THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 148 OF 2002

IN THE MATTER OF MARINER INTERNATIONAL BANK LIMITED

and

IN THE MATTER OF THE INTERNATIONAL BUSINESS COMPANIES ACT NO. 18 OF 1996

and

IN THE MATTER OF THE INTERNATIONAL BANKS ACT NO. 19 OF 2002

and

IN THE MATTER OF THE COMPANIES ACT NO. 8 OF 1994

Appearances:
Mr. Jaundy Martin for the Petitioner
Mr. Stanley John for the Opposant Sierra Foundation
Mr. Joseph Delves for Mariner International Bank Ltd
Mr. Graham Bollers for IPCO Inc. and KMT Services Ltd

2004: May 20th
2005: April 18th

JUDGMENT

[1] BRUCE-LYLE, J: Mariner International Bank Limited (Mariner) is an International Business Company incorporated under the provisions of the International Business Companies Act Number 18 of 1996 of the Laws of Saint Vincent and the Grenadines. Mariner was granted a Class 1 International Banking Licence to conduct offshore banking business pursuant to the provisions of the International Banks Act No. 19 of 1996. This licence was revoked on 28th March 2002, by the Saint Vincent and the Grenadines

Offshore Finance Authority acting on the advice of the Minister of Finance on the grounds that it was in breach of several provisions of the International Banks Act and that it was insolvent. Mariner has not appealed the revocation of its International Banking licence.

[2] On the 12th April 2002, the Attorney-General petitioned the Court seeking to wind up Mariner. This winding up petition is not opposed by Mariner but is opposed by a creditor, the trustees of Sierra Foundation Management (Sierra) a trust which has obtained a judgment in the High Court St. Vincent in the amount of EC$2,209,624.20 which sum remains partially unsatisfied. Shortly after instituting High Court proceedings to recover its money from Mariner, counsel for Sierra, Mr. Stanley John wrote a letter dated 24th July 2001, to Mr. Colin Williams, then Offshore Inspector as specified in Exhibit LAL 2 of the affidavit of Linton Lewis filed on the 19th April 2002.

[3] The position therefore is this; though Sierra has acknowledged from various documents filed in this matter that Mariner is insolvent, it has yet filed a Notice of Intention to Appear on the hearing of the petition and to oppose the Attorney-General's petition. Basically the purpose of a winding up order is to make an equitable and rateable distribution of all the assets of the company, from the moment of the presentation of the petition amongst all the creditors without favour or preference. Sierra, therefore, in opposing the winding up order would have a priority charge over Mariner's assets to the extent of its judgment.

[4] It is interesting to note that Sierra has not opposed the winding up petition on the basis that Mariner is not insolvent. The courts normally would give effect to the wishes of the majority of Mariner's creditors on whether it should be placed in liquidation or not. The general policy is to treat the creditors as being in the best position to decide what is in their best interest. If the company is already insolvent an opposing creditor must give good reasons for their opposition whether a winding up order should be made – see **Re: Vuma Ltd [1960] 3 All ER 629.**

[5] I agree with Learned Counsel for the creditors and who are in support of the winding up petition, that the question of what shall constitute "good reason" is a question of fact but is

usually determined by commercial interests and not technical arguments as posited in the ***Andrew Keay and Peter Walton Insolvency Law: Corporate and Personal Longmans 2003 at pages 229 – 230.***

[6] Having thus said, Sierra's skeleton arguments as outlined at pages five and six of its skeleton arguments can be outlined as follows:

(a) The petition does not contain the information specified under paragraphs 2, 3 and 4 of Form 4.2 in conformity with the UK Insolvency Rules, rule 4.7(1) nor does it contain the prescribed endorsement as provided for therein.

(b) The petition was not served at the registered office of the company as prescribed under Insolvency Rule 4.8, nor is there an affidavit of service filed in accordance with Rule 4.9.

(c) The petition was not advertised in accordance with the provisions of Rule 4.11 (1) – (4) and the court must dismiss it pursuant to Rule 4.11.

(d) There has been no certificate of compliance filed and the court shall in all the circumstances dismiss the petition pursuant to Rule 4.14(3).

(e) That the Attorney-General does not have locus standi to present the petition for winding up because a report made pursuant to Section 18(4) of the International Banks Act by someone appointed under Section 18 (2) (d) or (e) is a condition precedent to a revocation of an offshore banking licence and an application for winding up under Section 18 (5) (d). Mr. Marcus Wide, having been appointed under Section 18 (2) (g) of the International Banks Act renders his report incapable of forming the basis of an application.

[7] These in a nutshell form the main grounds advanced for Sierra's opposition to the Petition to wind up Mariner. It is my contention that these arguments are all technical in nature and do not address whether the winding up order is in the best interest of Mariner's creditors. Sierra's objections are not based on the commercial interests of the creditors. Technical objections can only be taken by Mariner and not by a creditor whose only purpose before

the Court on a winding up petition is to assist the court to ascertain the wishes of creditors who have filed Notices of Intent to Appear, and whether a winding up order ought to be made or not. The right to determine whether an order ought to be made or not is a right not to an individual creditor but to the class of creditors as a whole, and it is for the majority of creditors to seek the best interest of their class as a whole. See **Re P & J Macrae, Ltd [1961] 1 All E.R. 302**; ***Derek French "Applications to Wind up Companies" 1993 Blackstone Press Limited pages 121 – 123.***

[8] Having thus opined, it is my intention to deal specifically with ground (3) of the opposants Sierra. This pertains to the assertion that the Attorney-General does not have locus standi to present the petition for winding up because a report made pursuant to Section 18(4) of the International Banks Act by someone appointed under Section 18(2)(d) or (e) is a condition precedent to a revocation of an offshore banking licence and an application for winding up under Section 18(5)(d); and that Mr. Marcus Wide, having been appointed under Section 18(2) (g) of the International Banks Act, his report cannot form the basis of an application by the Attorney-General to wind up Mariner.

[9] The uncontroverted evidence in this matter is that Mariner is unable to pay its debts and is undoubtedly insolvent. This court would have jurisdiction to order the winding up of a company if at the time of the hearing of the petition there exists one of the circumstances outlined or specified in Section 377 of the Companies Act. Section 377 (c) of the said Companies Act is therefore applicable in the case of Mariner which is unable to pay its debts and is insolvent. Does the Attorney-General therefore have standing to prosecute the winding up petition at the hearing of the petition?

[10] To answer the above-stated question there is a need to examine the Saint Vincent and the Grenadines Offshore Finance Authority. This authority is a body charged with licensing and regulating offshore banks in this State. It is a body corporate created by Act Number 16 of 1996. It is my contention that this authority is a servant of Government in that the Board of the authority is appointed by Cabinet; Government maintains control over the board and has the power to revoke the appointment of any member of the board; the rules

and bye-laws governing the functioning and operations of the authority are to be prepared by the Minister of Finance and is subject to the approval of Cabinet; all its annual operating expenses are funded by Government and shortfalls in revenue will be met through the other revenues of Government; the authority is also subject to audit procedures of State agencies.

[11] It follows without any doubt in my mind that based on the above-mentioned controls over its operations and otherwise that the Authority is a State agency and therefore Section 15 of the Crown Proceedings Act would be applicable to any proceedings affecting the Authority. The relevant case law further strengthens my contention stated above, in that in determining whether the authority is a State agency depends on the degree of control, which the Crown through its Ministers exercises over the performance of its duties. It is my view that the control of the Crown over the authority can be described as total.

[12] It follows therefore that if Section 15 of the Crown Proceedings Act is applicable, then it permits the Attorney-General to have the legal interest to institute winding up proceedings to protect the interest of the State and its reputation as a responsible offshore jurisdiction. Section 18 (5) (d) of the International Banks Act as amended also confers on the Attorney-General the power to petition the court. It is quite surprising that counsel for Sierra insists that the preparation of a report pursuant to Section 18 (2) (d) and (e) is a condition precedent to the right of the Attorney-General to present this petition. The International Banks (Amendment) Act No. 16 of 2000 amended Section 18(2) by adding a new paragraph (g) which permits the Authority to revoke a licence and to appoint someone to assume control of the licensee's affairs. Section 18(4) of the Principal Act was also amended to permit a person appointed under Section 18 (2) (g) to prepare a report for submission to the Authority upon which it can act.

[13] The Authority being charged with licensing and regulating banks in accordance with the provisions of the International Banks Act must have the power to ensure that Banks whose licenses have been operating in a manner that is inimical and detrimental to the interests of the State should be wound up through the Court process. In the circumstances I again

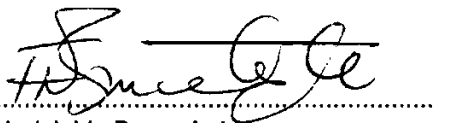
find the arguments of Sierra to hold no water when they assert that the Attorney-General can only petition if the Authority revokes a licence and then asks for her to petition; and that if a licence is revoked already under Section 18 (2) (g) then she has no authority to petition. This argument by Sierra would be fraught with all sorts of absurdities especially where it would render the Authority powerless in enforcing the winding up of offshore banks that are operating in a manner detrimental to the interests of the State and the fragile offshore industry, and where it is necessary that their licences be revoked and they be compulsorily wound up.

[14] And finally, I also hold the view that the Attorney-General has power to petition this court from Section 379 of the Companies Act as amended by Section 3 of the Companies (Amendment) Act No. 28 of 2002 and also by Section 18 (5) (d) of the International Banks Act as amended. Section 379 (1) of the Companies Act No. 8 of 1994 has set out the classes of persons entitled to petition the court for a winding-up order. A new sub-clause (e) has been added to this class of persons by an amendment to Section 3 of the Companies Act – No. 28 of 2002 – which amended Section 379 by including "any interested party". Although this phrase has not been defined, and it is accepted that the Attorney-General has to show a legitimate interest in the relief sought in the petition, the phrase has been widely held to include anyone possessing a legal or pecuniary interest – See ***Peterson – Shareholder Remedies in Canada at para. 20.8.***

[15] Having opined already on the position of the Attorney-General as juxtaposed to the Saint Vincent and the Grenadines Offshore Finance Authority being a total State agency, owing to the degree of control which the Crown through its Ministers exercises over the performance of its duties I hold that the Attorney-General clearly has a locus standi in relation to the winding up petition involving Mariner International Bank Ltd.

[16] Flowing from this finding I also hold that a winding up order from the petition before the court will operate in favour of all the creditors of Mariner. I find Sierra's opposition of the winding up strange to say the least, considering that Sierra is also a creditor of Mariner.

[17] I hereby order in terms of the Draft Order filed by the Attorney-General with her petition and appoint Mr. Marcus Wide as liquidator of the Mariner International Bank Limited with all the powers and duties of a liquidator as contained in the Companies Act of 1994 as amended or any other legislation related thereto and with further duties and responsibilities as conferred by the terms of the Draft Order which is to be settled by the Registrar as an order of the Court. Costs to be paid by the opposant to the Petitioner in the sum of $8,000.00.



Frederick V. Bruce-Lyle
HIGH COURT JUDGE