statute. As such its powers, rights and privileges are as conferred by the statute. The Plaintiff on any reckoning was a creature of Cap 222. As a corporation under Cap 222, its powers, rights and privileges are as conferred by the law. Section 18 of Cap 222 accordingly states:

"18. (1) A corporation has the capacity and, ***subject to this Act,*** *the rights, powers and privileges of a natural person of full age and capacity.*

(2) A corporation has the capacity to carry on its business, conduct its affairs and exercise its powers in any other country to the extent that the laws of Antigua and Barbuda and of that country permit."

Lord Macnaghten stated in WELTON VRS SAFFERY [1897] AC 299 at page 324 *that "These companies are the creature of statute"*. And Lord Halsbury L.C noted in OOREGUM GOLD MINING CO. OF INDIA LTD VRS ROPER [1892] AC 125 at page 133 thus:

"…the whole structure of a limited company owes its existence to the Act of Parliament, and it is to the Act of Parliament one must refer to see what are its powers, and within what limits it is free to act."

The 2nd Defendant argues that the Plaintiff's right to sue is extinguished when its name is struck off the register. The Plaintiff however thinks that the right to sue remains, even whilst it remains struck off.

On our examination of Cap 222 as a whole, there can be no doubt that the provisions in Sections 335 and 336 are generally sanction-imposing. That is why among other defaults, subsection 1(a) allows the Director to strike off a corporation if: *"the corporation fails to send any return, notice, document or prescribed fee to the director as required pursuant to this Act"*.

Before the corporation is struck off under this provision, there is an opportunity to remedy the default under subsection 2. The Director must send notice to the corporation advising it of the default and stating that unless the default is remedied within thirty days after the date of the notice, the corporation will be struck off. It is when the default is not remedied under the subsection that the Director may strike the corporation off the register and publish the notice thereof in the Gazette.

Under subsection 5, upon striking the corporation off the register, all licences issued to the corporation to engage in international banking, trust or insurance businesses are simultaneously rendered null and void.

Then Section 336 provides thus:

> *"Where a corporation is struck off the register, the liability of the corporation, and of every director, officer or shareholder of the corporation continues and may be enforced as if it had not been struck off the register."*

It is clear that the statute suspends the right to sue whilst the company remains struck off. It is the liability of the corporation and that of every director, officer or shareholder that continue, and which may be enforced against it. The law envisages the company as a defendant and not as Plaintiff. It creates a right to defend in those specific cases and not a right to sue. Apparently, the law-maker intended a provision that will protect the rights of third parties in respect of liabilities that had been incurred before the company was struck off.

For good measure, the word "continues" in Section 336 is significant. It means that the liability in question must have been incurred prior to the striking off. It is only a thing that has happened already that can continue. The provision therefore does not envisage new liabilities. The reason is plain. During the period of striking off, the company cannot undertake usual business because its licence must have been rendered null and void by virtue of subsection 5 of Section 335. If the law-maker intended for the company to exercise all of its regular powers, rights or privileges which include of course, the right to sue, there would be no need for Section 336. Therefore, by enacting the specific provision in Section 336, what is not enacted was not intended unless there were other provisions in the law justifying the absence of the other rights. The latin maxim is *Expressum facit cessare tacitum*, 'what is expressed makes what is silent cease'.

The interpretation put forth by the Plaintiff if accepted, leads to the vanity of Section 336. That sins against a well settled principle of interpretation. The law maker does not speak in vain. In SOLOMON FAAKYE VRS UNIVERSITY OF GHANA & ATTORNEY GENERAL J1/03/2019, judgment dated 24th April 2024, I expressed the following view of the principle:

> *"It is trite that Parliament does not speak in vain. Every provision is presumed to be enacted to satisfy an intention or cure a mischief. There is a presumption against tautology. The maxim*

ut res magis valeat quam pereat applies here. In LANGUNJU V OLUBADAN-IN-COUNCIL (1947) 12 WACA 223 at 236 the court noted: "…in the words of Halsbury's Laws of England, 2 ed., Vol. XXI pages 501-2: It may be presumed that: (i) that words are not used in a statute without a meaning and so effect must be given, if possible, to all the words used, for the legislature is deemed not to waste its words or say anything in vain."

Acquah JSC (as he then was) in the case of EDUSEI VRS ATTORNEY-GENERAL [1997-98] 2 GLR 1 expressed the effect of the principle this way:

"The word "exclusive" was not used in article 130(1) without significance. And an interpretation which fails to bring out the meaning and effect of the word "exclusive" would be myopic. For as the Privy Council cautioned in Ditcher v. Denison (1857) 11 Moo. P.C. 324 at 337: "It is also a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe, should not without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect or be of some use."

For the foregoing reasons, we find that the interpretation put forth by the 2nd Defendant is in sync with the intention of the law-maker and hence, preferrable. It is our interpretation of the law of Antigua and Barbuda that a company which has been struck off the register of companies, though does not lose its corporate personality until dissolved, nonetheless, becomes legally incapacitated to commence an action in Court.

Again, we also agree with the 2nd Defendant that the approach put forth by the Plaintiff leads to the provision in Section 336 running counter to the Section 333(5) which provides thus; *when a corporation is struck off the register, all licenses issued to that corporation to engage in international banking, trust or insurance business are simultaneously rendered null and void.*

From our standpoint, the legislative voidness under the subsection cannot be consistent with any subsisting capacity to sue save what has been specially enacted under Section 336. Another latin maxim that comes to play is *omni interpretatio si fieri potest ita fienda est in intrumentis, ut omnes contrarietates amouveantur*, 'every interpretation, if it can be done, is to be made in instruments, that all contradictions may be removed'.

We have also scrutinized the opinion contained in the letter of ROBERTS & CO, ATTORNEYS-AT-LAW AND NOTARIES PUBLIC. The mainstay of their opinion is seen in their conclusion which they draw in page 3 of their letter [page 99 ROA] as follows:

> *"It is therefore our opinion that the corporation ceases to be a legal entity only after a certificate of dissolution has been issued and publication of the notice of dissolution in the Gazette."*

The conclusion is a direct answer to the issue they sought to address which they captured in their open paragraph at page 1 of their opinion [page 97 ROA]. They had written:

> *"Dear Sir,*
>
> *"You have requested that we provide an opinion on whether a company incorporated under the International Business Corporation Act Cap 222 of the revised laws of Antigua and Barbuda as an International Business Corporation ceases to be a legal entity only after a certificate of dissolution has been issued and published in the Gazette."*

We are satisfied with the conclusion drawn by the lawyers in the letter. It does not however address the question of the Plaintiff's capacity to sue whilst it remained struck off. Nothing has been said in this Court to suggest that it is not a dissolution backed by a certificate that sounds the final death knell of a company. The primary answer we were seeking was whether during the period that a company remained struck off the register of companies, it had legal

capacity to commence an action in court. The opinion that a company ceases to be a legal entity only after a certificate of dissolution has been issued and a publication made in the Gazette is not determinative of our primary quest. The letter therefore fails to advance the Plaintiff's case before us.

Now what is the effect of the restoration of the Plaintiff to the register in 2014. Did it revive the action commenced in 2006 whilst it was struck off? Let us rehearse the provision in subsection 6 of Section 335:

> *"When a corporation is struck off the register and the cause of such striking off has been cured, the Board may upon receipt of an application in the prescribed form and upon payment of any fees and penalties due, restore it to the register, and reinstate any licences previously issued to the corporation to engage in international banking, trust, or insurance business under such conditions as it determines appropriate."*

The learned Justices of the Court of Appeal had the following view on the provision:

> *"The said provision did not save or give retroactive validity upon reinstatement to any acts done or performed or carried out by the company while it was struck off the register. In the absence of a provision akin to the saving provision in many similar statutes within the commonwealth, including S. 1032(1) of the English Companies Act 2006, which states that "the general effect of an order by a court for restoration to the Register is that the company is deemed to have continued in existence as if its had not been dissolved or struck off the register", see: as applied in Davy v Pickering & Ors. [2015] EWHC 380 (Ch) it would seem that while its name remained struck off the register at Antigua and Barbuda, from June 2006 until October 2014, the respondent had no legal status which would empower it to bring suit, and the subsequent restoration in October 2014, would have no effect to validate acts done (such as the institution of an action) while it was struck off the register."*

It was in support of the above delivery that learned Counsel for the 2nd Defendant cited the jurisprudence of such other jurisdictions as British Virgin Islands and the United Kingdom where the law specifically provides for 'deeming provisions' that allow restoration to assume retrospective effect to revive past actions taken during the striking off period. See for instance TYMANS LTD VRS CRAVEN [1952] 1 ALL ER 613; STEANS FASHIONS LTD VRS LEGAL AND GENERAL ASSURANCE SOCIETY LTD [1995] BLCL 332; JODDRELL VRS PEAKTONE [2013] 1 ALL ER 13.

The above proposition is right. In many common law jurisdictions, indeed in countries that operate as International Financial centers, the laws have specific 'deeming provisions' that allow restoration of a struck off company to have retrospectively effect. Examples include Turks and Caicos Island whose Companies Ordinance Cap. 16.08 contains the following provision under Section 260 subsection 7:

> *"Where a company is restored to the Register of Companies under this section, the company is deemed never to have been struck off the Register of companies".* In the British Virgin Islands, Section 218 subsection (6) states thus: *"A company that is restored to the Register is deemed to have continued in existence as if it had not been dissolved or struck off the Register."* A similar provision is also captured in Section 159 subsection (4) of the Cayman's Companies Act (2023) Revision (as amended) thus: *When the Court orders that the name of the company is to be restored to the Register under subsection 3(a) the company is deemed to have continued in existence as if its name had not been struck off the Register".*

There is no such provision in the Cap. 222 to allow an interpretation that gives the retrospective effect to validate the suit the Plaintiff commenced in the High Court. See also MORRIS VRS HARRIS [1927] AC 252; RE WORKVALE LTD (NO.2) [1992]2 ALL ER 627;

ALLIED DUMBER ASSURANCE PLC VRS FOWLE [1994] BCLC 197.The Plaintiff's argument therefore fails.

Finally, the Plaintiff's contention is that its interpretation of the provisions better serves the whole purpose of Cap 222. This is in the sense that its interpretation keeps the legal personality of a corporation under the law.

Section 371 of Cap 222 captures the purpose of the Act as follows:

> *"371. (1) This Act is to receive such fair, large and liberal construction and interpretation as will best ensure the attainment of its purposes. (2) The purposes of this Act are (a) to encourage the development of Antigua and Barbuda as a responsible offshore financial, trade and business center; (b) to provide incentives by way of tax exemptions and benefits for offshore business carried on from within Antigua and Barbuda; and (c) to enable the citizens of Antigua and Barbuda to share in the ownership, management and rewards of any business activity resulting therefrom."*

Our view of the provisions in Sections 335 and 336 is that they are to ensure corporate discipline. Corporate bodies must live up to their statutory responsibilities. The power of the Director to strike off defaulting companies from the register as we have in this case, for non-payment of fees, is to bring sanity to corporate practice. Where an erring company even upon notice to remedy a default fails to do so, the requisite statutory sanction must be imposed whilst steps are taken to protect third party interest. In this context, an interpretation which allows a defaulting company to do business as usual which appears to be the kernel of the Plaintiff's interpretation cannot accord with the purpose and virtues of Cap 222. The Plaintiff's argument here promises no merit and is dismissed.

In the final analysis, grounds (a), (b) and (c) fail and are dismissed. By this decision, grounds (d) and (e) which were merely consequential to the conclusions reached by the Court of Appeal for which they ordered the striking out of the Plaintiff's writ and all proceedings thereon including the judgment and also ordered that monies paid under the judgment be refunded to the 2nd Defendant also stand dismissed.

Now the final ground of appeal. This turned on a procedural point not contained in the Plaintiff's notice of appeal but argued in the statement of case. Leave was subsequently granted by this Court to allow the point to stand as argued with a corresponding right to the 2nd Defendant to file a response which done on 18th July 2014. The ground of appeal which was argued as ground (f) was:

> *"The Court of Appeal was not the proper forum to hear the application as the Applicant did not have a pending appeal before it."*

The Plaintiff's whole argument is contained in two short paragraphs at the last page of the statement of case and is as follows:

> *"My Lords, we raised a preliminary objection in our affidavit in opposition on page 92 of the Record of Appeal, that the Respondent's application was not properly before the Court. This was because, the Respondent did not have appeal pending before the Court of Appeal and as the Court had no jurisdiction to determine the application. The Appeal in respect of this suit was heard by the Court of Appeal on the 10th of May 2012. The Court of Appeal proceeded to hold that the Cross-Appellant had abandoned its appeal. It is our contention that once the court of appeal stated that the appeal had been abandoned there was no appeal pending."*

This argument we think must be disposed of more summarily. The fact that the Court of Appeal stated (almost in passing) that the appeal was abandoned did not mean there was no appeal pending to found the application. On our consideration of the relevant rules, save a determination on merits, it is required for an appeal to be formally struck out or dismissed under the certificate of the Registrar to terminate it. The Registrar's certification may result from non-compliance under either Rules 18 or 20 of the Court of Appeal Rules (C.I 19) (as amended) or upon a withdrawal of the appeal on notice pursuant to Rule 17 of the same Rules. In the absence of any of these, an appeal must be deemed pending in that Court. See GHANA TEXTILES PRINTING VRS ANKUJEAH & ORS [1999-2000] 2 GLR 473; ACCRA HEARTS OF OAK SPORTING CLUB LTD VRS QUARTEY [2001-2002] 2 GLR 503.

In the end, all the grounds of appeal fail and the appeal is dismissed.

(SGD.) R. ADJEI-FRIMPONG
(JUSTICE OF THE SUPREME COURT)

(SGD.) A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

(SGD.) I. O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

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