ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUMSC2005/0400

In the Matter of Bank of Europe Limited (In Receivership)

And

In the Matter of the International Business Corporations Act, Cap. 222 (as amended)

BETWEEN:

FINANCIAL SERVICES REGULATORY COMMISSION

Applicant

And

PETER QUEELEY

And

HUGH HENRY

Respondents

Appearances:

Mr Septimus Rhudd and Ms Gail Pero for the Applicant
Mr Kevin John and Ms Stacy-Ann Saunders for the Respondents

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2006: March 16th
June 12th

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DECISION

[1] Blenman: J; These are rulings based on two applications by the Financial Services Regulatory Commission (the Commission).

[2] The first application seeks to have Mr Peter Queeley and Mr Hugh Henry (Messrs Queeley and Henry) removed as liquidators of the Bank of Europe Limited (In receivership) (the bank). In the second application, the Commission seeks an interim injunction to suspend the liquidation and dissolution of the bank with immediate effect. In addition, the Commission applies to restrain Messrs Queeley and Henry from accessing, transferring or

drawing or otherwise removing any funds held by the bank in various accounts at banks in Antigua and Barbuda.

Background

[3] The Bank of Europe Limited (the bank) was incorporated on the 3rd day of November 1996 in accordance with the International Business Corporation Act Cap 222 Laws of Antigua and Barbuda (as amended) (the Act). On the 3rd day of November, 1996, the Supervisor of International Banks and Trust Corporation (the supervisor) granted the bank a licence to conduct international (offshore) banking.

[4] The initial authorized capital of the bank is US$1,000,000 divided into $1,000,000 common shares of US$1.00 per share. The directors of the bank were Hubert Edward Secretan, Edison Ferrena Da Silva, Maria Del Carmen Forcella and Marve Christian. The shares of the bank were owned by Euro Trust Group (also known as the Bedford Group).

[5] By 1st December 2004, the bank's assets were felt to be less than its liabilities and the directors of the bank by this time were unwilling to continue the operations of the bank.

[6] Section 287 of the Act states as follows:

> "The appropriate official may appoint a receiver-manager under Part II for a corporation when any of the following circumstances apply to the corporation, namely-
>
> The realizable value of the corporation's assets is less than the aggregate of its liabilities and capital accounts or the corporation's financial condition suggests that it will shortly be in that circumstance."

[7] Section 219 of the Act states that:

> "A receiver or receiver-manager of a corporation must -
>
> (a) Act honestly and in good faith;
>
> (b) Deal with any property of the corporation in his possession or control in a commercially reasonable manner."

[8] The Supervisor appointed Messrs Queeley and Henry as receiver-managers.

[9] At the time of their respective appointments as receiver-managers, Mr Queeley was employed by the Commission as a senior research officer while Mr Henry was employed by the Commission as a senior examiner.

[10] The material terms of their appointment as receiver-manages were as follows:

> 1. During the period of the appointment as Receiver-manager, your salary and other entitlements, as per existing terms of your employment with the Commission, will be paid by the Financial Services Regulatory Commission (Commission) and the Bank of Europe (In Receivership) (hereinafter referred to as the bank) will reimburse these expenses to the Commission. You will not be entitled to salary or any other payment form the bank, except for the necessary and legitimate expenses incurred by you in discharge of your duties as Receiver-manager.
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> 2. You will prepare, in consultation with the appropriate official, a scheme of dissolution of the bank, which will include an appropriate provision for compensating the Commission for making available your services to the bank as Receiver-manager.
>
> 3. Your appointment as Receiver-Manager will terminate in the event you leave your employment with the Commission.
> 4. You will act in good faith and in the best interest of the creditors of the bank and the integrity of the Commission and the jurisdiction.

[11] Section 219 of the Act states that:

> "A receiver of any property of a corporation, may, subject to the rights of the secured creditors, receive the income from the property, pay the liabilities connected with the property, and realize the security interest of those on behalf of whom he is appointed; but except to the extent permitted by the court, he may not carry on the business of the corporation".

[12] Section 218 of the Act provides:

> "A receiver or receiver-manager of a corporation appointed under an instrument must act in accordance with that instrument and any directions of the court made under section 220."

[13] Messrs Queeley and Henry accepted the terms and conditions referred to above and commenced their work as receiver/managers.

[14] Section 215 of the Act states:

> "A receiver of a corporation may, if he is also appointed manager of the corporation, carry on any business of the corporation to protect the security interest of those on behalf of whom he is appointed."

[15] On 28th January 2005, Messrs Queeley and Henry petitioned the High Court to be appointed as liquidators of the bank and sought increases in remuneration from the court.

[16] On 8th February, 2005 Lewis Hunte J granted their petition and ordered as follows:

> (a) That Bank of Europe Limited (In Receivership) be liquidated and dissolved pursuant to Section 287(1) (a) of the International Business Corporations Act, Cap. 222 of the Laws of Antigua and Barbuda.
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> (b) That the Petitioners, Peter Queeley and Hugh Henry, be and are hereby immediately appointed as the Liquidators of Bank of Europe Limited (In Receivership) for the purposes of carrying out the liquidation and dissolution of he Bank.
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> (c) That the Petitioners be and are hereby granted an Indemnity out of the assets of the Bank, which said assets shall include deposits.
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> (d) That the Petitioners be and are hereby permitted to postpone and/or delay payment to creditors and/or depositors if in their discretion the Petitioners think it is in the best interest of all depositors and/or creditors of the Bank.
>
> (e) That the Petitioners be and are hereby permitted to act in any jurisdiction to recover assets and property of the

Bank including the right to bring or defend any action related or associated therewith subject to compliance with the laws of any such jurisdiction.

(f) That the remuneration of the Petitioners and immediate staff appointed by them from December 2nd 2004 be set at an hourly rate of US$200 for each of your Petitioners and senior consultants, US$100 for senior management and staff and that these sums be paid from the assets of the Bank, which said assets shall include deposits.

(g) That the Petitioners be reimbursed for such reasonable out of pocket expenses as are incurred by them during the liquidation.

(h) That the reasonable costs to Legal Counsel for the Petitioners be paid out of the assets of the Bank, which said assets, shall include deposits."

[17] Messrs Queeley and Henry embarked on the process of liquidation purporting to act pursuant to the order of the court.

[18] Further, purporting to act in accordance the court order, Messrs Queeley and Henry are alleged to have fixed their estimated monthly allowance at EC$3,000.00. As liquidators they incurred expenses include traveling, rental for premises, telephone and other miscellaneous expenses. They have paid themselves remuneration at a rate of US$200 per hour.

Applications

[19] The Commission filed the applications referred to above and made several complaints including that Messrs Queeley and Henry have acted in breach of their fiduciary duties and that by their actions they will dissipate the bank's funds available to pay the bank's creditors and depositors.

[20] I do not propose to address all the complaints in detail; suffice it to say that the Commission says that Messrs Queeley and Henry continued to incur very high telephone and rental expenses, in relation to their execution of their duties, as liquidators. The

Commission complains, further, that the operational expenses which they were incurring are unreasonable and operates against the interest of the creditors and depositors.

[21] Another complaint raised by the Commission is that Messrs Queeley and Henry have issued "a policy directive through which they are not required to produce receipts for their expenditure". The Commission says that this is unreasonable and can possibly lead to committal of fraud on the creditors/depositors.

[22] The Commission also complains that Mr Queeley and Mr Henry were wrong to have sought and obtained approval from the court in the terms they did, the effect of which is to benefit themselves personally while at the same time breaching their fiduciary duties to the creditors/depositors.

Issues

[23] The issues that arise for the court's determination are:

(a) What the terms and conditions are applicable to the liquidators;

(b) Whether, based on the circumstances that exist, the court should remove the liquidators and replace them as requested by the Commission;

(c) Whether the Commission has locus standi to bring these applications;

(d) Whether the court should grant the injunctions restraining the liquidators from accessing and transferring monies that are held in accounts of the bank;

(e) Whether the Commission ought to have filed a separate claim.

Law

[24] I find it convenient to refer to some of the other relevant legal provisions at this point. I do not propose to quote the entire provisions of the legislation but would refer only to the material parts.

[25] Section 217 of the Act stipulates:

> "A receiver or receiver-manager of a corporation appointed by the court must act in accordance with the directions of the court."

[26] Section 220 of the Act stipulates:

> "Upon an application by a receiver or receiver-manager of a corporation, whether appointed by the court or under an instrument, or upon an application by any interested person, the court may make any order it thinks fit, including –
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> (a) An order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;
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> (b) An order declaring the rights of persons before the court or otherwise, or directing any person to do or abstain from doing anything;
>
> (c) An order fixing the remuneration of the receiver or receiver-manager;
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> (d) To relieve any such person from any default on such terms as the court thinks fit;
>
> (e) To confirm any act of the receiver of receiver-managers and
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> (f) An order giving direction on any matter relating to the duties of the receiver or receiver-manager."

[27] Section 304 of the Act stipulates:

> "In connection with the dissolution of a corporation, the court may, if it is satisfied that the corporation is able to pay or adequately provide for the discharge of all its obligations, make any order it thinks fit, including, without limiting the generality of the foregoing.
>
> (a) an order to liquidate;
>
> (b) an order appointing a liquidator, with or without bonding, fixing his remuneration and replacing inspectors or referees;

(c) an order appointing inspectors of referees, specifying their powers, fixing their remuneration and replacing inspectors or referees'

(d) and order determining the notice to be given to an interested person, or dispensing with notice to any person;

(e) an order determining the validity of any claim made against the corporation.

[28] Section 316(1) of the Act establishes a Financial Services Regulatory Commission (the Commission).

[29] Section 316 (3) of the Act states that the Commission shall be responsible for:

> (a) the administration of this Act, including but not limited to, issuing certificates of incorporation to international business corporation regulating international business corporations, licencing and regulating international financial institutions;
> (b) regulating business operated or carried on under the Financial Institution Non-Banking Act, the Cooperative Societies Act and The Insurance Act.

Terms and conditions of liquidators

[30] Learned Counsel for the Commission, Mr Septimus Rhudd argued that the terms and conditions that applied to liquidators are the same as when they were appointed as receiver-managers. He maintained that the original terms and conditions should be applicable to them in their present capacity as liquidators.

[31] In support of his contention, Mr Rhudd relied, among other things, on Section 288 of the Act which states:

> "Within thirty days after a receiver-manager has seized the administration and control of a corporation under this Division, the receiver-manager shall begin proceedings in the court for the liquidation and dissolution of the corporation under section 300 or for the re-organisation of the corporation under this Act, as the circumstances require.

> On an application to the court by a receiver-manager of a corporation under this Division for the liquidation and dissolution of the corporation, the court has all the powers of the court under section 304 notwithstanding that the corporation is not able to pay or adequately provide for the discharge of all its obligations, but subject to section 286 and section 289."

[32] Mr Rhudd further contended that a proper reading of the terms and conditions of their letters of appointment as receiver-managers would lead to only one conclusion that is; Messrs Queeley and Henry knew that it was likely that 30 days after their appointment as receiver–managers the liquidation procedure would have to be undertaken. He therefore argued that Messrs Queeley and Henry could have had no doubt in their minds that the terms and conditions that applied to them as receiver-managers would have to be applied if they were appointed as liquidators. Counsel asserted that it is therefore unreasonable for them to have sought and obtained approval from the court for remuneration as liquidators that were far in excess of what they earned as receiver-managers. They are not commercial liquidators but were originally appointed based on the fact among other things that they were regulators employed by the Commission.

[33] For their part, Messrs Queeley and Henry deny that they are in breach of their duties as liquidators. They maintain that they are acting in accordance with the order of court. Messrs Queeley and Henry have placed before the court evidence in support of their contention that the salary increases that were obtained from the court is lower than that charged in the market for similar services

[34] Learned counsel Ms Saunders argued for the contrary position to that urged on behalf of the Commission. She said that Messrs Queeley and Henry are not acting in breach of their fiduciary duties, as alleged or at all. The court approved the payment of remuneration of $200 per hour and this is what they have paid themselves. They have not breached any fiduciary duties to the creditors or the depositors.

[35] Ms Stacey Saunders further posited that it was never intended that Messrs Queeley and Henry's remuneration as liquidators would have been the same as that obtained as

receiver-managers. They never expected nor understood that they were to work as liquidators based on the same terms and conditions as when they were receiver-managers.

[36] Ms Saunders further stated that the terms and conditions that applied to Messrs Queeley and Henry in their capacity as receiver-managers ended when they were appointed as liquidators by virtue of the court order. Counsel insisted that there is nothing in their letters of appointment as receiver-managers that indicate that they were to continue to receive the same terms and conditions when they were appointed as liquidators. The terms and conditions that were applicable to them as liquidators ceased with effect from the date of the order of court through which they were appointed liquidators.

Court's analysis

[37] I have reviewed Messrs Queeley and Henry letters of appointment and can find no basis for the contention urged on the court on behalf of the Commission. I am not of the view that Messrs Queeley and Henry ought to have known that they would have earned as liquidators the same remunerations as when they were receiver-managers. I am satisfied that the letters of appointment dealt exclusively with their appointment as receiver-managers. There is no legal or evidential basis for stating that the terms and conditions that applied to them as receiver-managers were to be applicable to them as liquidators.

[38] I am not persuaded that Messrs Queeley and Henry were obliged to act in accordance with the terms and conditions of their appointments as receiver-managers when they were subsequently appointed liquidators by the court. Further, the court in its order indicated and sanctioned the payment of US$200 per hour to the liquidators. They have complied with the court order in this regard and cannot be said to be in breach of their fiduciary duties to the creditors by complying with the court's order. Had the court so desired it could at the time of making the order fixed the same terms and conditions as applied to them as receiver-managers.

[39] The terms and conditions under which Messrs Queeley and Henry operated as receiver-managers were not made a part of the order of court. In my respectful view, it would be plainly wrong to read those conditions into the order of the court in the absence of any basis for doing so.

[40] I can see no harm being done, without more, by Messrs Queeley and Henry paying themselves salaries approved by the court (provided that in so doing they are not acting unreasonably and against the interests of the creditors). Based on the evidence they have furnished to the court as to the prevailing rates for similar services, the court is not of the view that the rates they are paying themselves are unreasonable or exorbitant. It seems to the court that the rates they are charging are comparable to that charged and even lower than some rates charged by other auditors.

[41] Messrs Queeley and Henry deny that they have been extravagant in spending the bank's money. They deny that they were paying themselves $3,000.00 per month as alleged by the Commission and indicate that they were withdrawing sums from their accrued earnings. I have no reason to disbelieve them.

[42] While there is evidence before the court to show that Messrs Queeley and Henry were able to obtain the court's approval and were thereby enabled to be paid increased salaries as liquidators, in comparison to what they received as receiver-managers, there is no evidence before the court on which it can properly be concluded that they by so acting breached their fiduciary duties to the creditors. Further, while it would have been more desirable for them to have communicated to the Commission their proposal for increase payment to themselves, they were under no obligation to do so.

[43] There is no fixed rate or settled scale for determining the amount of compensation to be paid to a liquidator. The court is of the view that the compensation which the liquidators should receive should be fair and reasonable. At the same time the liquidators must ensure that the liquidation is managed in a competent and economic fashion as possible. In the absence of any evidence to the contrary, the court must take the view that when

Lewis Hunte, J approved the liquidators' remuneration of $200US per hour he must have felt that the sum awarded was fair and reasonable. I hasten to add that it is no part of my function to sit on appeal on the order made by Hunte J suffice it to say as stated earlier that had the court thought that it was necessary to order different terms and conditions to those applied for in the petition by Messrs Queeley and Henry surely Hunte J would have done so.

Should the court exercise its discretion to remove the liquidators?

[44] Learned Counsel Mr Septimus Rhudd said that Messrs Queeley and Henry by paying themselves the increased salaries are acting in their own interest and not genuinely or honestly. He submitted that it is unreasonable for them to have obtained the court's approval for the salary increase, particularly when the bank is insolvent. This amounts to a breach of their fiduciary duties to the creditors and depositors.

[45] Mr Rhudd further contended that the court has the power to remove liquidators even if there is no proof of breach of the fiduciary duty. See: Quickson (South and West) Ltd v Katz 2004 EW HC 2443.

[46] In Re Marseilles Extension Railway and Land Company (1867) LR 4 EQ 692 it was held that the court may remove a liquidator if on consideration of all circumstances the court finds it desirable to do so.

[47] In Shepheard v. Lamey [2001] BPIR 939 Jacob J stated that "*all one has to find is some good cause why a person should not continue as a liquidator you do not have to prove everything in sight, you do have to prove, for example, misfeasance as such; you do not have to show more than there may well be a case of misfeasance or indeed, incompetence."*

[48] Ms Saunders submitted that the court ought not to exercise its discretion and remove the liquidators. There is no substantiation of the allegation before the court that they have breached their fiduciary duties. The Commission has not placed any evidence before the

court to show Messrs Queeley and Henry are in breach of their fiduciary duties. The liquidations were appointed by the court and the court could have exercised its discretion, if it thought fit, to reduce the fees. At all times, the liquidators have complied with the order of the court. In order to remove its liquidators, the court must be satisfied that their retention would be against the interest of the liquidators.

[49] Counsel relied on the British Virgin Island case of Nam Tai Electronics Inc v. David Hague and Tele Art Inc Suit No 21 of 2000 in support of her contention that the court should not lightly remove its liquidators in the absence of breaches of their duties. Matthew LJ in that case quoted from Nourse LJ in re Edennote Ltd [1996] 2 BC LC 389 at p. 389 as follows:

> "Sir John Vinelott said that the decision in Re: Keypak Homecare Ltd. was founded on and usefully illustrated the general principle that a 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… Again, I respectfully agree. But there is an important qualification… The creditors' loss of confidence must be reasonable. Moreover, the Court does not lightly 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."

[50] Ms Saunders also placed reliance on Johnson and Dinnan v Deloitte Touche (1997) Cayman Island Law Reports in which Georges JA, as he then was, at page 145, said:

> "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 applicant has 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 Liquidators? The issues as to whether or not due cause has been shown and whether the discretion should be exercised are far more frequently canvassed that the issue of standing. That issue is often uncontroversial, the application being usually made by a creditor or contributory."

[51] In Deloitte & Touche A.G v. Johnson and Brother [1999] 1 WLR 1605 the plaintiff which was not a creditor or contributory to the company applied under section 106(1) of the Companies Law for an order removing the liquidators. The liquidators applied for the plaintiff's originating summons to be struck out on the ground that the plaintiff had no locus standi to make the application or real interest in seeking such relief. The Privy Council held as follows:

> "Section 106(1) of Companies Law did not limit the category of person entitled to apply for the removal of an official liquidation by the court on due cause being shown, and the plaintiff had the requisite statutory qualification to make the application for the removal of the company's liquidators .Since the plaintiff had alleged that the liquidators had an interest which conflicted with their duty to the company and its creditors, but not that they owed any duty to the plaintiff, only the creditors had a legitimate interest in complaining of such a conflict of interest. Also, since the liquidators were able and willing to continue in office and the creditors were the only persons with a legitimate interest in having them removed, had not applied for their removal the plaintiff was not entitled to invoke the court's statutory jurisdiction under section 106(1)."

Court's analysis.

[52] The court has no doubt that the wording in section 304 of the Act is not the same as that stated in Companies Act .Section 304 authorizes the court to make any order it thinks fit including an order replacing a liquidator.

[53] Both counsel have not referred the court to any authorities that address the issue of removal of liquidators under a provision similar to that of section 304 of the Act. However, counsel very helpfully referred the court to a number of persuasive authorities referred to above, which should guide the court in determining whether or not the liquidators should be removed. In most of the cases where the court's power of removal was addressed the relevant companies legislation contained the words *"due cause shown*"

[54] Justice Etherton in Quickson v Katz ibid said that the touchstone for an appraiser of whether good cause has been shown for the removal of a liquidator is the principle stated Bowen LJ in Re: Adam Eyton at p. 306:

> "The due cause is to be measured by reference to the real, substantial, honest interests of the liquidation and the purpose for which the liquidator is appointed."

[55] The burden is on the applicant to show good cause for removal of a liquidator, I am of the view that the statutory provision confers a wide discretion on the court which is not dependent on proof, of particular breaches of duty by the liquidator.

[56] It is well recognized principle that the court has the power to remove a liquidator even though there is no evidence against him either personally or in his conduct of the particular litigation. There is no doubt that liquidators owe fiduciary duties to the creditors and the depositors

[57] Be that as it may, Lord Millet very helpfully in Deloitte v Touche ibid stated at page 1611 that:

> "Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he "has an interest in making the application or may be affected by its outcome." It means that he has a legitimate interest in the relief sought. Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor: see In re Corbenstoke Ltd (No. 2) 1990 B.C.L.C 60. This case was criticized by the plaintiff: Their Lordships consider that it was correctly decided."

[58] I can do no more than respectfully adopt the principles referred to above. Accordingly, the court is of the view that it has the discretion to remove liquidators if it is in the interests of the creditors and depositors to do so. There is no need to establish that the liquidators have breached their fiduciary duties.

Locus standi

[59] Ms Saunders posited that the Commission has no authority or standing to file the present applications. She argued that the legislation was enacted for the protection of creditors. The Commission is not a depositor or creditor of the company and therefore it does not have the requisite standing to file the applications.

[60] Counsel placed reliance on the decision of Deloitte and Touche AG v. Johnson 1999 1 WIR 1605 Lord Millet at page 1611 said:

> "In their Lordship's opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction."

[61] Mr Rhudd argued that the Commissioner is entitled to apply to the court for the reliefs it seeks. He submitted that the Commission is clothed with the power to regulate the industry and has the inherent power to apply to the court in order to obtain the reliefs sought.

[62] Mr Rhudd further relied on section 316 of the Act which states:

> The Commission shall be responsible for:
>
> (a) the administration of this Act, including but not limited to, issuing certificates of incorporation to international business corporation regulating international business corporations, licencing and regulating international financial institutions;
>
> (b) regulating business operated or carried on under the Financial Institution Non-Banking Act, the Cooperative Societies Act and THE Insurance Act.

[63] He further submitted that there can be no doubt that the Commission has the requisite standing to file the applications before the court since the Commission has the ultimate responsibility for regulating the industry.

Court's analysis

[64] There seems to be no express limitation, in the Act, on the category of person who may make application. Where an insolvent company is being wound up, usually the depositors are those who wish to apply for the appointment of or removal of a liquidator and are usually regarded as the proper persons to make the application. The Act in question seems to envisage persons who fall in neither category being able to apply to the court for various orders. The court is of the opinion that the Act has not exclusively defined the category of persons who are entitled to make applications to the court. In my respectful opinion, the court is given a discretion to determine who is a proper person to make an application.

[65] However, I adopt the view taken in Deloitte v. Touche ibid where Millet J said at page 1610 paragraph 2, that:

> " The cases have shown that the court has consistently regarded the creditors (in the case) of an insolvents liquidation as the proper person to make the application, being the only person interested in the liquidation. They do, however, show that the court has consistently regarded the creditors (in the case of an insolvent liquidation) and the contributories (in the case of a solvent liquidation) as the proper persons to make the application

being the only persons interested in the liquidation. Their Lordships have not been shown any case in which the court has removed a liquidator who is able and willing to act on the application of anyone who is not a creditor or contributory as the case may be."

[66] Section 316(4) of the Act states:

"The Commission shall, in performing its functions under this Act, take any necessary action, including but not limited to issuing any guidelines or directions required to ensure the integrity of the business corporations sector and failure to comply with such guidelines or directions shall be dealt with under section 359 A (1)(c) of this Act."

[67] His Lordship Mr Justice Millett in Delotte and Touche ibid at page 1610 very helpfully stated that:

"where the standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made. Section 106(1) does not limit the category of persons who may make the application. The plaintiff therefore does not lack a statutory qualification to invoke the section. But the question remains whether it has a legitimate interest in the relief which it seeks. It is not asking the court to appoint a liquidator to fill a vacancy. It is asking the court to remove incumbent liquidators for cause. The English cases relied upon by the plaintiff show that an interest which is sufficient to support an application of the former kind may not be sufficient to support an application of the latter kind."

[68] More importantly Lord Millet stated that:

"When the company is insolvent. The liquidation is continuing under the supervision of the court. The only person who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors. The liquidators are willing and able to continue to act, and the creditors have taken no step to remove

> them. The plaintiff is not merely a stranger to the liquidation; its interests are adverse to the liquidation and the interests of the creditors. In their Lordship's opinion, it has no legitimate interest in the identity of the liquidators, and is not a proper person to invoke the statutory jurisdiction of the court to remove the incumbent office-holders."

[69] While the court is of the view that the Commission has the necessary standing to file the applications, the court finds the reasoning in Deloitte v. Touche very attractive and persuasive. I can do no better than respectfully apply the principles stated above. The matter of standing does not conclude the court's determination. The court is obliged to go further and ascertain whether the Commission has the requisite interest to make the application to remove the liquidators.

[70] While there is no doubt that the court has the requisite jurisdiction to entertain the applications, the court must go on to consider the ancillary question namely; whether the Commission is a person who is interested in the liquidation. The above cases show that where the company is insolvent and the liquidation is continuing under the supervision of the court, the creditors are the only persons who have a legitimate interest in the ultimate distribution of the company's assets.

[71] Accordingly, the court is of the respectful view that the Commission has no legitimate interest in having the liquidators removed in as much as it is not a creditor or depositor of the bank. Accordingly, the court is of the view that it cannot entertain applications to remove liquidators, unless in the appropriate circumstances, those applications are made by creditors or contributors. The Commission does not fail in either of the two categories.

[72] In view of the foregoing, the court is of the respectful opinion that the Commission is not a proper person to invoke the statutory or inherent jurisdiction of the court to remove the liquidators.

Cause of action

[73] Ms Saunders argued that the Commission ought to have filed a separate cause of action in so far as it sought interlocutory remedies. Counsel relied on the well known injunctive principles in support of her argument that a party cannot properly seek interlocutory/ injunctive remedies in the absence of a cause of action.

[74] Ms Saunders argued that it was critical for the Commission to have filed a separate claim establishing a cause of action. Counsel complained that the Commission has proceeded to file applications in the Petition without establishing that it has a cause of action. Counsel argued further that it was incumbent on the Commission to file a claim form and a statement of claim in order to be able to file the applications sought. The Commission's failure to do so, counsel says, is fatal to its applications.

[75] On the other hand Mr Rhudd sought to rely on CPR 2000 part 17.2(3) which provides that:

> "The court may grant an interim remedy before a claim has been made only if:-
>
> (1) the matter is urgent; or
> (2) it is necessary to do so in the interest of justice

[76] He further submitted that there was no need for the Commission to file a separate claim form. He stated that it is quite permissible for the applications to have been filed in the pending matter.

Court's analysis

[77] For the sake of completeness, I state that I am in agreement with the submissions made by Mr Rhudd and state that I am not of the opinion that the Commission ought to have filed another claim. Should someone desire to have the liquidators removed, it is proper in my view to make an application in the substantive matter as the Commission has done.

[78] I am of the view that it is not permissible to change the rubric of a petition or claim without first obtaining the court's approval. It seems clear to me that one cannot properly change the rubric of a claim without the permission of the court. Be that as it may, it is my

respectful view that nothing turns on this irregularity. I therefore refrain from commenting any further on that save to say that I am of the respectful opinion that where there is an extant/substantive matter, an applicant cannot unilaterally change the parties to the claim.

Should the court grant the injunctive reliefs?

[79] The court having concluded that the Commission is not the proper party to seek to have the liquidators removed, it therefore becomes otiose to determine the issue of whether or not the injunctive reliefs should be granted.

Costs

[80] I order that the Commission pays Messrs Queeley and Henry costs in the sum of $12,000.00, as agreed by counsel.

[81] The court gratefully acknowledges the assistance of all counsel.

Louise Esther Blenman
Resident High Court Judge