

**IN THE SUPREME COURT OF GRENADA AND THE
WEST INDIES ASSOCIATED STATES SUPREME COURT**

(CIVIL)

GRENADA

CIVIL CASE NO. GDAHCV2003/0255

IN THE MATTER OF BANK CROZIER LIMITED

AND

IN THE COMPANIES ACT, NO :35 OF 1994

AND

IN THE MATTER OF THE OFFSHORE BANKING ACT: 39 OF 1996

AND

IN THE MATTER OF THE INTERNATIONAL COMPANIES ACT. CAP 152

Appearances:

Mr. Alban John for the Applicants

Mr. Ian Sandy and Miss Claudette Joseph for the Respondent Official Liquidator

Mr. Michael Sylvester for interested party

2004: April 5, July 2

- (1) **BELLE, J.** On 24th July 2003 Mr. Garvey Louison, FCCA was appointed liquidator of Bank Crozier Limited (In Liquidation) (“the Company”) by an order of Madam Justice Charmaine Pemberton. Mr. Louison states in paragraph 17 of his affidavit sworn on 24th March 2004 the following:

“That for the avoidance of doubt, I state that all progress in the liquidation has been adequately addressed in two reports to the court which I have filed to date and which are matters of public record. Additionally, I have directed inquiring creditors

to the website bankcroziergd.com which is updated regularly and which contains all progress in the liquidation proceedings to date, including both reports which I have laid before this Honourable Court in complete obedience to the Winding Up Order.”

- (2) In spite of this assertion a number of creditors have joined in a “coalition” to have Mr. Louison removed from his court appointed position as liquidator of the Company. It is now the court’s task to determine whether their allegations against the Mr. Louison are justified and how the court should exercise its discretion in the circumstances.

Preliminary Attack

- (3) In this matter however the respondent through his counsel attacked the affidavits of the various applicants submitting that with the exception of affidavits of Oystein Tofte, all of the affidavits of the applicants sworn in support of the application by summons filed on 10th February 2004 to remove Mr. Louison from his position had been improperly executed and were inadmissible as evidence in support of the summons. The respondent’s grounds for this application were that the affidavits were executed outside of the jurisdiction of the court and purported to exhibit certain documents. However the documents were all certified by the Registrar of the High Court in Grenada.
- (4) Counsel for the respondent contended that the Registrar of High Court in Grenada is not competent to certify which documents were presented before the Notary in foreign jurisdictions in which the affidavits were executed, because the Registrar was not present and did not administer the requisite oaths to the deponents. Counsel therefore submitted that this incorrect certifying of the exhibits by the registrar rendered the affidavits fatally flawed and incapable being used in support of the applicants’ summons.
- (5) The court listened to the applicants’ counsel’s response and understood him to be saying that the certificate of the Registrar was used merely to have a system which coincided with the practiced of the court in Grenada. He said that the affidavits of Scott Wilson and Melissa Eaton and indicated that they referred to documents which all bore the stamp of the Notary. In sum he submitted that what is exhibited in the affidavits is partly proof of what had been previously exhibited before the Notary. Respondent’s counsel replied that in some cases it was impossible to determine what had been exhibited before the Notary and he referred to a number of examples.

- (6) In support of his attacks on the affidavits Counsel cited **Halsbury's Laws of England 4th Edition Volume 37 paragraph 958**. The relevant texts in the extract from **Halsbury's Laws**, states that a document used in conjunction with an affidavit must be produced to and verified by the deponent, and remain separate from the affidavit, and must be identified by a declaration of the person before whom the affidavit was sworn. Based on this statement of the rules the applicants' affidavits were defective. However in the same extract from **Halsbury's Laws**, indeed on the same page in the penultimate paragraph one reads that if an affidavits or an exhibit to an affidavit or witness statement does not comply with the relevant rules or practice direction in relation to its form, the court may refuse to admit as evidence and may refuse to allow the costs arising form its preparation but permission to file a defective affidavit or to use a defective exhibit may be obtained from a judge in the court where the case is proceeding.
- (7) In the circumstances the court asked the respondent liquidator's counsel whether any of the documents were new to the respondent or had been seen by his client before. He said "no". I therefore exercise my discretion to permit the applicant to use the defective affidavits and exhibits in the circumstances. Thereafter the court proceeding to deal with the substance of the application.

The Applicants' Grievances

- (8) The affidavits of the applicants basically supported and repeated each other's claims. Mr. Scott Wilson added to paragraph 10 of his affidavit that the liquidator's fees would be excessive and fraudulent if he charged more than \$150 per hour for a senior person or US\$40 for a junior person. But the general claim or allegations against Mr. Louison could be summarized as follows:
- a) That the liquidator has not convened a meeting of creditors pursuant to Rule 115 of the Companies (Winding Up) Rules 1909.
 - b) That the liquidator had failed to file with the Registrar a certified list of all the proofs of debt received by him.
 - c) That the liquidator has failed to keep adequate books and records.
 - d) That the liquidator has not responded to communication from the creditors and where he has done so, his responses have been simplistic and lacking in detail.
 - e) That the liquidator had sold an asset of the Bank by private treaty and has not reported information to the creditors of the said sale.

- f) That the liquidator had failed to disclose specific assets of the Bank, such as furniture, equipment and other real and personal assets, and his plans to dispose of them.
 - g) That the liquidation has refused and/or failed to co-operated with Daryl Sands of PricewaterhouseCoopers, the former controller of the Bank.
 - h) That the creditors have no idea as to the liquidator's billing rate.
 - i) That the liquidation paid himself the sum of EC\$200,000.00 without jurisdiction.
 - j) That whatever reports had been made to creditors had been simplistic and lacking in detail and the creditors remain uniformed and unenlightened about the liquidation process.
- (9) I will deal with those submissions on which there was some argument in sequence. First the applicants submit that the liquidator was duty bound to summon a meeting of creditors pursuant to rule 115 of the Winding Up Rules of 1909 and section 400 (1) and 405 (1) of the Companies Act within 21 days of his appointment or at least within a reasonable period thereafter. They further submitted that given the facts deposed to in the affidavits in support of the application Mr. Louison never had an intention to summon such a meeting. They further argue that since the liquidator could not have kept the sort of records contemplated by section 400 of the Companies Act the liquidator would have been guilty of an offence.
- (10) The Second submission was based on an interpretation of rule 110 of Winding Up Rules which states that every liquidator in a winding up by the Court shall on the first day of every month, file with the Registrar a certified list of all proof, if any, received by him during the month next proceeding, distinguishing such list the proof admitted, those rejected and suit as stand over for further consideration and in the case of proofs admitted rejected, he shall cause the proofs to be filed with the Registrar.
- (11) The concomitant submission was that it is not for the liquidator to ignore creditor's proofs when they are submitted. If a proof is submitted the argument goes, in a form that is not acceptable it is the duty of the liquidator to communicate with the Registrar and the creditors submitting the proof and to state his reason for rejecting it.

- (12) The logical conclusion of the argument is that this alleged failure to communicate on the issue of the proof of debt led to the allegation that the liquidator was ignoring the creditors' communication and made them feel isolated from the whole process of the liquidation and that they have no input or representation in a matter that obviously concerns them. Consequently they have no faith in the liquidator.
- (13) The applicants further allege that the liquidator has not justified his transfer of EC\$200,000.00 from the Bank's funds to the liquidator's account. They argue that the liquidator's explanation that he had to pay utility bills and terminate bank staff was no substantiated by any supporting documentation.

The Liquidator's Response

- (14) For the respondent liquidator it was submitted firstly that rule 115 of the Winding Up Rules does not govern the law in Grenada relating to the convening of meeting of creditors and contributories of the company. The proper law counsel argued was section 399(2) of the Companies Act since that is the law governing the liquidation of Companies generally and not section 152 of the Companies (Consolidation Act) Act 1908, which is referred to in rule 115 of the Companies Winding Up Rules. This latter rules was inconsistent with the Companies Act and Companies Act should take precedence it was argues. Thus the liquidator was not in law required to summon a meeting of creditors as was alleged by the applicants.
- (15) The respondent also denied that he was required to file certified list of proofs of debt received. It was submitted that the law with respect to proofs of debt is contained in section 456 (2) of the Companies Act of 1994. That section proscribed that the rules for proving debt are the same as those, which apply in the law of bankruptcy with respect to the estates of persons adjudged bankrupt. It was further argued that the relevant law in Grenada was the Bankruptcy Act Cap.27 of the 1990 Revised Law of Grenada and the applicable section was section 36 and the second schedule of Bankruptcy Act and neither providing for the liquidator to file a list of proofs of debt as was claimed by the applicants.
- (16) The liquidator also denied that he failed to keep adequate books and records. He put the applicants to proof of this. The liquidator further responded to the allegations summarized in paragraph d, e, f, g and h in his affidavit.
- (17) With respect to (d) Mr. Louison sated that he has at all times responded to the queries of the applicants or directed them to the relevant information which would have addressed their concerns and sent letters to as many creditors as he could address their concerns. He exhibited the standard form of the responses to creditors marked "GL7", "GL8" and "GL9". He also included a letter specifically written to one Eva M Corn marked "GL10".

- (18) Mr. Louison also states that contrary to the allegation summarized in paragraph (e) above the information concerning the sale of the motor car was contained in his first report as liquidator filed with the court on 4th September 2003. By way of detail the liquidator explains in paragraph 13 of his affidavit that he sold the motorcar for a sum in excess of the appraised value that is US\$4,500.00 versus the appraised value of EC \$8000.00.
- (19) With regards to the allegations that the liquidator refuse to cooperated with Mr. Daryl Sands, Mr. Louison deposed in paragraph 18 of his affidavit that Mr. Sands had consistently sought to obstruct him in the performance of his duty and that Mr. Sands had presented himself to be a possible liquidator of the company but was rejected by the court because it was found that he had a conflict of interest having been the controller of the company and having also been sued by Carla Bella Limited, and by Grenville-Winslow Philips controller of Bank Crozier international Limited.
- (20) In the subsequent paragraph 19-23 the liquidator describe various problems involving Mr. Sands which he characterized as “obstructing” him in the performance of his duties. The Liquidator also provides the answers to (g) in paragraph 26 of his affidavit where he states that he has been billing at the rate of US\$200.00 per hour, and that he has imposed a ceiling in respect of his billing so that in any one month his billing would never exceed US\$10,000.00. He observes that he would have answered this question on request.
- (21) In paragraph 24 and 25 of his affidavit the liquidator states that the sum of EC\$200,000.00 was never paid to him as fees but simply a transfer of funds from one of the liquidator’s account to another.

Scott Wilson

- (22) A person who claims he is a creditor, Mr. Scott Wilson has filed a reply to the liquidator’s affidavit of 25th March 2004. I have read Mr. Wilson’s affidavit and compared it with the comments made by in the liquidator’s affidavit. I have not seen anything in the to affidavits which changed my final position on the law and facts of this case. Indeed I observe ample reason for the liquidator to treat Mr. Wilson’s claims with some suspicion. I will deal with one example.
- (23) Mr. Wilson as a director of the 23 companies that have made claims under his directorship must know that a liquidator need not accept that he has proven his status by a mere assertion. Companies usually function according to law, found in municipal statues and the bye-laws of the company. The appointment of a director is usually made in resolution and lists of directors and members may be compiled and certified by the company’s secretary. It is therefore not extreme behavior for the liquidator to reject his assertions of directorship and it is fair for the liquidator

to seek to question Mr. Wilson based on the assertion in the letter from Peter Johansson to Cora Felix the company's office manager that Wilson had been appointed a director and treasurer of the Bank. Mr. Wilson has denied this association with the Bank and it may be that these appointments never took place. But the background to it needs to be investigated by the liquidator.

- (24) There is nothing else in the Wilson / Louison exchange which requires special mention. However I note that it is this kind of problem, which understandably makes it difficult for the liquidator to respond to some claims. If claims require investigation, and he need not report the progress of such an exercise in detail since such a disclosure would alert the person being investigated. The tactics and strategy involved have to be left to the discretion of the liquidator in the circumstances; As long as that discretion is exercised reasonably there should be no cause for legitimate complaint.

The Law

- (25) Having traversed the allegation of the applicants and the respondent's responses the scene is set for the analysis of the applicable law.
- (26) The applicants submit that the liquidator was obliged to hold a meeting of creditors within 21 days of the date of the winding up order. This on the face of it sounds extreme especially in circumstances where the creditors may be found in various parts of the world. I am satisfied having pursued The Companies Winding Up Rules that this rule 115 does not have any application to the law of Grenada. It must be said that these rules should be read *mutatis mutandis*, "or so far as the same are applicable to local circumstances" (see section 2 of Cap.58 (A) of the 1990 Revised Laws of Grenada) since they were designed to be subsidiary to The Companies Consolidation Act, 1908 rather than the Companies Act 1994 of Grenada. It should also be pointed out that the Companies Act 1994 contains the primary provisions governing the summoning of general meetings. That section is 399 (2) of the Companies Act 1994.
- (27) The section reads:

"The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall summon meetings at such times as the creditors or contributories, by resolution either at the meeting appointing the liquidator or otherwise, direct, or whenever requested in writing to do so by not less than one-tenth in the value of the creditors or contributories."

- (28) Having determined that this is the applicable law, I must examine these provisions to see whether the liquidator may indeed be compelled to hold a meeting of creditors in twenty one days. It is clear that the section does not mandate any such meeting. The use of the word “may” is also an indication that the decision to hold a meeting is at the discretion of the liquidator. But furthermore part of this provision is relevant to a situation where the liquidator is appointed in a meeting. This is not the circumstance of Mr.Louison. Mr.Louison was appointed by the court. Secondly we do not know what fraction of the proven creditors are represented by the applicants in this suit, and while the liquidator is assessing their various claims it is open to him to make determinations as to the genuineness of their claims. In the final analysis, at this stage in the process, the court is not willing to upset the liquidator’s discretion with regard to a determination whether to hold a meeting of creditors.
- (29) I also conclude that the claim that the liquidator is obliged to file a certified list of all proofs of debt received by him is unfounded. Counsel for the liquidator is correct when he cites section 456(2) of the Act as the source of the relevant law in this regard. This section directs us to the Bankruptcy Act Cap 27 Revised Laws of Grenada, which in turn at section 36 provides that “with respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the Second Schedule, the rules in that Schedule shall be observed.”
- (30) The rule which comes closest to required that a list of proof of debts be provided is rule 7 of the Second schedule and that states that “every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first meeting and at all reasonable times.” Indeed the mechanics of this service to the creditors have to be worked out by the liquidator. There is no rule that the liquidator must file a list of proofs of debts with the Registrar. Again this rule has nothing to do with rule 110 of the Winding Up Rule of 1909, which is to be applied *mutatis mutandis* since its parent Act is the Companies (Consolidation) Act of 1908 and not the Companies Act of 1994/
- (31) There are two other issues which can be settled once and for all as matters of law. These are the issue of the sale of an assets namely the motorcar and remuneration of the liquidation. Dealing with the first matter it is patently clear that the liquidator has the power to sell assets of the Company. Section 398(2)(a) of the Companies Act of 1994 provides that “ the liquidator in a winding up by the court may sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person to sell the same in parcels.”

- (32) I also note that paragraph 10 of the order appointing the liquidator, authorizes the liquidator to do a number of things including the realization of the assets of the Bank for any purpose pursuant to the order. I do think that selling a motor vehicle falls squarely within the category covered by this paragraph of the order. Therein should therefore be no legal reason to object to the sale and, liquidator has adequately accounted for the money obtained on the sale.
- (33) It is instructive that the framers of the Act did not create any letters on this lower because the Act does not provide that the liquidator should have the sanction of the court or the committee of inspection in selling assets. I also find that the liquidator informed the creditors of the sale in paragraph 43 and 44 of his first report. He also spoke to the disposal of fixed assets.
- (34) As far as the liquidator's remuneration is concerned, I think that this is a matter which has been adequately dealt with by the liquidator. Notwithstanding the Mr. Scott Wilson's assertions in relation to the liquidator's fees I do not have any evidence that the liquidator's stated hourly rate is fraudulent or extortionate.
- (35) As to allegations with regard to the transfer of the EC\$200,000.00 I accept the liquidator's explanation of his actions and refer the parties to section 401 of the companies Act of 1994 which governs the manner in which the liquidator should handle the company's funds. If the creditors have evidence of a breach or breaches of this section then they are entitled to complain. But again I have no reason to doubt the liquidator's explanation of this incident without more.
- (36) The other issues raised by the creditors are matters of fact which must be proved on a balance of probabilities. Poor communication for example is a matter, which is affected by subjectivity. In the circumstances an allegation such as this may be based on high expectations or misunderstandings of the law. In this case there is a little bit of both. The court is not powerless in ensuring that communication takes place and the relevant provisions of the Act should be utilized if necessary to ensure that the need in this regard is satisfied or is at least met by a reasonably adequate response. I will treat with that subject again when I deal with the remedy, which I intend to impose.
- (37) I must state at this point that the applicants' allegation that the failure to call a meeting of creditors' means that there must be a failure to keep books and records is a non sequitur. I do not see what one has to do with the other. But this is in my view another indication of expectations based on erroneous views of the discretion available to the liquidator in the exercise of his duties. There is therefore a view

formed that there can be no exercise of discretion, only failure to perform. But there is not factual basis for this view.

(38) The case law on the issue of the removal of the liquidator provides that the court has discretion in the final analysis to decide whether to remove a liquidator from office if “just cause” is shown. Of course the first thing the applicants must achieve is a determination that there is “just cause” for the removal of the liquidator. There is ample legal authority on this matter. A good starting point is the case **Nam Tai Inc v David Hague (Court of Appeal) [2001] ECSJ NO.184**. This is a decision of the Eastern Caribbean Supreme Court, Court Appeal delivered by Matthew JA. The alleged misbehavior in the case was bias, and conflict of interest. The court agreed with the determination of Benjamin J that the Liquidator David Hague had done nothing wrong. This was in spite of his finding that there were no Chinese walls at PricewaterhouseCoopers Hong Kong to prevent leakage of information from one department of that accounting firm’s office to another, possibly causing breaches of confidentiality and conflict of interest. However Mr. Hague the Official liquidator in that case was not responsible for this. In making their decision the Court of Appeal approved the application of the principles enunciated in **Johnson and Dinnan v Deloitte & Touche A.G. 1997 Cayman Island Law Reports** a decision of the Cayman Island Court of Appeal where the process of legal reasoning fitting to a decision such as this was explained.

(39) In the **Johnson and Dinnan v Deloitte & Touche** Georges JA states at page 145 of that report:

“A review of the cases establishes that the process of resolving an application for the removal of a liquidator raises three stages: (a) Does the appellant have the locus standi to apply? (b) Has due cause been shown and (c) If such cause has been shown, should the court exercise its discretion and remove the Liquidator? The issue as to whether or not due cause has been shown and whether the discretion should be exercised are far more frequently canvassed than the issue of standing. The issue is often uncontroversial, the application being usually made by a creditor or contributory.”

(40) In this case the locus standi of the applicants has not been challenged it is presumed that some of them do have locus standi otherwise the liquidator would have challenged the entire action on that basis. But it is left to be determined whether the applicants have shown due cause. In my view this point is addressed in the case **Re: Edennote Ltd: Tottenham Hotspur plc & Ors v Ryam & anr [1996] NLOR No.3497** where the test applied was that the liquidator must act in the interests of the general body of creditors and should not continue in office if in the circumstances the creditors no longer had confidence in his ability to realize the

assets of the company to their best advantage and to pursue claims with due diligence. However there is an important qualification which is that the creditors' loss of confidence must be reasonable. Secondly the court does not easily remove its own officer and will, amongst other considerations, pay a due regard to the impact of a removal on his professional standing and reputation.

- (41) With regard to the acts of the liquidator the test laid down in **Re Eden** was that the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it.
- (42) The applicants submit that in **Re: Keypack Homecare Ltd . [1987] ch 409** the liquidator was removed for failing to display sufficient vigour in carrying out his duties as liquidator. But in that case the issue was one of the liquidator's failure to pursue legal remedies against certain directors of the company who had been able to use the stock of the wound up company to start another company on the same premises, purchasing the stock at a forced sale price. Additionally the liquidator has failed to investigate the circumstances in which sums due to creditors doubled while value of stock drastically decreased. In this case the liquidator was also appointed by a meeting of creditors and contributories in a voluntary winding up and his appointment had been opposed by a significant number of creditors. I do not see any parallel issue in this case. Indeed it seems that the phase of investigation of creditors' claims and the demise of the company is still in progress and some of the creditors of Bank Crozier themselves may be under investigation.
- (43) Counsel for the Applicants also referred the Court to the dictum of Sir R.Malins, VC in **Re Marseilles Extension Railway and land Company 1867[L.R. IV] Eq.692**. In that case Vice Chancellor Malins said that he was satisfied that it is a serious and valid objection to their efficiency as liquidator' that a considerable number of the creditors are opposed to their continuance. Counsel argued that this reasoning should be applied to this case. Again this was a case of a voluntary winding up and at the end of the day the court did not remove the liquidator because there was evidence of significant opposition to such a move. We have not seen evidence of any opposition. But as I said before there is no clear evidence of the fraction, which the 42 applicants in this case represent in terms of the proportion of the value of the total sums due to creditors of the total number of creditors. One of the reasons of this is that they first have to be established as creditors. This is put in question by the situation with Scott Wilson who claim to represent 23 creditors but could himself be an agent of the Company. This has to be investigated.
- (44) Counsel for the applicants also referred to the case of **AMP Enterprises Ltd (t/a Total Home Entertainment) v Hoffman and another 2002 All ER (D) 393 (Jul)**.

I do not find that this case takes the arguments any further; based on the facts we have before us relating to the allegation made against the liquidator and his response to those allegations.

- (45) I agree that a situation such as which the applicants in this case describe with regard to poor communication calls for a remedy. But as I have set out above the applicants' fears are not reasonable at this time, based on the objections which have been articulated, since they have no basis in law and are mainly fickle as factual objections. This does not mean that the court feels that the situation is totally happy one. But the failure to establish the validity of the many complaints does impact upon the question whether "just cause" has been shown whether the court will exercise its discretion to remove the liquidator from his office.
- (46) I do not accept that there is just cause to remove the liquidator based on the complaints which have been made. I have therefore no reason to exercise my discretion to remove the liquidator since I do not find it have been demonstrated that the liquidation of the company would benefit from the liquidator's removal, and there is no other just cause.
- (47) But the applicants asked for action with regard to the calling of a meeting of creditors. While this may be desirable in an ideal situation, I do not believe that such an action is necessary in the circumstances and the cost of such a meeting to the estate may be unnecessarily high. Secondly I have no evidence that these forty-two applicants represent the required one tenth of creditors of the company since a number of them represented by Scott Wilson are challenged by the liquidator. I therefore would not order the liquidator to call a meeting of creditors. However the liquidator may want to consider some means of responds to correspondence from legitimate creditors. I therefore order that the liquidator should within one month of the date of this order provide the certified creditors with a list of proofs of debts, which have been received so that all of the creditors can have an idea of the volume and authenticity of other creditor's claims. I am satisfied that this remedy would be in keeping with the intent of rule 7 of the Second Schedule to Bankruptcy Act Cao.27 of the 1990 Revised Laws of Grenada. The court will permit the liberty to apply for a variation of that order if necessary.
- (48) The application to remove the liquidator is therefore dismissed with costs which should be paid by applicants in the circumstances. These costs would have to be taxed if not agreed since this application does not fall under CPR 2000.

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Francis H V Belle
High Court Judge