

What are the Statutory duties and powers of a Liquidator appointed in the context of the Court- ordered winding-up of an international Company which is or was licensed as an Offshore Bank in Grenada, with respect to the summoning and conduct of any meeting of creditors or the appointment and conduct of any committee of inspection?

Many creditors/depositors to the bank have raised the question of the legal duty of the Liquidator to convene a meeting of creditors and to form a committee of inspection. Against his background the Liquidator has obtained a legal opinion from the counsel reporting his position in this matter.

Counsel has advised that the question is best answered by, an examination and an analysis of that various Statutes, which govern such matters (see Appendix1).

In the Opinion of Counsel the combined effect of the various Statutes, leads to the following answer to the question:

(1) A Liquidator has the discretionary power, at any time after his appointment, to summon meetings of creditors.

(2) A liquidator is obliged to call a meeting of creditors upon the written demand of creditors or group of creditors, the value of whose claims exceeds 10% of the sum of all creditors' claims.

Without the concurrence of the liquidator, it is not possible for a creditor or group of creditors to prove that they represent 10% or more of the total value of all claims. In effect, this provision, whilst mandatory, is in practice subject to the liquidator's discretion.

(3) However, any creditor has the right to file objection with the Court against any decision of the liquidator in response to a request for a meeting of creditors. In my opinion, the onus would be on the liquidator to show why such a meeting should not be held.

(4) The only time at which a committee of inspection can be appointed is upon application by the Official Receiver following a "first meeting" of creditors which should have been convened by the Official Receiver immediately after the order for winding-up was made, and before the appointment of a liquidator, and no such "first meeting" was held or can now be held.

(5) A new Offshore Banking Act, No. 13 of 2003, has been passed by Parliament and assented to by the Governor-General. Its commencement date has not yet been proclaimed. If and when it is commenced, it will provide for the winding-up of a licensee company by a “custodian” who will have powers broadly similar to that of a Companies Act liquidator. The new Act, which does not make any provision for meetings of creditors or the appointment of a committee of inspection, supercedes all previous legislation with respect to the winding-up of companies.

## **APPENDIX 1**

### **THE CALLING & CONDUCT OF MEETING OF THE CREDITORS AND THE APPOINTMENT OF A COMMITTEE OF INSPECTION IN THE WINDING-UP OF A GRENADA OFF-SHORE BANK.**

#### **ANALYSIS OF PERTINENT LEGISLATION**

(A) The Offshore Banking Act, No 39 of 1996 as amended.

The Act is relevance only in three respects;

(i) that at Section 5 (a) provides that the holder of a license to engage in Offshore Banking, issued under the Act by the Minister Of Finance must be incorporated or registered in accordance with the international Companies Act, Cap. 152 of the 1990 Revised Laws of Grenada.

For the purpose of this opinion, I assume that the subject offshore bank is so incorporated or registered.

(ii) that at Section 20(8) (d), recalls that the Minister of Finance is given the discretionary authority to revoke that license under certain circumstances, and in the case of a licensee not licensed under the Banking Act, No.40 of 1993, to apply to the court for an order that the business of the licensee be wound up.

For the purpose of this opinion, I assume that the subject offshore bank was not licensed under the Banking Act, No. 40 of 1993, and that the Minister did apply to the Court for a winding up.

(iii) Section 20 (9) of the Act Provides that where the Court orders the winding up of a company under sub-section (4), the provision of the Act with regards to compulsory liquidation shall apply and where those provisions are silent on any matter the provisions of the International Companies Act, Cap. 152 of the 1990 Revised laws of Grenada shall apply mutatis mutandis (meaning with the necessary changes that the context demands) in relation to the winding up of that company.

There is what is perhaps a typographic error in sub-section 20 (9). It refers to “winding-up of a company under sub-section (4)” In fact, sub-section (4) deals with companies, which are also licensed under the Banking Act and sub-section (8) (d) Specifically removes such companies from the authority otherwise granted to the minister to apply for a winding-up. Sub-section 9 as printed is meaningless. In my opinion, if this matter were to be brought before a Court, it might well be that the Court would use its discretion to have sub-section 20 (9) refer back to sub-section 20 (8).

It is noted, although the Offshore Banking Act has been amended several times since 1996, this apparent discrepancy has not been addressed.

The Act does not contain any further provision with regard to compulsory liquidation, and it is therefore necessary to look to the international Companies Act for guidance.

(B) The International Companies Act, Cap. 152 of the 1990 Revised Laws of Grenada, as amended.

This Act provided certain procedures in the case of voluntary winding-up, other procedures in the case of winding-up by order of the Court, and some procedures applicable in both situations.

I proceed on the basis that the subject winding-up is consequent upon an order of the Court.

Section 97 of the Act provides that a company incorporated under the Act may be wound up by the Court under any of the circumstances, in so far as they are applicable to a company incorporated under the Act, in which a company incorporated under the Companies Act, No. 35 of `994 may be wound up by the Court and, in that case, the provision of the Companies Act relating to winding-up apply mutatis mutandis to the winding-up.

(C) The Companies Act No. 35 of 1994 as amended

Section 393, stipulates that the Official Receiver shall upon the winding-up order having been made, summon separate meetings of the creditors and contributories for the purpose of determining whether or not an application should be made to the court for the purpose of appointing a liquidator in the place of the Official Receiver.

In the Liquidation process a Liquidator was appointed by the court as part of the winding-up order and the section 393 meetings were thus not required or summoned.

Referring to section 389 (1), the liquidator is obligated to consider and directions given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection.

Section 399 (2) provide that the liquidator May summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and that he shall summon meetings at the written request of not less than 10% in value of the creditors or contributories.

The mandatory provision requires than the total value of all creditors claims be known, so that the 10% threshold can be established. It would therefore seem that, until the total value is determine and published by the Liquidator, the mandatory provision cannot be relied upon by a creditor or group of Creditors.

However, section 399 (5) supplies that any person who is aggrieved by any act or decision of the Liquidator may apply to the court for rectification. Thus, if any creditor or group of creditors make a written request for a creditors meeting (regardless of whether they represent 10% of the value) and the discretionary provision of section 399 (2) thus being invoked, the creditor (s) would have the right to ask the court to make an order compelling the Liquidator to summon a meeting. Such an application, if supported by evidence of the Liquidator's conduct or apprehended conduct, is likely to succeed, given that the purpose of the relevant sections of the Act are generally directed toward the protection of creditors.

Section 405 of the Act provides that the meeting of creditors and contributories summoned by the Official Receiver under section 393 may determine whether to apply to the court for the appointment of committees of inspection to act are with the liquidator. As has been stated above, it is assumed that the section 393 meeting was never summoned, and subsequently there is no other provision under the Act whereby a committee of inspection can be called for or appointed.

Finally, Section 424 of the Companies Act No. 35 of 1994, provided for the making of Rules for enabling or requiring all or any of the powers and duties conferring and imposed on the court by that Act, the holding and conducting of meetings to ascertain the wishes of creditors and contributories. These Rules, called the Companies (winding-up) Rules, are made by subsidiary Legislation, Cap. 58A of the 1990 Revised Laws of Grenada, which states that the general rules relating to the winding-up of companies in force under the Companies (Consolidation) Act of 1908 (Imperial Legislation) at the commencement of the parent Act which was the companies Ordinance of 1934 shall, so far as the same are applicable to local circumstances and not inconsistent with that Act, apply to the winding up of companies under that Act.

The 1994 Companies Act at section 545 provides that certain provisions of the former Act- being the 1934 Companies ordinance – are continued unless repealed by the 1994 Act. This includes the aforementioned Rules.

#### (D) The Companies (Winding-Up) Rules, 1909

These Rules were made pursuant to the Companies (consolidation) Act of 1908, and are applicable today in Grenada to the extent that they are applicable to local circumstances and are not inconsistent with the current Companies Act.

For the purpose of this opinion, it is assumed that meetings of contributories are not of concern, only meetings of creditors

Rules 115 to 138 stipulate the manner in which general meetings of creditors must be summoned and conducted.

Rules 115 to 120 refer to the meeting described as the “first meeting”. It is required that the Official Receiver hold a meeting of creditors within 21 days after the date of the winding-up order, or if a special manager has been appointed notice within one month after the date of the winding-up order or within such further time as the Court may approve. This is the meeting called for by Section 393 of the Companies Act, No. 35 of 1994.

As Stated above, it is assumed for the purposes of this opinion, that when the Court made the winding-up order, such order included the naming and appointment of a liquidator. There is no provision in the Rules, or in any of the legislation considered above, that requires a Court-appointed liquidator to assume any of the functions or duties of the

Official Receiver. Under the Rules, it was still the responsibility of the Official Receiver to summon the “first meeting” within the specified time. If this was not done and no application has been made to the Court for an extension of the time, then consequently it is now too late for the Official Receiver to call a “first meeting”.

In any event, the Companies Act, No.35 of 1994 restricts the business of the “first meeting” to the appointment of a liquidator (section 393) and the appointment of a committee of inspection.

Rule 121 states that, in addition to meeting directed to be held by the Court, the liquidator may himself from time to time hold and conduct meetings of the creditors for the purpose of ascertaining their wishes. This is the same discretionary powers, as is stipulated in section 399 (2) of the current companies Act. In contrast to Section 399 (2) the rules do not impose any mandatory duty on the Liquidator, in the case where 10% by value of the creditors request a meeting.

Rules 122 to 138 set out the specific procedures for the calling and conducting of creditors meetings. It is understood that this opinion need not touch on such matters.

#### (E) The Offshore-banking Act. No 13 of 2003

This legislation, which repeals and replaces the Offshore Banking Act, No. 39 of 1996, was assented to on 25<sup>th</sup> September 2003. Section 101 provides that the Act shall come into operation on such date as the Governor-General appoints by proclamation. Up to the date of this opinion, no such proclamation has been made.

The Act, if and when commenced, includes at Part VIII, provision relating to the winding-up of a licensee, which will over-ride the provision of the aforesaid Rules, the companies Act, and the International Companies Act.

The new Act will place the court-ordered winding up of an offshore Banking licensee into the hands of a “custodian”, whose duties and powers are broadly similar to those of a liquidator under the Companies Act. However, the custodian is required to deliver, within 60 days after the winding-up order, a statement of account to any depositors or other claimant is recorded in the books of the licensee. A period of 60 days is allowed for objection. 90 days after the last date for objection, the custodian must set out his disposition of the claims, and any claimant then has a further 20 days to file objection for hearing by the Court.

This new Act speaks nothing containing any provision for the summoning or conduct of any meeting of creditors or for the appointment of any committee of inspection.