

SUPREME COURT OF NIGERIA

2ND MAY, 1997. SC. 155/1995

**CORAM;- M. L. UWAIIS CJN, S. M. A. BELGORE, I. L. KUTIGI,
S. U. ONU, A. I. IGUH, JJSC.**

NIGERIA DEPOSIT INSURANCE CORPORATION AP-
PELLANT
AND
FINANCIAL MERCHANT BANK LIMITED RE-
SPONDENT

COMPANY LAW - *Directors - Though empowered to act on behalf of the company - There are occasions when the company can act for itself.*

COMPANY LAW - *Directors - Locus standi - Motion brought on behalf of board of directors - Is incompetent - Seeing that a provisional Liquidator has been appointed - And no leave was obtained.*

COMPANY LAW - *Liquidators - Whether - There is no difference between a liquidator and a provisional liquidator - Under ss. 422 and 423 of CAMA.*

COMPANY LAW - *Liquidators - Appointment of a provisional Liquidator - Removes the powers of directors - Save leave of court is obtained.*

FACTS

The licences of the respondent bank and another bank was revoked by the governor of the Central Bank of Nigeria and the Appellant was appointed their provisional Liquidator vide s. 38 (3) of the Banks and Other Financial Institutions Decree No 21 of 1991 (BOFID). The Respondent challenged the exercise of the CBN's power and prayed the court to wind it up under the provisions, of the Companies and Allied Matters Act 1990 (CAMA) as amended by s. 38 (4) of BOFID. The Appellant brought an ex-parte application for an order to advertise the petition filed for winding up. The application was granted.

The Respondent brought an application to have the petition struck out on the ground that the Federal High Court Lagos has no jurisdiction, as the petition was not brought by the proper party. The trial judge dismissed the Respondent's application, holding that the petition was competent. Respondent's appeal to the Court of Appeal was allowed. Being dissatisfied the Appellant has now appealed to the Supreme Court raising three issues, which the apex court narrowed down to a single issue.

ISSUE FOR DETERMINATION

Whether in view of the relevant provisions of CAMA and BOFID the Appellant by virtue of its appointment has the power and legal standing to file a petition for the winding-up of the Respondent.

HELD (Unanimously allowing the appeal per lead judgment of **UWAIS CJN**)
No difference between a liquidator and a provisional liquidator

1. Although the heading to Section 422 deals with the appointment of a liquidator simpliciter yet subsection (2) thereof provides for the appointment of a provisional liquidator. It seems to me, therefore, that the provisions of subsection (9) are applicable to both a liquidator and a provisional liquidator. I am strengthened in this view by the Statement on page 474 of Company Law and Practice in Nigeria by Dr. J. O. Orojo, 3rd Edition, that a provisional liquidator has the same power as a liquidator under section 423 of CAMA to take into his custody or under his control all the property of the company to which he is a provisional liquidator. (p. 931 D)

Appointment of a provisional liquidator

2. It follows, therefore, that on the appointment of a provisional liquidator the directors cannot exercise any of their powers unless the court grants them the leave to do so. (p. 931 F)

Occasions when the Company can act for itself

3. There is, of course a difference between a company and its board of directors. Although in practice the latter is empowered to act on behalf of the former by the articles of association of the company and provisions of CAMA, there are occasions when the company can act without the participation of the board of directors. For instance, the company can under the provisions of Section 63 subsection (5) of CAMA institute legal proceedings in its name and on behalf of itself if the board of director refuse or neglect to do so.
 (p. 931 G)

Directors - Locus standi

4. It is clear, therefore, that the motion on notice was brought not on behalf of the company but on behalf of its board of directors. This is what section 422 subsection (9) of CAMA provides that the directors should not do unless they obtain the leave of the Federal High Court to do so. Since there is no evidence that they obtained the necessary leave, I have no doubt whatsoever that the board of directors acted contrary to the provisions of Section 422 sub-

section (9) in brining the motion. Accordingly, I hold that in this connection the Respondent has no locus standi to bring the motion, as it did, challenging the power of the Appellant and the jurisdiction of the Federal High Court to respectively bring and entertain the petition for winding-up. (p.932 C)

NOTABLE POINT OF INTEREST

BELGORE JSC

1. When the board of directors will become functus officio

Thus, from the moment of the liquidator's appointment, all powers of the Board of the Company are vested in the liquidator and the Board of Directors thus becomes functus officio. (Section 422 (9) Companies and Allied Matters Act). There is hardly any ambiguity in s. 422(2) and s. 422(9) of the Act, the provisions of the later subsection equally applies to provisional liquidator under subsection (2). Once the licence was revoked and the Governor of Central Bank invoked his powers to appoint a liquidator the powers sought to be exercised by the defunct Board or its representative as in this case by Otunba William Olufemi Ajayi are illusory because the Board has become functus officio, Central Bank of Nigeria v. Chief N. A. B. Kotoye (1994) 3 NWLR (Pt. 330) 66. (p. 933 A)

REPRESENTATION

Professor G.A. Olawoyin with Muhammed Akanbi for the Appellant
Bamo Adesanya, Esq., for the Respondent

CASE REFERRED TO

Central Bank of Nigeria v. Kotoye (1994) 3 N.W.L.R. (Part 330) 66

STATUTES REFERRED TO

Banks and Other Financial Institutions Decree No. 25 of 1991 (BOFID) ss. 12, 38 (3)
Company and Allied Matters Act (CAMA) Cap. 59 LFN 1990 ss. 422, 423

BOOKS REFERRED TO

The Law of Receivers of Companies - By Light man & Moss 2nd Ed. pp. 18 - 22
Company Law and Practice in Nigeria - By Dr. Orojo 3rd Ed. p. 474

LEAD JUDGMENT BY UWAIS CJN

This is an appeal from the decision of the Court of Appeal holden at Lagos which reversed the ruling of the Federal High Court sitting at Lagos.

The facts, which are common ground, may be stated as follows:

By Government Notice No. 1 published in the Official Gazette of the Federal republic of Nigeria No. 1 Volume 81 of 21st January, 1994, the licences of the Financial Merchant Bank Ltd. (the Respondent herein) and one other Bank were revoked by the Governor of the Central Bank of Nigeria and the Appellant was appointed their liquidator. The revocation was declared to be in accordance with the powers of the Governor under Section 12 of the Banks and Other Financial Institutions Decree, No. 25 of 1991 (hereinafter referred to as "BOFID"). The reason for exercising the power was given in the Gazette notice to be "the grave financial condition of the banks which culminated in the total erosion of their capital obligations to their depositors and creditors, various action were taken by the regulatory authorities to halt further deterioration, including calls on the shareholders to capitalize the banks which has (sic) failed."

By a deed of appointment, the Governor of the Central Bank, in exercise of his powers under Section 38 subsection (3) of BOFID, appointed the Nigeria Deposit Insurance Corporation (the Appellant herein) as a provisional liquidator to the Respondent. The deed of appointment gave the powers of the provisional liquidator, in addition to those given to it by the Company and Allied Matters Act, Cap. 59 of the laws of the Federation of Nigeria, 1990 (hereinafter referred to as "CAMA"), to be thus:-

"(a) To take immediate possession, and establish control over all the property assets, records and the whole affairs of the bank.

(b) To take or defend proceedings in the name of the bank.

(c) To give valid receipts for all moneys and execute all conveyances, deeds, assurances and things which may be deemed proper or desirable.

(d) To execute and deliver any deeds of instruments and to convey, assign or otherwise assure the properties of which it is appointed liquidator (sic) or any part thereof or any interest therein.

(e) To make and effect all repairs and insurances which are necessary for the protection or improvement of the properties and assets of the bank.

(f) To demand and recover all income or debts due or owed to the bank by action distress or otherwise.

(g) To do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers hereof or derived under any law which it lawfully may or can do as a Liquidator of the bank."

On the 4th March, 1994, the Appellant presented a petition before the Federal High court (Eigbedion, J) praying as follows:-

"(i) That the Financial Merchant Bank Limited may be wound-up by the Court under the provisions of the Companies and Allied Matters Decree, 1990, as amended by Section 38 (4) of BOFID.

(ii) *Or that such other Order may be made in the premises as shall be just.*"

On 8th March, 1994, the Appellant brought an ex-parte application praying the trial court for an order to advertise the petition filed for winding-up in accordance with the provisions of rule 19 of the Companies winding-Up B Rules, 1983, (S.I. 45 of 1983 now Cap. 59 of the Laws of the Federation of Nigeria, 1990). The application sought that the petition be advertised in the Official Gazette of the Federal Republic of Nigeria, one National Daily Newspaper and a newspaper circulating in Lagos State. The application was granted on being heard. Consequently, the petition was advertised in the C issue of the Guardian News-paper of 19th April, 1994. It was then that the Respondent became aware of the petition brought by the Appellant.

On the 26th April, 1994, the Respondent brought an application on notice in the matter asking Eigbedion, J. to make an order -

D *"Staying proceedings and striking out the petition herein on the ground that this Honourable Court has no jurisdiction to entertain same, as it is not brought by the proper party in compliance with Section 410 of the companies and Allied Matters Decree, 1990 and Section 37 and 38 of the Banks and Other Financial Institutions Decree, 1991."*

E After hearing the Respondent's application, the learned trial judge delivered his ruling on 28th June, 1994 dismissing it. Thus holding that the petition was competent and that it was properly before him.

The Respondent felt aggrieved. He, therefore, appealed against the ruling to the Court of Appeal (Kalgo, Ayoola and Pats-Acholonu, JJ.C.A.). In the lead judgment delivered by Kalgo, JCA with which the other learned Justices concurred, the learned Justice held as follows:-

F *"It is very clear to me that with the appointment of the Respondent as provisional liquidator of the Appellant company, all the powers of the directors are determined and the provisions of Section 422 (9) of CAMA are applicable to the situation. This, therefore, means that as soon as the Respondent was appointed a provisions (sic) liquidator of the Appellant by the Governor of the Central Bank under Section 38 (3) of BOFID, the powers of the directors*
G *of the Appellant Company ceased until the Federal High Court orders the continuance thereof. There was no such order made in this case. However, there is nothing in the provisions of BOFID to show that the powers of the directors are automatically transferred to the provisional liquidator. In my view this is where the learned trial judge fell into the trap (sic) and treated the respondent as having 'supplanted the directors' and so acted as the bank itself*
H *in filing the petition under Section 410 of CAMA. This is wrong assumption which is not backed up by any provision of the relevant law. What is more, without the act of the directors, in the circumstances of this case, the bank*

can be wound-up on the application of any or more of the persons or bodies listed under paragraphs (b) - (g) of Section 410 of CAMA, and under Section 38 (2) of BOFID by the Central bank Governor. In any case even if the respondent were to be entitled to file a petition, it can only do so in the name of the bank and not in its own name as provisional liquidator. It would not be right, therefore, to say that because the powers of the directors ceased after the appointment of the Respondent as provisional liquidator, the bank cannot act for itself for the purpose of winding-up of itself and so the liquidator had to take its place. This cannot be so and if it is intended that the provisional liquidator shall have the power to present a petition to wind-up the bank, the law would have said so clearly. It did not say so and such power cannot in my view be implied or presumed, as the learned trial judge did in his ruling now on appeal." (Underlining mine)

In the appeal before us the appellant formulated the following issues for our determination-

"(i) whether having regard to the combined effect of the provisions of Section 38 of BOFID, 1991 and Section 422 of the Companies and Allied Matters Decree 1990, (CAMD), the appellant did not step into the shoes of the Respondent Board of Directors, thereby conferring it with the locus standi to present the winding up petition. (Grounds 1 and 2).

(2) whether the learned Justices of the Court of Appeal were right when they held that the trial Judge was not entitled to look at the totality of the evidence before him in deciding the issue of the locus standi of the Appellant to present the petition for winding up. (Ground 3).

(3) Whether the Respondent had the locus standi to bring the motion on notice dated 25th April, 1994 having regard to the fact that a Provisional Liquidator had been appointed pursuant to the revocation of its banking licence by the Governor of the CBN. (Ground 4)."

While attacking issues Nos. 1 and 3 as not fully encompassing the question raised by grounds 1, 2 and 4 of the Appellant's appeal, the Respondent formulated three issues in its brief of argument, which it contended are the issues that could possibly arise from the grounds of appeal filed by the Appellant. The issues are:-

"1. Whether the locus standi to petition for the winding up of a bank can by implication or inference be acquired by the Appellant in virtue of the provision of Section 38 (3) of BOFID despite the fact that the statutory power in that behalf is not conferred on it by the provisions of Section 410 of CAMD and Section 38 (1) and (2) of BOFID.

2. Whether the learned Justices of the Court of Appeal were right when they held that the trial Judge was not entitled to look at the totality of the

evidence before him in deciding the issue of the locus standi of the Appellant to present the petition for winding up the Respondent Bank.

3. *Whether the appointment of a Provisional Liquidator of necessity (in all cases and especially) in this case, should terminate the power of the board in the name of the Respondent bank to oppose a winding up petition B presented by the Appellant."*

It is significant that although the Respondent attacked the first and third issues formulated by the Appellant no preliminary objection has been raised nor have we been urged to either strike out or discountenance the issues. Be that as it may, I think the main question to be determined in this appeal, C which will encompass all the issues formulated by the parties, is: whether in view of the relevant provisions of CAMA and BOFID the Appellant by virtue of its appointment has the power and legal standing to file a petition for the winding-up of the Respondent.

But before considering that issue it is necessary first to determine the more crucial issue of whether the Respondent, as personified by Otunba D William Olufemi Ajayi who was the Chairman of its Board of Directors, has the locus standi, after the appointment of the Appellant as a Provisional Liquidator, to bring the motion to stay the proceedings in the petition filed by the Appellant.

The Court of Appeal held that on the Appellant being appointed Provisional Liquidator the powers of the directors of the Respondent ceased until the Federal High Court made an order restoring the powers to the directors. Learned Counsel for the Appellant, Professor Olawoyin, submitted that upon the appointment of provisional liquidator, under the provisions of Section 422 subsection (9) of CAMA, the Respondent's board of directors is supplanted by E the provisional liquidator. He argued that since the court below had so found, then otunba William Olufemi Ajayi had no locus standi to bring any motion on behalf of the Respondent. He cited the case of Central Bank of Nigeria v. Kotoye, (1994) 3 N.W.L.R. (Part 330) 66 in support and submitted that the motion on notice brought by the Respondent is incompetent and therefore the whole of the proceedings pertaining to it in both the Federal High Court and F the Court of Appeal, are incompetent and should be struck out.

Replying, Mr. Adesanya, learned counsel for the Respondent, conceded that by both the general law and the provisions of Section 422 subsection (9) of CAMA the appointment of a liquidator, as has been done in this case under Section 38 subsection (3) of CAMA, automatically renders the Board of Directors functus officio because the powers of the Board are assumed by H the liquidator. He, however, contended that the position cannot be the same when the remedy sought by the Board of Directors is to oppose a winding-up petition as filed in the present case by the Appellant. He argued that the provi-

sions of Section 38 subsection (3) of CAMA do not clothe the Appellant with the powers of the Board of Directors of the Respondent since the Appellant is a provisional liquidator and does not have the powers of a liquidator under Section 422 subsection (9) of CAME. He referred to the book - The Law of Receivers of Companies by Lightman & Moss, 2nd Edition at pp. 18 - 22 and the case of In re Union Accident Insurance Co. Ltd., (1972) 1 W.L.R. 640. B

It is true that the provisions of Section 422 subsection (9) of CAMA take away the powers of the directors when a liquidator is appointed. The provisions read -

"(9) If a liquidator is appointed under this Section, all the powers of the directors shall cease, except so far as the court may be order sanction C the continuance thereof."

Although the heading to Section 422 deals with the appointment of a liquidator simpliciter yet subsection (2) thereof provides for the appointment of a provisional liquidator. It seems to me, therefore, that the provisions of subsection (9) are applicable to both a liquidator and a D provisional liquidator. I am strengthened in this view by the Statement on page 474 of Company Law and Practice in Nigeria by Dr. J. O. Orojo, 3rd Edition, that a provisional liquidator has the same power as a liquidator under section 423 of CAMA to take into his custody or under his control all the property of the company to which he is a provisional liquidator. E It follows, therefore, that on the appointment of a provisional liquidator the directors cannot exercise any of their powers unless the court grants them the leave to do so.

It is very clear from the record of proceedings in the Federal High Court that the Respondent, acting through Otunba William Olufemi Ajanyi, F its Chairman, did not obtain the order of that court before bringing the motion on notice challenging the jurisdiction of the court to entertain the petition for winding-up. This violates the provisions of Section 422 subsection (9) of CAMA. **There is, of course a difference between a company and its G board of directors. Although in practice the latter is empowered to act on behalf of the former by the articles of association of the company and provisions of CAMA, there are occasions when the company can act without the participation of the board of directors. For instance, the company can under the provisions of Section 63 subsection (5) of CAMA institute legal proceedings in its name and on behalf of itself if the board H of directors refuse or neglect to do so.**

The question that arises from this is: did Otunba William Olufemi Ajayi act simply on behalf of the company, since it can only act through natural persons, or did he act as a member of the board of directors, whose powers have been suspended under Section 422 subsection (9) on the appointment D

of the Appellant as provisional liquidator? The answer to the question can be found in the affidavit in support of the motion brought on behalf of the Respondent. The affidavit was sworn to by Otunba William Olufemi ajanyi. Paragraph 1 thereof states -

"I. That I am the Chairman of the Board of Directors of the Respondent Bank and have the authority of the said Board to swear to this Affidavit in opposition to the winding-up Petition herein."

The affidavit was sworn to on the 26th day of April, 1994, that was after the appointment of the Appellant on 21st January, 1994 as provisional liquidator of the Respondent. **It is clear, therefore, that the motion on notice was brought not on behalf of the company but on behalf of its board of directors. This is what section 422 subsection (9) of CAMA provides that the directors should not do unless they obtain the leave of the Federal High Court to do so. Since there is no evidence that they obtained the necessary leave, I have no doubt whatsoever that the board of directors acted contrary to the provisions of Section 422 subsection (9) in bringing the motion. Accordingly, I hold that in this connection the Respondent has no locus standi to bring the motion, as it did, challenging the power of the Appellant and the jurisdiction of the Federal High Court to respectively bring and entertain the petition for winding-up.**

In the light of the foregoing, it is futile and unnecessary to consider the remaining issues for determination in this appeal. The result is that the appeal succeeds and it is hereby allowed. Both the decisions of the Court of Appeal and the Federal High Court are hereby set aside. The Respondent's motion on notice in the latter court dated 26th April, 1994 is hereby struck out. There is no order as to costs since the Appellant's expenses as provisional liquidator are chargeable to the funds of the Respondent.

BELGORE JSC

I agree with the judgment of the Honourable Chief Justice of Nigeria that this appeal has merit and ought to be allowed. The liquidator in Companies and Allied Matters Act is clearly defined. Unless a different definition is provided in the law the "liquidator" certainly includes "provisional liquidator". In the absence of any separate definition for "provisional liquidator", all powers of a liquidator are exercisable by provisional liquidator.

On the appointment of a liquidator (whether provisional or substantive) under s. 422(9) of Companies and Allied Matters Act, the subject Company's Board of Directors is automatically supplanted by the liquidator. Thus, from the moment of the liquidator's appointment, all powers of the

Board of the Company are vested in the liquidator and the Board of Directors thus becomes functus officio. (Section 422 (9) Companies and Allied Matters Act). There is hardly any ambiguity in s. 422(2) and s. 422(9) of the Act, the provisions of the later subsection equally applies to provisional liquidator under subsection (2). Once the licence was revoked and the Governor of Central bank involved his powers to appoint a liquidator the powers sought to be exercised by the defunct Board or its representative as in this case by Otunba William Olufemi Ajayi are illusory because the Board has become functus officio, Central Bank of Nigeria v. Chief N. A. B. Kotoye (1994) 3 NWLR (Pt. 330) 66. The only occasion the Board can come in, after the appointment of a liquidator is when the leave of court is sought and obtained. This is clearly stated in s. 422(9) of Companies and Allied Matters Decree as follows:

"9. If a liquidator is appointed under this section, all powers of the directors shall cease, except so far as the Court may by order sanction the continuance thereof."

Otunba William Olufemi Ajayi has not sought leave of Court, nor has the Court suo motu sanctioned the retention of any of the powers of the directors of the bank. It therefore follows he had no locus standi to intervene as he has attempted to do before the Federal High Court. As this issue of locus standi disposes of the necessity to consider other issues, discussion of which will be merely academic, I will allow this appeal. Federal High court was, therefore wrong to entertain the motion in the first place.

I therefore set aside the decisions of the two Courts below; that of the Federal High Court in entertaining the motion and of the Court of Appeal in recognizing the locus of the respondent.

KUTIGI JSC

I have had the opportunity of reading in advance the judgment just read by my learned brother Uwais, CJN. I agree with him that in view of the provisions of section 422 subsection 9 of the companies and Allied Matters Act Cap. 59 Laws of the Federation of Nigeria, 1990, the Board of Directors of Respondent/bank herein had no locus standi, without prior order of court, to bring the Motion on Notice dated 25th April, 1994, having regard to the fact that a Provisional Liquidator had been appointed pursuant to the revocation of its banking licence by the Governor of the Central Bank of Nigeria under Section 12 of the Banks and Other Financial Institutions Decree No. 25 of 1981.

The Federal High Court was therefore in error to have entertained

the motion. The decisions of both the Federal High court and the Court of Appeal will have to be set aside. They are accordingly set aside. The motion dated 25th April 1994 is hereby struck out and this should be the order of the High Court. I will also make no order as to costs.

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ONU JSC

I have had the privilege to read in advance the judgment just delivered by my learned brother Uwais, C.J.N. I agree with him in his consideration of this appeal that in view of the provisions of section 422(9) of the Companies and allied Matters Act, Cap. 59 Laws of the Federation of Nigeria, 1990 (hereinafter referred to as CAMA) the Board of Directors of the Respondent/ Bank herein has no locus standi, without the prior Order of court, to bring the Motion on Notice dated 25th April, 1994, having regard to the fact that a Provisional Liquidator had been appointed pursuant to the revocation of its banking licence by the Governor of the Central Bank of Nigeria under Section 12 of the Banks and other Financial Institutions Decree No. 25 of 1981 (otherwise referred to shortly as BOFID).

For purposes of clarity section 422 sub-section (9) of CAMA provides as follows:-

"(9) If a liquidator is appointed under this section, all the powers of the Directors shall cease, except so far as the Court may be order sanction the continuance thereof."

In the motion on Notice dated the 25th April, 1994 referred to above, the Respondent/Bank had moved the trial Federal High Court pursuant to section 41 of CAMA for an order:-

"Staying proceedings and striking out the petition herein on the ground that this Honourable Court has no jurisdiction to entertain same, as it is not brought by the proper party in compliance with Section 410 of the companies and Allied Matters Decree 1990 and Sections 37 and 38 of the Banks and other Financial Institutions Decree, 1991"

In the affidavit in support thereof, Otunba William Olutfemi Ajayi swore in three succinct paragraphs to the effect, inter alia, that he was the Chairman of the Board of Directors of the Respondent/Bank, opposed to the winding up Petition brought at the instance of the Petitioner/Appellant and that he would be relying on the contents of the said Petition at the hearing of the application. It was sequel to the hearing of this application that led the learned trial Federal High Court Judge to rule, while dismissing the application, that the Petition before him was competent and that it was properly before him. Having regard to section 410 of CAMA (ibid) which stipulates that

"(1) An application to the Court for the Winding-up of a Company shall be by petition presented subject to the provisions of this section either by - (a) the Company; (b) a creditor, including a contingent or prospective creditor of the Company; (c) the official receiver; (d) a contributory; (e) a trustee in bankruptcy to, or a personal representative of a creditor or contributory; (f) the Commission under section 323 of this Act; (g) a receiver B if authorized by the instrument under which he was appointed; or (h) by all or any of those parties, together or separately"

The Federal High Court, in my view, was in error to have entertained the motion asking for stay of the proceedings in the petition for winding-up.

That being so, the decision of the Federal High Court and a fortiori, C that of the court below, cannot be allowed to stand. They are both accordingly set aside while the motion dated 25th April, 1994 is struck out. The same shall be the order of the trial Federal High Court. I too will make no order as to costs.

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IGUH JSC

I have had the privilege of reading in draft, the judgment just delivered by the Honourable the Chief Justice of Nigeria and I entirely agree with the reasoning and conclusion therein reached.

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I do not think there is anything more I can usefully add.

Consequently, I, too, allow this appeal and set aside the decisions of the two Courts below. I subscribe to the consequential orders contained in the leading judgment.

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