

GRENADA

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

CLAIM NO. GDAHCV2003/0228

BETWEEN

IN THE MATTER OF
GRENADA INTERNATIONAL FINANCIAL SERVICES AUTHORITY ACT 26 OF 1999

AND

IN THE MATTER OF
THE OFFSHORE BANKING ACT 39 OF 1996

AND

IN THE MATTER OF
AN APPLICATION BY BANK CROZIER INTERNATIONAL LIMITED

BETWEEN

GRENVILLE WINSLOW PHILLIPS
CONTROLLER OF BANK CROZIER INTERNATIONAL LIMITED

Claimant

AND

DARYL SANDS OF PRICE WATERHOUSE COOPERS
CONTROLLER OF BANK CROZIER LIMITED (IN LIQUIDATION)

AND

GARVEY LOUISON, LIQUIDATOR
BANK CROZIER LIMITED

Defendants

Mr. Seenath Jairam SC, Stephen Singh and Ms. Sheila Harris for the applicant.
Mr. Anthony Astaphan S.C and Mrs. Celia Edwards for the Bank Crozier Limited in
Liquidation
Mr. Sean Lewis for the Liquidator, Mr. Garvey Louison

2005: December 16
2006: January 17

RULING

- [1] **BAPTISTE, J:** This is an application by Daryl Sands for an order that (1) he be granted leave to proceed with this action pursuant to section 386 of the Companies Act No. 35 of 1994; and (2) the consent order dated the 24th of November 2005 be vacated or discharged, or alternatively, be suspended or stayed pending the determination of this claim as well as all related claims/actions in which he is sued as Controller of Bank Crozier Limited. The application is supported by the affidavit of Daryl Sands. The background facts taken from the affidavit of Mr. Sands show that he was appointed Controller of Bank Crozier Limited (the Bank) on July 31, 2002, by the Minister of Finance, under section 20 of the Offshore Banking Act, 1996. His appointment was extended until August 14, 2003. During his tenure as Controller, three actions were filed against Mr. Sands, including Suit No. 2003/0028 wherein Grenville Winslow Phillip, Controller of Bank Crozier International Limited (BCIL) obtained an injunction against Mr. Sands as Controller, prohibiting him from removing from the jurisdiction US \$3,500,000 of the Bank's assets.
- [2] On July 24, 2003, the Bank was ordered to be wound up and Garvey Louison was appointed its liquidator. On August 22, 2003, an order was made that RBTT (Grenada) Ltd. (RBTT) allow the Liquidator access to accounts opened in the Liquidator's name subject to the Liquidator maintaining a deposit of US\$5 million until the discharge of the injunctions in two of the claims.
- [3] On October 30, 2003, Mr. Sands applied to the High Court pursuant to section 398 (3) of the Companies Act, 1994, for directions and orders concerning, inter alia, his obligations in terms of the BCIL injunction, his entitlement to indemnification by the estate of the Bank and his ongoing security interest in the assets of the Bank in support of such indemnity. The application was dismissed by Pemberton, J. on 17th November, 2003. The matter is on appeal.

[4] A consent order was entered in this matter between BCIL and the Liquidator, incorporating a settlement between them. Mr. Sands contends that no notice of the application nor affidavit setting out the grounds on which the consent order was being entered was served on him or his counsel. No order was made for his removal as a party nor was the Liquidator ever substituted as a party to this action, although the Liquidator is aware of his claim, which is the subject of an Appeal.

[5] I now consider the grounds of the application.

Ground (i)

That pursuant to section 386 of the Companies Act all actions against a company in liquidation are stayed. Accordingly, this action/claim was stayed automatically when the Bank was put into liquidation. A party wishing to proceed must obtain leave/permission to proceed with the action/claim and neither the liquidator nor any other party to the action/claim has obtained leave/permission to proceed under section 398 of the Companies Act. The said Consent Order is accordingly null, void and/or of no effect and ought to be set aside.

Section 386 states:

"When a winding up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.

[6] Mr. Jairam S.C argues that all proceedings against the Bank have been stayed and any reactivation of the claim requires leave of the court. No leave having been obtained to continue with the action prior to the filing of the consent order, the consent order is bad and ought to be set aside without more. Mr. Astaphan, S.C, contends that section 386 does not apply to the Liquidator and leave was not required once the Liquidator decided to continue with the claim. Mr. Astaphan argues that the liquidator and no one else had the standing to invoke section 386; and the Liquidator has not objected to the claim of BCIL on the ground that leave was not granted. Mr. Astaphan, SC, further contends that assuming leave were required, it is a fundamental rule of law that once parties have taken part in the

proceedings they cannot complain of the absence of leave. Mr. Sands has already taken a step in the proceedings with full knowledge of section 386. Mr. Astaphan, S.C, referred to section 398 of the Act and submitted that the statutory power to compromise or make arrangement is distinct from the power to bring or defend proceedings. The court gave its consent to that agreement by agreeing to the terms of the consent order.

- [7] In a winding up by the court, the Liquidator may, with the sanction of the court, make any compromise or arrangement with creditors or persons claiming to be creditors [Section 398 (1) (a)]. The liquidator may also, with the sanction of the court, bring or defend any action or other legal proceeding in the name and on behalf of the company [S. 398 (1) (a)]. Clearly the statutory power vested in the liquidator to make compromise or arrangement is different from the power to bring or defend an action or legal proceeding, they are both different concepts. In terms of section 386, I do not consider the consent order and settlement contained or incorporated therein to be an action or proceeding, proceeding against the company, neither can it be said to be an action or proceeding commencing against the company. Therefore, no leave was required. What was required was the sanction of the court for making the compromise or arrangement The court gave its sanction. The ground based on lack of leave, therefore, fails.

- [8] Ground (ii)

That the payments contemplated by the said consent order herein constitute a fraudulent preference within the meaning of section 458 of the Companies Act in that such a payment prefers one creditor, the claimant, Bank Crozier International Limited, over other creditors of the Bank (one of whom is the Applicant).

Section 458 (i) states:

"Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference or a fraudulent conveyance, assignment, transfer, sale or disposition, shall, if made or done by or against a company, be deemed in the event of its being wound up, a fraudulent preference of its creditors, or a fraudulent conveyance, assignment, transfer, sale or disposition, as the case may be, and be invalid accordingly."

[9] The judgment of Pemberton, J. in Civil Suit No. 2003/0255 **Daryl Sands Controller of Bank Crozier Limited and Garvey Louison Liquidator of Bank Crozier Limited** places insuperable obstacles in Mr. Sands path, essentially thwarting his reliance on the fraudulent preference provision of section 458. Pemberton, J found that there was no evidence before the court that Mr. Sands had performed duties whether as Controller or otherwise. Further, there is no indication of the date of the performance of the duties, the rate of remuneration for his services, how many or much of his bills or invoices have been satisfied and what remains outstanding. The court was in the dark as to the Bank's alleged indebtedness. Finally Pemberton, J stated that on a scrutiny of the law and evidence, there was nothing to classify Mr. Sands as a creditor or a contributor. In my judgment, in view of the clear finding that Mr. Sands is not a creditor, he cannot invoke the fraudulent preference provision of section 458.

[10] It may be instructive to pay regard to the case of **Re T. W Cutts (a bankrupt), Ex p. Bognor Mutual Building Society v Trustee in Bankruptcy** [1956] 2 All E.R. 537 at p. 546, where Jenkins, L. J said.

"Lastly it is clearly established by the authorities that inasmuch as preference implies selection and selection implies freedom of choice, a payment must in order to constitute a preference be voluntarily made, and that a payment made under pressure e.g. in the shape of proceedings actual or threatened by the creditor concerned or fear of such proceedings is not for this purpose, a voluntary payment."

Although Jenkins L.J gave a dissenting judgment, his statement is an accurate reflection of the Law. The settlement in the instant case clearly arose out of legal proceedings, thus posing another obstacle in the way of Mr. Sands

Mr. Astaphan S.C, pointed out that the settlement in this case arose out of legal proceedings. There is no debate that BCIL is a creditor. Mr. Astaphan argued that the clear intent in the instant case was to settle the claim in the face of threatened proceedings. Mr. Astaphan submitted, and I agree, that there is no evidence of any intention to make a fraudulent preference over Mr. Sand's. The court found that he was not a creditor.

[11] Ground (iii)

That the payments contemplated by the said Consent Order is contrary to section 448 of the Companies Act, in that such payment does not allow for equal satisfaction of the liabilities of the Bank.

Section 448 states:

"Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities equally, and subject to that application, shall, unless the articles of the company otherwise provide be distributed among the members according to their rights and interests in the company."

Mr. Sands cannot rely on section 448 because he does not fall within the purview of the section. Mr. Sands has not established any liability on the part of the company toward him. The judgment of Pemberton, J is pellucid.

[12] Ground (iv):

That the Consent Order is flawed and made without authority in that it purports to disregard an Order made by Benjamin, J on the 22nd of August 2003 in claim No. GDAHCV 2003/0255 whereby it was ordered that the Liquidator maintains or deposits the sum of USD 5,000,000.00 until the discharge of the injunction in High Court Suit GDAHCV2003/220 and Suit GDAHCV2003/228 and that the Applicant ought to have been given notice as to the related Application and the terms of the said Consent Order as the Applicant is a proper party to this action Suit GDAHCV 2003/228.

[13] The grounds for setting aside a consent order fall into two categories: (1) cases in which it was alleged that there was at the date of the order, an erroneous basis of fact, e.g misrepresentations or misunderstandings as to the position or assets, and (2) cases in which there had been a material or unforeseen change in circumstances after the order, so as to undermine or invalidate the basis of the consent order, and known as a supervening event. Per Bracewell J in *S v S* [2002] All E. R (D) 58. It cannot be said that the present case falls into either of the categories. Further, we have seen that the Liquidator is

statutorily empowered to make any compromise or arrangement with creditors. [S.398 (1) (e)] The liquidator, in a winding up by the court, may do all such other things as may be necessary for winding up the affairs of the company and distributing its assets [S.398 (2) (h)]. It is also noted that Mr. Sands' appointment as Controller lapsed by operation of law upon the appointment of Mr. Louison as Liquidator under the winding-up order. As pointed out by Mr. Astaphan, Mr. Sands therefore had no authority to do anything relating to the case. In the circumstances it cannot be said that the Consent Order is flawed or was made without authority.

Ground (v)

[14] That the signature Peter E. Foster to the settlement agreement referred and attached to and/or incorporated in the said consent is null, void and of no effect, he not being a party to the proceedings/suit, this Honourable Court having denied him leave/permission to be substituted for the claimant, Grenville Winslow Phillips, Controller of Bank Crozier International Ltd. and or having denied him leave/permission to be added as a party to the claim/action.

[15] Again the Liquidator had the statutory power to make any compromise or arrangement with creditors with the sanction of the court. The court gave its sanction. Mr. Foster's signature, in the circumstances mentioned in Ground (v) does not affect the validity of the Settlement Agreement. Ground (v) consequently fails.

[16] Ground (vi)

That the said Consent Order was made without the appropriate consents having been given, including the lack of consent of the Applicant, and as such no order can be made and the court cannot consent on behalf of a party.

[17] Mr. Jairam submits that as a matter of law, Ground (vi) is self evident. Having regard to the matters referred to earlier, e.g. the ability of the Liquidator to compromise or make arrangements; Mr. Sands not being a creditor; Mr. Sands' authority as controller having lapsed by operation of law and there being no dispute that BCIL is a creditor, I am of the view that the Consent Order was made with the appropriate consents; therefore there is no

merit in Ground (vi). Further, I agree that once Mr. Louison was appointed as Liquidator, Mr. Sands had no authority to do anything relating to the case.

[18] Ground (vii)

That the heading and or intituling of the application for the entering of the said Consent Order and the intituling and/or heading thereon is incorrect, wrong, misleading and made or obtained without sanction, leave or permission of the court.

[19] I do not consider that ground to be a proper basis for setting aside or varying the Consent Order. The liquidator is empowered, with the sanction of the court, to make any compromise or arrangement with creditors. That was done in the present case.

[20] Ground (viii)

That under the provisions of the Company Act No 35 of 1994 the said Garvey Louison cannot be a party in his own right and any proceedings by or against a Company in Liquidation is in the company's name. Accordingly, the added defendant should be "Bank Crozier Ltd. (In Liquidation)". The Applicant will rely on Section 397 of the Companies Act.

[21] Section 397 of the Act states:

"Where a Company is being wound up by the court, the court may on the application of the liquidator, by order direct all or any part of the property of whatever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his official name, and thereupon the property to which the order relates shall vest accordingly, and the liquidator may after giving such indemnity, if any, as the court may direct, bring or defend in his official name any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its assets.

[22] It is not disputed that Mr. Louison is the liquidator of the Bank. It is not disputed that the Bank is in liquidation. Mr. Louison as liquidator, with the sanction of the court, may bring or defend any action or legal proceeding in the name and on behalf of the company and may

make any compromise or arrangement with creditors. Mr. Louison has done what he is statutorily empowered to do. I do not, in the circumstances, consider the manner of naming the added defendant to be a proper ground for setting aside or staying the Consent Order.

[23] Earlier I referred to the judgment of Pemberton, J. The said judgment has been appealed against. It is observed that no court order was made staying execution of the judgment, nor was there any undertaking given by the liquidator, not to act on the judgment.

[24] None of the grounds for setting aside, suspending or staying the consent order having been made out, the application is dismissed with costs.


Davidson Kelvin Baptiste
High Court Judge