BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPAEL NO.6 OF 2003

BETWEEN:

IN THE MATTER OF THE COMPANIES ACT CAP 285
and
IN THE MATTER OF THE INTERNATIONAL
BUSINESS COMPANIES ACT CAP 291
and
IN THE MATTER OF A PETITION BY
RBG RESOURCES PLC [IN LIQUIDATION]

Appellant

and

IN THE MATTER OF RBG GLOBAL S.A.

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Brian G.K. Alleyne, SC	Justice of Appeal

Appearances:

Mr. Steven Smith, QC [London]; Mr. Paul Webster, QC and Ms. Reid
for the Appellant
Mrs. Shelly-Williams for the Respondent

2003: October 2, 3;
2004: January 12.

JUDGMENT

[1] ALLEYNE, J.A.: RBG RESOURCES p.l.c. (in Liquidation), the Appellant, hereinafter referred to as RBG, is a public company limited by shares incorporated under the laws of England and Wales with its registered office in London. RBG applied to the High Court without notice for an order that Malcolm Shierson and Andrew Bickerton be appointed Provisional Liquidators of RBG Global S.A., the Respondent, hereinafter referred to as Global, a company incorporated in the

British Virgin Islands under the International Business Companies Act Cap. 291, with its registered office in Road Town, Tortola, British Virgin Islands. Global is the parent company of RBG.

[2] The grounds of the application were that Global was indebted to RBG in the sum of approximately US$121,773.65 which sum remained unpaid. There is some dispute as to whether this debt, or any debt, is owed by Global to RBG. The provisional liquidators have produced some documentary evidence of the debt, as well as of admissions in writing that the debt is owed. The Respondents have raised objection to this evidence, but it is not clear at this point whether the debt is contested bona fide or on substantial ground.

[3] A further ground of application was that the Liquidators of RBG had cause to believe that Global was part of a major international fraud perpetrated against RBG and third party financial institutions throughout the world, by the owners and directors of RBG and their agents, and further that there had been a deliberate destruction and concealment of documents at RBG's London offices, which activities the Liquidators believed had been and would continue to be carried out in respect of Global as well. The Liquidators believed that there was a serious risk that Global's assets would be disposed of or dissipated by the directors and management of Global in order to frustrate the efforts by the Liquidators to gain a proper understanding of the fraud, and to recover RBG's assets.

[4] The order was made, and a hearing on notice was set for 17th September 2002. RBG filed a Notice of Application to continue the said order, and subsequently Global filed an application to set aside the order.

[5] The order was extremely wide in its terms and gave the Provisional Liquidators extensive powers, wider, indeed, than the powers of an official liquidator provided for under section 129 of the Companies Act Cap. 285. It is of interest to note the provisions of section 130 of that Act;

> "130. The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him."

The section does not provide for the expansion of the prescribed powers, either in the case of an official liquidator, or a provisional liquidator.

[6] The learned Judge, on considering the applications to continue and to discharge respectively, set aside the order made without notice appointing provisional liquidators, ordered that the liquidators account for all activities which have taken place since their appointment, and that costs be in the cause. RBG has appealed against this order, upon the grounds that:

[a] The Learned Judge erred in failing to state any reasons for reaching the conclusions that she did, whether by way of analysis of the evidence, the arguments or otherwise. Had a proper analysis been carried out, the learned Judge would have found that there is and was:

(i) no substantial or bona fide dispute over the debt owed by the Respondent to the Petitioner and

(ii) a serious risk that the assets of the Respondent would be dissipated and disposed of.

[b] The Learned Judge erred in law in concluding that the debt was disputed on substantial grounds in that after reviewing the evidence she failed to have any or any proper regard to whether the evidence did reveal a bona fide dispute on reasonable and substantial grounds and to the fact that the Respondent did not adduce any credible evidence as to a bona fide dispute on substantial grounds. In particular the Learned Judge failed to have regard to:

(i) Respondent's evidence containing a clear admission of its debt to the Petitioner and an indication that the Respondent was willing to pay this debt.

(ii) The Respondent's failure to pay the debt to the Petitioner following its admission of it and despite its claim to be solvent.

(iii) The Respondent's failure to adduce any evidence of solvency.

(iv) The Respondent's subsequent denial of the debt in the Second Affidavit of Pradeep Sancheti was merely a bare denial with no evidence of the basis for such a denial.

(v) The Petitioner's evidence showing the movement of funds between the Petitioner and the Respondent and clearly showing a negative balance against the Respondent in the amount of the debt.

[c] The Learned Judge erred in concluding that there was no serious risk that the Respondent's assets would be disposed of or dissipated in that, having reviewed the evidence adduced by the Respondent, she failed to state any reasons for reaching her conclusion, whether by way of analysis of the evidence, the arguments or otherwise. Had a proper analysis been carried out, it would have been apparent that there was and is a serious and substantial risk that the Respondent's assets would be dissipated prior to the hearing of the petition herein.

[d] The Learned Judge erred in concluding that there was no serious risk of the dissipation of the Respondent's assets, thereby implicitly and apparently concluding that the Respondent was not involved in the fraud as alleged by the Petitioner, while failing to have any or any proper regard to the evidence adduced by the Petitioner as to the Respondent's involvement in that fraud. The Learned Judge erred in basing her conclusion that there is no risk of the dissipation of the Respondent's assets solely on the fact that the Respondent was not named as a party to the fraud proceedings in the UK and that the Respondent is not mentioned in those proceedings. In doing so the Learned Judge failed to have any

regard to any of the evidence adduced by the Petitioner in the British Virgin Islands as to the Respondent's involvement in that fraud.

[e] The Learned Judge was wrong in law in finding that because the powers granted by the Order were wider than the powers contemplated by section 129 of the Companies Act, that the said powers were too wide and contrary to law.

[f] The Learned Judge erred in concluding that Viren Rastogi is the majority shareholder of the Appellant having regard to the uncontroverted evidence in the case that the Respondent owns the majority in number of the shares of the Appellant is the ultimate parent of the Appellant.

[g] The Learned Judge exercised her discretion wrongly in refusing to admit into evidence the Third Affidavit of Malcolm Brian Shierson.

[7] In her judgment the learned trial Judge held as follows:

> [51] Having read the various affidavits and listened to the arguments of both Counsel, I have arrived at the conclusion that the alleged debt has to be investigated since it is being disputed on substantial grounds. "It is an abuse of process to present a winding up petition against a solvent Company as a means of putting pressure on it to pay money which is bona fide disputed". [Re: a Company No.0012209 of 1991]. This being so, the debt cannot then be the subject of a winding up petition before this Court, the basis upon which the Provisional Liquidators were appointed.
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> [52] The supporting affidavit of Mr. Shierson was the basis upon which the Provisional Liquidators were appointed. He deposed to "a major international fraud……." and that "there is an urgent need for the appointment of Provisional Liquidators because there is a `serious risk' that Global's assets may be disposed of or dissipated `by the directors and management' of Global (if not already dissipated), and that "RBG's records" may be destroyed in order to frustrate the Liquidators in gaining a proper understanding of the fraud and to recover RBG's assets.
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> [53] The evidence discloses further that the fraud charge was made in England in the High Court of Justice, Chancery Division and that it concerned RBG as Claimant and Viren Rastogi and other members of his family as Defendants.
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> [54] It is of the uttermost importance to note that Global was not a named party nor was its name mentioned anywhere except where shareholdings were

being noted. It therefore cannot be said that there is a serious risk that Global's assets may be disposed of or dissipated.

[55] Based on the above, it is hereby ordered that:

1. The order appointing Malcolm Brian Shierson and Andrew Bickerton as Provisional Liquidators on the 30th July, 2002 be set aside;
2. The Liquidators do account for all activities which have taken place since being appointed by the Court on the 30th July, 2002;
3. Costs be costs in the cause."

[8] In their skeleton arguments, and also in their oral presentations before the Court, Learned Queen's Counsel for the Appellants combined the various grounds of appeal under a single broad head, namely that the Judge asked herself the wrong questions. Counsel addressed the broad issue under three specific heads and submitted that there was a good prima facie case that (a) Global is unable to pay its debts; (b) it is just and equitable that Global be wound up; and (c) even if the powers granted to the provisional liquidators in the interim order are too broad, the remedy is not to discharge the order, but to vary it to provide for appropriate powers within proper limits. I think it is convenient to consider the appeal under these heads.

Global is unable to pay its debts

[9] In her judgment, at paragraph 51, the learned Judge stated her conclusion that 'the alleged debt has to be investigated since it is being disputed on substantial grounds.' The learned Judge relied on Re a company (No.0012209 of 1991)[1] for her conclusion that on that ground the debt cannot then be the subject of a winding up before the Court. The headnote to that case states that:

> 'It is an abuse of process to present a winding up petition against a solvent company as a means of putting pressure on it to pay money which is bona fide disputed, instead of applying for summary judgment under RSC 14, and the court will in those circumstances issue an injunction restraining presentation of the petition …'

[1] [1992] BCLC 865

[10] That case was a case in which an alleged creditor was seeking to place into liquidation a manifestly solvent company on the basis of a claim for a disputed contract debt. Having expressed the view that a failure to pay an undisputable debt is evidence from which the inference may be drawn that the debtor is unable to pay, and that if a solvent company is not putting forward any defence in good faith and is merely seeking to take for itself credit which it is not allowed under the contract, a Court would not be inclined to restrain the presentation of a winding up petition, Hoffmann J. opined that:

> 'if it appears that the defence has a prospect of success and the company is solvent, then … the court should give the company the benefit of the doubt and not do anything which would encourage the use of the Companies Court as an alternative to the RSC Ord. 14 procedure.'

[11] In the present appeal there is (as yet) no application to strike out the petition, and as Learned Queen's Counsel for the Appellant has pointed out, the petition remains on foot whatever happens in the appeal. The issue before the trial Judge was the question of the appointment of provisional liquidators, and the extent of the powers granted to them by the interim order. The petition had not itself come up for consideration by the Court, and still has not.

[12] Learned Queen's Counsel for the Appellant submitted that the proper test to be used is to be found in the case of In re Highfield Commodities[2] in which Sir Robert Megarry V.C, after reviewing a number of the old authorities, said this:

> 'The section (providing for the power to appoint provisional liquidators) confers on the court a discretionary power, and that power must obviously be exercised in a proper judicial manner. The exercise of that power may have serious consequences for the company, and so a need for the exercise of the power must overtop those consequences." (Page 159).

The learned Vice Chancellor illustrated the point by reference to consideration of the case of a well-run and prosperous company thriving on the frauds which it practices on the public. His Lordship declared:

> 'I cannot conceive that it would be right to say that as the company is solvent and no assets are in jeopardy, no provisional liquidator should be

[2] [1985] 1 W.L.R. 149

> appointed unless the evidence of fraud is so strong at that stage that it is clear that the company is bound to be wound up. In such a case it might well be highly desirable to put a provisional liquidator in control so that no more money will be taken from the public. I therefore reject the limitations on the power to appoint a provisional liquidator which (counsel) put forward, and follow the view taken by Plowman J.' (the trial judge).

[13] Having clearly established the principles on which he proposed to act, the learned Vice Chancellor then considered whether in the case before the Court "there is at least a good prima facie case that (the company) will be wound up, and, if so, whether in the circumstances of the case it was right for a provisional liquidator to be appointed, and … whether it is right that he should remain in office." It seems to me that these are the questions which the learned trial Judge had to answer, and the questions we have to answer in this appeal.

[14] Learned Counsel for the Respondent Global, relying on the case of Mann v Goldstein[3], dictum of Ungoed-Thomas J at page 1099, submitted that the appointment of the provisional liquidators should be set aside on the ground that the debt was disputed on substantial grounds. His Lordship ruled that until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court, and that to invoke the winding up jurisdiction of the Court when the debt is disputed on substantial grounds is an abuse of the process of the Court. His Lordship held that it is not the legitimate purpose of winding up proceedings to decide whether a petitioner claiming to be a creditor is a creditor, because the section makes it a prerequisite that he should be a creditor even before he is even entitled to present a petition at all and before any consideration of the company's insolvency can become relevant. Counsel cited also Lympne Investments Ltd.[4] and Stonegate Securities Ltd. v Gregory.[5]

[15] Learned Counsel for the Appellant contended that the rule which the trial Judge applied, that there be no bona fide dispute on substantial grounds about the

[3] [1968] 1 W.L.R. 1091
[4] [1972] 2 All E.R. 385
[5] (1980) 1 All E.R. 241

existence of a debt owed to the petitioner (Re a Company *supra*) is only a rule of practice, and not a rule of law, and can be departed from where circumstances merit a departure. In Re Claybridge Shipping Co SA[6] Lord Denning MR at page 574 expressed the view that a person is a 'creditor' for the purposes of the section under consideration so long as he has a good arguable case that a debt of a sufficient amount is owing to him. He continued:

> "In the Companies Court it appears that a rule of practice has been adopted to the effect that the debt should be undisputed, and that the petition should not go forward if it is disputed. I do not think that is correct. It certainly is not so in regard to the amount of the debt. There is a decision of Plowman J in Re Tweeds Garages Ltd[7]. In that case the amount was not known with any exactness at all. All that was known was that something was due. That was held to be sufficient to justify a petition for winding up."

The learned Master of the Rolls continued, making reference to a rule which is applicable in relation to foreign companies, but which Lord Denning declares may in appropriate circumstances apply also to English companies. He said:

> "In the case of English companies there may be circumstances which warrant a departure from the general rule. The circumstances may show that there is a danger of the assets being removed out of the jurisdiction and put out of the reach of the creditors. Whenever this appears, then it should be sufficient to warrant a petition for winding up that the creditor should have a 'a good arguable case' that the debt is owing and unpaid. I entirely agree that a petition for winding up should not be used as a means of getting in a debt which is bona fide disputed on substantial grounds … But I think the Companies Court should be able to look into the bona fides of the defence. If it is obviously a 'put-up job' – or if it is so insubstantial that a Queen's Bench master would only give conditional leave to defend – then I should think the petition to wind up should stand. In short, I think that the Companies Court should keep the remedy flexible – for the sake of all creditors – so that the assets may not be disposed of or removed by the company before there is a chance of dealing with them."

[16] Oliver LJ. at page 578 cautioned against winding up petitions being used as a means of putting on pressure in cases of genuine dispute, and affirmed the rule of practice that the Court should keep a watchful eye on proceedings which can so

[6] [1997] 1 BCLC 572
[7] [1962] 1 All E.R. 121, [1962] Ch 406

easily be abused. But His Lordship emphasised that the rule is a rule of practice only, and recognised that there may be cases where 'to compel the petitioner to go off to another division of the Court to establish his debt would effectively deprive him of any remedy at all.' His Lordship recognises the facility with which an unwilling debtor may 'raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings.' These observations may well be apropos of this case.

[17] Oliver LJ accepted the invitation of the Master of the Rolls to comment on his observations regarding importing the practice relating to foreign companies into the practice relating to English companies in appropriate circumstances. The learned Lord Justice said this:

> "The court must, I think, reserve to itself the right to determine disputes – even, perhaps, in some cases substantial disputes – where this can be done without undue inconvenience, and where the position of the company, whether it be an English company or a foreign company, is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether."

I adopt that principle as the rule of practice applicable in the British Virgin Islands and referable to this case.

[18] In the case before us I think there is a good arguable case that the Respondent is indebted to the Appellant in some amount, albeit undetermined.

Just and Equitable

[19] Learned Counsel for the Appellant submitted that the requirement to establish that it is just and equitable that the company be wound up arises, not on the appointment of the provisional liquidators, but at the time of the hearing of the petition. Counsel submitted that this requirement is a prerequisite to the winding

up order, not to the presentation of the petition. The Appellant seeks to support this proposition on the authority of Mann v Goldstein[8] page 1095, letter E to F.

[20] Learned Counsel asserted that the affidavit evidence of Malcolm Brian Shierson discloses a strong prima facie case that Global was used as an instrument of fraud by Mr. Viren Rastogi, the ultimate owner of Global. Counsel argued that that is ample justification for a winding up order under section 115(e) of Cap. 285, which confers power on the Court to wind up a company whenever the Court is of opinion that it is just and equitable that the company should be wound up.

[21] In the several affidavits of Mr. Shierson, evidence of the alleged international fraud and the involvement in the alleged fraud by persons controlling Global, and by Global itself, is tendered. It is not necessary for this Court to come to any conclusion on this evidence. That is for consideration by the High Court in the trial of the winding up petition. It is enough for us to hold, as I do, that a good arguable case exists for the proposition that it is just and equitable for Global to be wound up: Re Claybridge Shipping Co SA[9] at page 579, where Oliver LJ says that the Companies Court undertakes the burden of determining bona fide disputes on substantial grounds in petitions on the just and equitable ground. See also Re Newbridge Sanitary Steam Laundry Co.[10] and Re Highfield Commodities Ltd.[11] referred to earlier in this judgment. It seems to me that in this case, to use the words of Sir Robert Megarry V.C. in In Re Highfield Commodities *supra*, a need for the exercise of the power to appoint provisional liquidators overtops the serious consequences of doing so.

Locus Standi of Petitioner

[22] Learned Counsel for the Respondent submitted that the Appellant has no locus standi, in that it is neither a creditor nor a contributory. I have already addressed

[8] [1968] 1 W.L.R. 1091
[9] [1997] 1 BCLC 572
[10] [1917] IR 67 at page 92
[11] [1985] 1 W.L.R. 149 at page 159

this issue earlier in this judgment, when I referred to the judgment of Denning MR in the case of Re Claybridge Shipping Co SA[12] that a person is a 'creditor' for the purpose of the Act so long as he has a good arguable case that a debt of a sufficient amount is owing to him, a fact which I have found.

Powers given to Provisional Liquidators

[23] Learned Counsel for the Respondent submitted that the appointment of the provisional liquidators should be set aside because the powers granted to them by the order are far too wide and greatly exceed the jurisdiction of the Court under the Act. I agree that the powers granted by the order are far in excess of the jurisdiction of the Court as provided by section 129 of the Act and as I have indicated at paragraph 5 of this judgment, I do not think that the Court has jurisdiction to expand those powers, bearing in mind the provisions of section 130 of the Act. The powers granted in the interim order are ultra vires the power of the Court.

[24] I agree with Learned Counsel for the Appellant, however, that the remedy is not an order to set aside the appointment of the provisional liquidators, but to amend the order so as to limit their powers as appropriate, within the confines of section 129.

Conclusion and Order

[25] I would allow the appeal, reinstate the order appointing the provisional liquidators, but amend the same as regards the powers of the provisional liquidators, limiting the said powers to the following:

[a] to bring or defend any action, suit, or prosecution, or any other legal proceeding, civil or criminal, in the name and on behalf of the company;

[b] to carry on the business of the company so far as may be necessary for the beneficial winding up of the same;

[12] [1997] 1 BCLC 572 at page 574

[c] to do all acts, and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;

[d] to prove, rank, claim, and draw a dividend, in the matter of the bankruptcy of any contributory, for any balance against the estate of such contributory, and to take and receive dividends in respect of such balance, in the matter of bankruptcy, as a separate debt due from such bankrupt, and rateably with the other separate creditors;

[e] to do in their official name any act that may be necessary for obtaining payment of any moneys due from a contributory or from his estate, and which act cannot be conveniently done in the name of the company; and, in all cases where they use their official name for obtaining payment of any moneys due from a contributory, such moneys shall, for the purposes of enabling them to recover such moneys, be deemed to be due to the provisional liquidators themselves.

[f] It is further ordered that the provisional liquidators may exercise any of the above powers without the sanction or intervention of the Court, but shall provide to the Court periodic reports of their activities at least once in every three months and as soon as possible after the determination of their appointment, either by the appointment of official liquidators or otherwise.

Costs

[26] At the conclusion of argument on the merits of the appeal, the Court invited counsel on both sides to agree on costs, or alternatively to provide written submissions on costs. The parties have failed to agree.

[27] Counsel for the Appellants have submitted, in writing, that the costs should be borne primarily by the director, Pradip Sanchetti, and not by Global. Counsel submitted that Mr. Sanchetti improperly caused Global to oppose the appointment of the provisional liquidators, on the basis of bare assertions not made bona fide.

Counsel argue that Mr. Sanchetti failed to undertake any real investigation, and caused the litigation to be unnecessarily prolonged and the costs to be substantially increased. Counsel cited Palmer's Company Law, Volume 3, paragraph 15.305.1, and Re Northwest Holdings plc, Secretary of State for Trade and Industry v Backhouse[13]. Counsel submitted, on the authority of Re Aurum Marketing Ltd. (in liquidation)[14], that the correct test is whether it is just to make such an order, not whether there was evidence of mala fides, abuse of process, procedural manipulation or improper defence of the petition. Counsel also referred to Re Bracklands Magazines Ltd. and others[15] and Re Bathampton Properties Ltd[16]. I note that all of these authorities relate to costs in the petition, and while I do not at this time express the view that these authorities do not apply in the case of the appointment of provisional liquidators, I think that in the circumstances of this case it would be premature and unjustified to make an order for costs against Mr. Sanchetti.

[28] Part 64.10(1) of the CPR 2000 provides that an application for a costs order against a non-party must be by notice to the person against whom the order is sought and must be supported by affidavit. This is not the case here and I would order the costs of the appellant, both here and in the court below, to be paid out of the company's estate.

[29] Rule 65.3 is in the following terms:

> 65.3 Costs of proceedings under these Rules are to be quantified as follows –
>
> [a] where rule 65.4 applies – in accordance with the provisions of that rule; and
>
> [b] in all other cases if, having regard to rule 64.6, the court orders a party to pay all or any part of the costs of another party – in one of the following ways –

[13] [2001] 1 BCLC 468 at 477
[14] [2000] 2 BCLC 645
[15] [1994] 1 BCLC 190
[16] [1976] 3 All E.R. 200

[i] costs determined in accordance with rule 65.5 ("prescribed costs");

[ii] costs in accordance with a budget approved by the court under rule 65.8 ("budgeted costs"); or

[iii] (if neither prescribed nor budgeted costs are applicable), by assessment in accordance with rules 65.11 and 65.12.

[30] Rule 65.5 states the general rule that where rule 65.4 ("fixed costs") does not apply, costs must be determined in accordance with that rule, i.e. rule 65.5. Rule 65.13 provides likewise for costs in an appeal to be generally determined under rule 65.5, 65.6 and 65.7 ("prescribed costs"). Thus, as provided by rule 65.3(b)(iii), "assessed costs" can be awarded only exceptionally when neither "prescribed costs" nor "budgeted costs" are applicable. In the case before the Court, the costs regime applicable is the "prescribed costs" regime, and the costs fall to be calculated in accordance with rules 65.5, 65.6 and 65.7.

[31] The case before the Court is not a claim for a monetary sum. Therefore, in accordance with the general rule set out in rule 65.5(2)(iii), the value of the claim is presumed to be $50,000.00. Provision is made for application under rule 65.6 for the determination of a different value, but no application has been made in that respect.

[32] Rule 62.20 declares that in relation to an appeal, the Court of Appeal has all the powers and duties of the High Court including in particular the powers set out in Part 26 (Case Management). Rule 65.2(1) and (3) makes provision for the principles to be applied if the Court has a discretion as to the amount of costs to be allowed to a party.

[33] The appellant has applied for costs in the sum of $270,000.00. No application was made pursuant to Rule 65.6(1) to determine the value to be placed on the case for

the purposes of costs under the prescribed costs regime. Consequently the value of the claim is $50,000.00 in accordance with rule 65.(2)(iii). To apply the general rule to the issue of costs in this case would result in a costs order in favour of the appellant in the sum of $14,000.00 in the court below and $9,333.33 in this court. It is therefore ordered that the respondent pay the costs of the appellant in the total sum of $23,333.33, to be paid out of the company's estate.

Brian G.K. Alleyne, SC
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal