

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NO: BVIHCV 395 of 2008

IN THE MATTER OF THE FINANCIAL SERVICES COMMISSION ACT, 2001

And

IN THE MATTER OF AN APPLICATION FOR A PROTECTION ORDER

BETWEEN:

FINANCIAL SERVICES COMMISSION

Applicant

And

WHITTEN TRUST COMPANY LIMITED

Respondent

And

IAN TRUMPER AND IAN THOMPSON
(As Joint Administrators of Whitten Trust Company Limited)

Applicant

Appearances: Ms Karen Troy and Mr Robert Nader of Forbes Hare for the Applicants
Ms Lynette Ramoutar for the Financial Services Commission
Mr Gerard Farara QC of Farara Kerins for Mr Kevin Whitten

JUDGMENT IN CHAMBERS

[2009:19 June]

[Court appointment of administrators under section 39(2)(b) of Financial Services Commission Act, 2001 over company - order providing for administrators' remuneration and reasonable costs and expenses to be paid out of assets of company – application by administrators for payment – terms of order - company appealing order of appointment – whether order for payment should abide decision of Court of Appeal]

- [1] **Bannister J [ag]:** This is an application made in proceedings brought by the Financial Services Commission ('the FSC') against Whitten Trust Company Limited ('the company') for the appointment of administrators under section 39(2)(b) of the Financial Services Commission Act, 2001 ('the Act'). On 14 January 2009 Foster J appointed Mr Ian Trumper and Mr Ian Thompson as administrators ('the administrators'). It is not necessary for the purposes of this judgment for me to set out the circumstances giving rise to the proceedings except to say that the sole owner and controller of the company, a Mr Kevin Whitten ('Mr Whitten') objects to and has been given permission to challenge the appointment by way of derivative appeal. That appeal is due to be heard some time in September. Meanwhile, the company is without directors, Mr Whitten having resigned and there having as yet been no appointment of a director in his place.
- [2] By an application made on 29 May 2009 the administrators applied in these proceedings seeking payment of their reasonable fees and disbursements, including payments to a firm of accountants and to Forbes Hare for legal advice and assistance provided to the administrators by that firm and it is that application which came before me on 19 June 2009. I gave my ruling at the end of the hearing. This judgment sets out my reasons.
- [3] Before going any further I should notice that the hearing was attended by Mr Gerard Farara, QC appearing on behalf of Mr Whitten personally. As I have said, the company is without officers and unable to represent itself. Although Mr Whitten has no locus standi to appear on behalf of the company and is not a party to these proceedings, he clearly has a real interest in the outcome of the proceedings and of this application. No-one objected to his appearing and I was greatly assisted by the representations made by Mr Farara, QC on his behalf.

[4] The application is founded upon the terms of the order of 14 January 2009 under which the administrators were appointed. Its material provisions are as follows:

"IT IS HEREBY ORDERED THAT:

1. Pursuant to sections 39(2)(b) and 39(3) of the Financial Services Commission Act Mr. Ian Trumper, Senior Managing Director in the FTI Forensic and Litigation Consulting practice in London, and Mr. Ian Thompson, Managing Partner in FTI Forensic Accounting Limited's BVI office, are hereby appointed as Joint Administrators of the Respondent.
2. The powers of the Joint Administrators shall be as follows:
 - (a) To take possession of, and to have full and complete access to, all books, records, papers, statements and other documents of the Respondent wherever located and in whatever form and to exercise such powers as may be necessary for the purpose of acquiring, retaining possession or making copies thereof;
 - (b) To examine and verify the said books, records, papers, statements and other documents of the Respondent;
 - (c) To take over and manage the affairs of the Respondent;
 - (d) To conduct such investigations as may be necessary to determine whether the Respondent and its functionaries are in breach of the provisions of the Act, the Banks and Trust Companies Act, 1990 ("the BTCA"), or any other financial services legislation;
 - (e) To examine by interview any director or officer of the Respondent;
 - (f) To examine by interview any person who in the opinion of the Joint Administrators is likely to have information relevant to the affairs of the Respondent;
 - (g) To investigate and/or oversee investigations into the operations of the Respondent, including the apparent intermingling of clients' funds with the Respondent's funds and the failure to follow accounting

procedures resulting in suspected shortfalls in client accounts and anomalies in the profit and loss account;

...

- (i) To make such applications as may be required to recover assets of the Respondent wherever located;
- (j) To make such applications as may be required concerning any matter arising out of the exercise of the above powers;

...

3. The Joint Administrators shall report to the Court and to the Commission pursuant to section 39(4) of the Financial Services Commission Act within 45 days of the date of this Order on the matters set out at paragraph 2 herein.

4. The remuneration of the Joint Administrators and their supporting personnel shall be paid out of the assets of the Respondent in priority to all other debts of the Respondent at the following hourly rates:

[The order then sets out the rates chargeable by the grades of personnel who would be carrying out the work.]

5. The reasonable costs and expenses of the Joint Administrators and their staff shall be paid out of the assets of the Respondent in priority to all other debts of the Respondent.

6(a) The remuneration and other costs and expenses of the Joint Administrators shall be paid out of the assets of the Respondent upon presentation by the Joint Administrators of either weekly or monthly statements of account for such period as the Court considers appropriate.

(b) All sums payable to the Joint Administrators pursuant to paragraph (a) above shall be paid as and when they fall due and shall be subject to approval by the Court on the application of the Joint Administrators, such

application to be made at the conclusion of the 45 day period referred to in paragraph 3 hereof.

...

10. This Order shall continue in effect until further Order of this Court."

[5] Section 39 of the Act (so far as material) provides as follows:

"(1) The Commission may apply to the Court for a protection order under this section with respect to

- (a) a licensee where his licence is about to be revoked or where the Commission is entitled to take enforcement action against him under section 37;
- (b) a former licensee; or
- (c) a person carrying on unauthorized financial services business.

(2) On an application made under subsection (1), the Court may make such order as it considers necessary to protect or preserve the business or property of the person with respect to whom the application is made, or the interests of his clients, investors, creditors or the public, including

...

- (b) an order appointing an administrator to take over and manage the financial services business then carried on by the person concerned or carried on by him immediately before the revocation or suspension of the licence, as the case may be.

...

(3) Without limiting the application of subsection (2)(b), an order made under that subsection shall specify the powers of the administrator and may

...

- (b) fix and provide for the remuneration of the administrator."

- [6] The order of 14 January 2009 clearly 'provided' for the remuneration of the joint administrators, by directing that the reasonable costs and expenses of the administrators and their staff be paid out of the assets of the company upon presentation by them of either weekly or monthly statements of account for such period as the court considers appropriate; and by specifying that all sums payable be paid as they fall due. In my judgment the order also 'fixed' the administrators' remuneration by specifying hourly rates.
- [7] On first reading there may appear to be the potential for conflict between (a) those provisions of paragraph 6 which specify that the remuneration, etc, of the administrators be paid 'upon presentation' of monthly or weekly statements of account, such sums to be paid 'as and when they fall due' and (b) the provisions of paragraph 6(b) which make payment subject to the approval of the court on application by the administrators. The evidence shows that administrators' firm does not issue statements. It issues invoices, payable immediately unless otherwise agreed. So that if paid 'on presentation' or 'as and when they fall due' there would be no opportunity for making an application for prior approval by the court. Further, paragraph 6(b) directs that the necessary application be made at the end of the 45 day period referred to in paragraph 3, by which time at least one monthly or six weekly statements would in the ordinary course have been presented and paid, so giving rise to the question what sort of approval is envisaged by the order. Finally, the terms of the order apparently envisage one application for approval only, to be made in respect of the first 45 days of the administration. On one reading this does not provide for the position, as in the event has happened, where the administrators remain in office after that period.
- [8] I do not think that there is any difficulty about this wording provided paragraph 6 is read without any preconceived notions. The order plainly directs that the administrators' 'statements' (which I take to be a generic word covering invoices, statements, fee notes, expenses claims etc) are to be paid without question on presentation or in accordance with the payment terms which they contain. But those payments are all subject to the approval of the court. That is to say, the administrators are to be paid timeously in accordance with the statements which they present, but their remuneration is always subject to ultimate

review by the court. It is implicit in this scheme that if, on such review, the court is of the opinion that unreasonable remuneration or expenses have been paid, the court may order repayment to the company, but the overriding intention is that the administrators are to be paid as they go, without having to wait for the court's prior approval.

[9] As for the fact that the order envisages only one review, to be made at the end of the 45 day period specified, it seems to me that is simply accounted for by the fact that when the order was made, it was thought that the administrators would not be in office after that time. It does not mean that the 'pay as you go' provisions of the order ceased to be of effect once that date was reached, still less does it mean that the administrators' statements submitted after that date are free from review by the court.

[10] This analysis shows, in my judgment, that while the court retained its overriding power to supervise the remuneration of the administrators, there is an expectation that they will be paid according to the statements which they submitted. The court, in other words, was not concerned to have each item in the administrators' statements vouched before payment could be made. Rather, the court was directing that payments of those statements should stand unless on review it was plain that the claimed or paid remuneration or expenses was not reasonable. The position, is different from that which normally obtains when a liquidator, for example, comes to the court to have his remuneration approved before any entitlement to payment arises.

[11] Approaching the matter in this way, I have been unable to detect anything unreasonable in the time spent by the administrators' firm in carrying out its function. As for the expenses claimed by them, one was a bill from CCP accountancy services, who were engaged by the administrators as a matter of urgency because, as set out in their final report, the books of the company were found to need bringing up to date as a matter of urgency. The amount charged by them was very far from excessive and Mr Farara very properly took no issue with the amount of that expense. The other expense was a bill from Forbes Hare for legal services provided to the administrators. I pointed out that the order of 14 January 2009 gave the administrators no power to employ solicitors (or, for that matter, any other

professional) but Miss Troy satisfied me that the terms of the order envisage that the administrators would be carrying out work for which they would need legal advice and assistance and in any event it is in the nature of an appointment such as the present that legal advice is going to be required generally, so that the administrators are in receipt of ongoing guidance as to the exercise of their powers and the carrying out of their functions. In the light of my findings as to the manner in which the order of 14 January 2009 is intended to operate, I have reviewed the bill presented by Forbes Hare in the same way as the administrators own remuneration. It does not seem to me that it is possible to characterize it as in any way unreasonable.

[12] Mr Farara, QC pressed me with the need to protect the company's position should its appeal (by Mr Whitten) succeed. As to this I think there are two points. First, as I have tried to explain, the court by its order of 14 January 2009 was evidently anxious that the administrators should not be kept out of pocket. Indeed, they should have received earlier payment long since. So that it seems to me that there is no justification for making them wait until the company's appeal is disposed of. Secondly, the administrators are not parties to these proceedings or to the forthcoming appeal, so that it seems wholly wrong that the question of their remuneration and expenses should, so far as their own position is concerned, be dependent in any way upon the outcome of the company's appeal. The administrators are court appointees. Their position is not to be equated with that, for example, of a secured creditor wrongfully dealing with his security. If any redress is to be sought if the appeal succeeds, it must, it seems to me, be sought elsewhere. That will be a matter for the Court of Appeal and is not something with which I have anything to do or as to which I can, or do, express any opinion.

[13] For these short reasons I approve the administrators' remuneration and the two sets of expenses to which I have referred above.

Edward Bannister
Commercial Court Judge
23 June 2009