

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE

GRENADA

CLAIM NO.GDAHCV2008/0381

IN THE MATTER OF BANK CROZIER LIMITED (IN LIQUIDATION)

-and-

IN THE MATTER OF THE OFFSHORE BANKING ACT 39 OF 1996

-and-

IN THE MATTER OF THE COMPANIES ACT 1994, NO 35

-and-

IN THE MATTER OF THE INTERNATIONAL COMPANIES ACT, CAP 152

-and-

IN THE MATTER OF AN APPLICATION BY GARVEY LOUISON
LIQUIDATOR OF BANK CROZIER LIMITED (IN LIQUIDATION)

Applicant

WRITTEN SUBMISSIONS

It is respectfully submitted that the Claimant is required by to obtain leave
of the Court before applying for the relief sought herein.

Background

1. By way of motion filed on October 7th 2010 the Claimant applied for:

(a) A declaration that the failure by a creditor to prove a debt by the time fixed by a liquidator pursuant to rule 102 of the Companies Winding Up Rules 1909 or as fixed by the Court pursuant to Section 416 of the Companies Act as the case might be, in no way bars that creditor from the subsequent proof of such debt, but merely potentially excludes such creditor from the right to share in or disturb any distribution made up to and including the stipulated deadline, if any such distributions were in fact made.

(b) A declaration that the Claimant be entitled to have its proof of debt filed on or about the 13th day of November 2008, examined by the Defendant pursuant to Rule 103 of the Companies Winding Up Rules 1909.

2. The Defendant opposed the Claimant's application on the ground that the Claimant required the leave of this Honourable Court in order to do so pursuant to the Order of this Court entered July 24th, 2003 (The Winding Up Order).

3. By virtue of an Order of this Honourable Court made on December 20th, 2010 it was ordered *inter alia* that the Claimant file written submission regarding whether the leave of this Court was required pursuant to the Winding Up Order.

4. In purported compliance with the Order of December 20th 2010 the Claimant attempted to surmount the hurdle of obtaining leave by shifting the grounds of its application to sections 399(5) and/or 398(3) of the Companies Act No. 35 of 1994.

Legal Submissions

By virtue of Clause 18 of the Winding Up Order Madam Justice Pemberton ordered:

“All actions, proceedings, and any claims whatsoever and whosoever initiating 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 against the liquidator of the Bank without the leave of this Honourable Court.”

THE COURT'S JURISDICTION TO GRANT THE ORDER APPOINTING A LIQUIDATOR.

It is submitted that the Court exercises its authority to appoint a Liquidator under Sections 380(1) and 391 of the Companies Act No. 35 of 1994.

Section 380 (1) provides:

“On hearing a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or **any other order that it thinks fit**, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the Company have been mortgaged to an amount equal to or in excess of those assets, or that the Company has no assets.”

Section 391 provides:

“For the purposes of conducting the proceedings in winding up a Company and performing such duties in reference thereto as the Court may impose, the Court may appoint a Liquidator or Liquidators.”

The view advanced by the Claimant at Paragraph 30 of its Skeleton Arguments that the requirement of leave constitutes a denial of “its

statute based right to seek accountability from an Officer of the Court by virtue of a provision in the winding up Order” is misconceived.

This view of the Claimant is in complete disregard of the fact that the basis of the grant of the Order is statutory (Section 380 of the Companies Act).

The protection conferred on the Liquidator by the aforesaid Order of Madam Justice Pemberton is intra vires the Companies Act and as a result of the exercise the Learned Judge’s discretion.

THE PROCEEDINGS

“Proceedings” as defined by Section 2 of the Companies Winding-up Rules of 1909 means “the proceedings in the winding-up of a Company under the Act.”

It is submitted that this definition in its normal and ordinary meaning applies to **ALL** proceedings in relation to the Winding up of a company, and by extension the current proceedings which were commenced by the Claimant by virtue of its Motion filed herein on October 7th, 2010, and

intituled In The Matter of Rule 102 of The Companies Winding Up Rules 1909.

This point appears to escape the Claimant as the same is not even dealt with in its written submissions filed in purported compliance with the Order of the Court dated December 20th, 2010.

This, it is further submitted, is evident when one considers the cases which have been cited and relied on by the Claimant in respect of its initial application and on the issue of leave, as not one of these cases deals with a circumstance in which a similar Order as the Winding Up Order. These cases therefore are distinguishable and have little relevance having regard to the peculiar facts of the instant case before this Honourable Court.

Notwithstanding the above submissions, it cannot be denied that application to the Court under Section 398 (3) and 399 (5) upon which the Claimant has suddenly relied on are proceedings within with the meaning prescribed by the Winding up Rules and the Companies Act.

Authority for this proposition can be found in the following cases:

Tanning Research Laboratories Inc. V. O'Brien [1990] H.C.A 8,

where it is stated:

“If the liquidator, in performing his function of considering the admissibility of proofs of debt, decides to reject a proof of debt, the ordinary remedy of the person claiming to be admitted as a creditor is to apply to the court to reverse or modify the decision: Companies Act 1961 (NSW), s.279; r.160 of the Supreme Court Rules 1968 (NSW) promulgated under the Companies Act; see now Companies (New South Wales) Regulations, reg.126(2). The proceedings thus instituted, though often referred to as an "appeal" from the liquidator's decision to reject, are originating **proceedings** which the court hears *de novo*: In **re Bird's Stores Pty. Ltd. (1931) 37 Arg LR 94**; In **re Kentwood Constructions Ltd. (1960) 1 WLR 646; (1960) 2 All ER 655**; In **re Trepca Mines Ltd. (1960) 1 WLR 1273; (1960) 3 All ER 304**. In such a proceeding, a liquidator who defends his decision to reject a proof of debt is no longer acting in a quasi-judicial capacity; he is cast in the role of an adversary, defending the assets available for distribution against a liability which, according to the view he formed when acting quasi-judicially, is not legally enforceable. The liquidator may defend those assets against the creditor's claim on any ground on which the company might have

defended the claim had it been sued by the creditor. If the liquidator relies on those special defences which allow him to go behind a judgment, an account stated, a covenant or an estoppel in order to ascertain the true liability of the company, he is none the less in the role of an adversary. The issue in the proceeding is whether the liability referred to in the proof of debt is a true liability of the company enforceable against it. The issue is contested between the putative creditor on the one hand and the liquidator on the other; the liquidator is a party litigant.”

In **Tang v. Toolsey**, a decision of the Court of Appeal of Hong Kong, the Court at Paragraphs 10 and 11 stated:

“Rule 95 of the [*Companies \(Winding-up\) Rules*](#) provides that if a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the court may, on the application of the creditor or contributory, reverse or vary the decision.

As correctly pointed out by Kwan J, **an application to the court under this provision is a new hearing** to determine to what extent the applicant should be allowed to rank as a proving creditor; the court is bound to decide the rights of the applicant in the light of all the evidence which is before the court, and not

merely to express a view as to whether the liquidator was right or wrong in rejecting the proof on the evidence then available to the liquidator when he rejected it (*Re Kentwood Construction Ltd* [1960] 1 WLR 646 at 647 to 648).

In **Snelgrove v. Great Southern Managers Australia Ltd.** (In Liq.) [2010] WASC 51 at Paragraphs 29 – 30, it is stated:

“Section 471B of the Act is in materially the same terms as its predecessors, s 471(2) of the Corporations Law and s 230(3) of the Companies Codes. In ***Re Gordon Grant & Grant Pty Ltd*** [1983] [2 Qd R 314](#) McPherson J concisely set out the history of s 230(3) of the Companies Codes (316). McPherson J, with whom W B Campbell CJ and Sheahan J agreed, said:

The precise purpose and function of provisions similar to s 230(3) have seldom been explained. From time to time the suggestion has been made that the prohibition exists in order to effectuate the statutory policy of ensuring that corporate assets are distributed rateably amongst all creditors so that none of them will gain an advantage over others: see eg ***Re Sydney Formworks Pty Ltd*** [1965] [NSWR 646](#), 649-650. But in Australia at least it is not often that the institution of proceedings or even the recovery of judgment operates to confer a priority or advantage on a litigating

creditor. A more convincing explanation is that, without the relevant restriction, a company in liquidation would be subjected to a multiplicity of actions which would be both expensive and time-consuming, as well in some cases as unnecessary. This explanation has been accepted in a number of Canadian cases and appears also to have been adopted by Street J in *Re A J Benjamin Ltd* (1969) [90 WN \(NSW\) 107](#), 109. It is consistent with this that there should be no automatic prohibition upon proceedings against a company in members' voluntary winding up, where the company is solvent and therefore less likely to be the target of numerous actions (316 - 317).

The identification of the purpose of s 417B of the Act and s 500(2) is important to enable the court to identify the relevant considerations to be considered in determining whether to grant leave. McPherson J continued in *Re Gordon Grant & Grant Pty Ltd*:

As a matter of history a winding up by the court was, and it remains today, an administration conducted by the court: *Re Phoenix Oil & Transport Co Ltd (No 2)* [\[1958\] 1 Ch 565](#), 370. Both because of this, and because it was before the Judicature Act an administration conducted in Chancery, it was inevitable that

there should be restrictions on the bringing of proceedings, whether at common law or otherwise, during the course of that administration. What is substituted for litigation in the ordinary form is a procedure by which a claimant lodges a verified proof of debt with the liquidator, who admits or rejects it wholly or in part, and from whom an appeal lies to a judge, who determines that appeal de novo primarily on affidavit material: ***Re Kentwood Constructions Ltd*** [\[1960\] 1 WLR 646](#). There can be no doubt that ordinarily such a procedure is, and is designed to be, much more expeditious and less expensive than ordinary proceedings by way of action. If this means that it occasionally has the consequence that the attainment of perfect justice is sacrificed to expedience, it may be justified by the circumstance that on appeal it is possible under modern rules of procedure for the judge in appropriate cases to make orders for discovery and even for the delivery of pleadings where it appears necessary or desirable to do so.

The question whether a claimant should be permitted to proceed by action, or should be required to submit his proof of debt and, if dissatisfied, appeal to a judge, is therefore reduced largely to one of choosing between alternative forms of procedure. The effect of s

230(3) is to require the claimant to adopt the course of lodging proof of debt unless he can demonstrate that there is some good reason why a departure from that procedure is justified in the case of the particular claim in dispute. This is really all that is meant in this context by expressions such as 'convenience' and 'balance of convenience' that appear in judgments on the matter: see, for example, *Re The Queensland Mercantile Agency Company Ltd* (1888) 58 LT 878, 879; *Stewart v Intercity Distributors Limited* [1960] NZLR 944, 946; and cf *Century Mercantile Co v Auckland Provincial Fruitgrowers' Co-operative Society Ltd* [1921] NZLR 272, 276. It, of course, follows that it is quite impossible to state in an exhaustive manner all the circumstances in which leave to proceed may be appropriate, but in the past they have been said to include factors such as the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved, and the stage to which the proceedings, if already commenced, may have progressed (317)."

In light of the foregoing authorities, it is clear that the effect of Paragraph 18 of the Winding-Up Order is to place any Claimant whether against the Bank or the Liquidator in the same position as requiring leave and this is

unlike the situation in Australia where there is a distinction between an action and its substituted proof of debt procedure.

SECTION 398 (3) and 399 (5) OF THE COMPANIES ACT

The reliance of the Claimant on Sections 398 (3) and 399 (5) of the Companies Act is misguided.

The preceding sections to Section 399 (5) namely 399 (1) to (4) allows the Liquidator in the administration of the assets to have regards to directions given by creditors or contributors in a general meeting or by a committee of inspectors summon a general meeting of creditors or contributors, to apply for directions from the Court, allow the Liquidator to apply for directions and empower the Liquidator to use his own direction in the management of the estate and in the distribution among the creditors.

It is submitted that the "act or decision of the liquidator" used in Section 399 (5) refers to acts or decisions referred to in Sections 399 (1) to (4).

It is therefore further submitted that the Claimant's application does not fall within any of the parameters of Section 399 (5) having regard to the preceding subsections

Assuming but not admitting that Section 399 (5) is a stand alone section, it is incumbent on the Claimant to establish that there is an "act or decision of the liquidator" and in respect of Section 398 (3) "any exercise or proposed exercise" of any powers conferred by the Liquidator.

The Claimants position as set out in the Application and particularly in the Skeleton Arguments is that the Liquidator has refused to observe his duty pursuant to Rule 103 of the 1909 Companies Winding up Rules.

This position is set out at Paragraphs 9, 10 and 19 of the Claimant's Skeleton Arguments.

The authorities relied upon by the Claimant all established that it is not merely the failure to act or make a decision that triggers the sections but that there has to be a positive act or decision done or made by the Liquidator.

In **Edenote Ltd.** [1996] 2 B.C.L.C. 389, the issue was whether the assignment made by the Liquidator should be set aside.

Nourse L.J. stated:

“It is therefore plain that the Court can control a past exercise of the powers and can, if appropriate, undo a transaction to which it has led.”

In **Leon v. York v. Matic Ltd and others** [1966] 3 A.E.R. 277, the issue was the sale of seven launderettes which were the property of the Company being wound up. The seven launderettes being assets of the Company were to be sold at an undervalue.

In **Hans Place Limited** [1992] B.C.C. 737, there was an application to set aside a disclaimer of a lease by a Liquidator.

In **Greenhaven Motors Ltd (In Liquidation)** [1997] 1 B.C.L.C. 739, the Court pointed out that there is a need to have an actual decision or act made by the Liquidator.

Haman J. Stated:

“This agreement to compromise proceedings is clearly a power within the terms of this Section, as it clearly is an exercise by the Liquidator of a power conferred by this Section.”

Assuming that an application can be made to the Court as the Claimant did it is respectfully submitted that the onus is on the Claimant to establish that the decision of the Liquidator is wrong in law.

In **Re. Dominion Trust; Critchley's Case (1916) 27 D.L.R. 580**, Macdonald, C.J.A., stated at pages 581-582:

“There are certain things which may be done by the liquidator only with the approval of the Court. They are specifically set out in the Act. There are others which the liquidator is authorised to do, and it is manifest to me that in respect to these the Court cannot control him so long as he keeps within the authority given him. It is idle to speak of the inherent jurisdiction of the Court over its officer where the officer acts in pursuance of authority given to him by statute.”

The Claimant's application to this Honourable Court stems from a Letter sent to the Claimant's Attorney-at-Law by the Liquidator's Attorney-at-Law in which on behalf of the Liquidator the position was communicated

that the purported proof of debt would not be admitted or rejected by the Liquidator as it fell outside of the time for submission of proof by Creditor.

In responding to the Claimant his attention was drawn to Rule 102 of the Winding up Rules. Rule 102 provides that subject to the provisions of the Act, and unless otherwise ordered by the Court, the Liquidator in any winding-up may from time to time fix a certain day, which shall not be less than fourteen days from the date of the notice, on or before which the creditors of the Company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved, and the Liquidator shall give notice in writing of the day so fixed by advertisement in such newspaper as he shall consider convenient, and in a winding-up by the Court to every person mentioned in the Statement of Affairs as a creditor, and who has not proved his debt, and in any other winding-up to the last known address or place of abode of each person who, to the knowledge of the liquidator, claims to be a creditor of the Company and whose claim has not been admitted.”

The Claimant in his Skeleton Submissions dated the 23rd day of November, 2010, relies and bases his application on Rule 102 and Section 416 of the Companies Act.

Rule 103 provides the Liquidator shall examine every proof of debt lodged with him, and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

It is submitted that Rules 102 and 103 of the Winding up Rules are linked and that the duties provided for the Liquidator to discharge in Rule 103 are dependent on the satisfaction and compliance of the positions of Rule 102.

It is submitted that there is no basis established in law or set out in the Claimant's motion that would show that the Liquidator had a duty to accept the purported proof of debt notwithstanding it was submitted late.

The inability of the Claimant to show that the Liquidator acted improperly renders their application misconceived.

A reading of the Claimant's Skeleton arguments and authorities referred to in respect of this point would lead this Honourable Court to conclude that

the filing of a proof of debt after the time fixed is automatic only affecting future distribution.

In re **Mc Murdo Penfield v. Mc Murdo** [1902] 2Ch 684 at 699-700
Vaughn Williams L.J. stated dismissing the submission of a proof in
bankruptcy:

“Now according to my experience of bankruptcy practice, there never has been any doubt as to the right of a creditor, whether he is a secured creditor or whether he is an unsecured creditor, to come in and prove at any time during the administration, provided only that he does by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the Court may think it just to impose; and, of course, in every case in which there has been a time limited for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards, subject to the conditions which I have mentioned, in every such case he can only come in and prove with the leave of the Court. If that is so, leave must be granted upon such terms as the Court may think just.”

In discussing the submission of a proof in administration, Vaughn Williams L.J stated at pages 701-702:

“It is quite true that the effect of the certificate is that the creditor, not having come in within the time limited, has no longer any right to the benefit of the Order or decree without some subsequent Order by the Court, some supplementary certificate, and, in effect, what is being asked for here is a supplementary certificate. I say again that, upon the authorities that have been cited to us, including the authority of Lord Eldon in *Gillespie v. Alexander* 91), it is plain that the right to apply for leave to prove, to put it shortly, out of time is a right which has been recognised again and again in administrations. Under those circumstances, I really do not think that it makes very much differences whether one looks at this proof as if it were carried in bankruptcy or carried in the administration in Chancery. In either case it seems to me that, by the machinery of what is in effect a supplementary certificate, upon proper terms the Court would allow the creditor to come in.”

Romer L.J. at page 705:

“Of course the Court of Bankruptcy would have had power to impose terms, if terms had been necessary, and, in such a case, in the absence of any special circumstances which would render it

unjust to allow the creditor to come in, he would and ought to have been allowed in bankruptcy to come in; and the bankruptcy practice would clearly have allowed him to do so.”

At page 706:

“I will not say that there may not be special circumstances that might justify the Bankruptcy Court in refusing to admit a creditor who came in late; but I have stated what I conceive to be the general rule and practice of the Bankruptcy Court.”

It is submitted that the Claimant’s application is misconceived and bad in law as it cannot be established the Liquidation must accept the proof of debt notwithstanding that time has expired for its filing.

There is no wrong committed by the Liquidator in seeking to act within the confines of the Winding up Rules of Court.

There is the need for first to obtain leave of the Court to file the proof of debt out of time.

There is no application for leave to institute any proceedings against the Liquidator in accordance with the Order of Court.

Respectfully Submitted

.....
MR. ROYSDALE A. FORDE
Attorney-at-Law for the Defendant

.....
MR. SEAN A.M. LEWIS
Attorney - At - Law for the Defendant

This Writtens Submissions of the Appellant/Applicant is filed by Roysdale A. Forde and Sean A. M. Lewis and Messrs. Hannibal & Duncan-Phillip, Church Street, St. George's