

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

IN THE HIGH COURT OF JUSTICE

SUIT NO. GDAHCV 2003/0255

IN THE MATTER OF BANK CROZIER LIMITED

AND

IN THE MATTER OF THE OFFSHORE BANKING ACT, 1996 NO 3

AND

IN THE MATTER OF THE COMPANIES ACT 1994, NO 35

AND

IN THE MATTER OF THE INTERNATIONAL COMPANIES ACT, CAP 152

BETWEEN:

PRICE WATERHOUSECOOPERS INC.

Applicant

and

**GARVEY LOUISON
(Liquidator of Bank Crozier limited)**

Defendant

Appearances:

Mr. James Bristol for the Applicant
Mr. Sean Lewis for the Defendant

2012: December 13;
2013: March 5; May 3.

DECISION

- [1] MOHAMMED, J.: The Minister of Finance of Grenada ("the Minister"), appointed the Applicant ("the Applicant") as the Controller of the Bank Crozier Limited ("the Bank") pursuant to the Offshore Banking Act ("the OBA"). The arrangement between the Minister and the Applicant were set out in an agreement referred to in these proceedings as the Letter of Engagement ("the Letter of Engagement"). Thereafter, the Court ordered the Bank to be wound up and the Defendant was appointed the Liquidator of the Bank ("the Liquidator"). Upon the appointment of the Liquidator the mandate of the Applicant ceased.
- [2] During the Applicant's mandate as Controller, certain legal actions (which I will set out in greater detail later) were instituted against it alleging its negligence and misconduct. While the Applicant was the Controller, it incurred legal expenses to defend these actions and this continued even after the appointment of the Liquidator. The Liquidator was advised by the Applicant of these expenses. The Applicant also unsuccessfully pursued its claim for an indemnity from the Bank in proceedings at various levels of the Court.
- [3] The Minister, with whom the Applicant has the Letter of Engagement to act as Controller of the Bank, submitted a claim ("the Proof of Debt") to the Liquidator, which both parties agree pertain to the litigation expenses incurred by the Applicant in its defence of the aforementioned litigation during its mandate as Controller and its litigation expenses incurred at various levels of the Court in asserting his indemnity expenses claim¹. The Minister claimed a priority payment of the Proof of Debt pursuant to section 457 of the Companies Act of Grenada ("the Companies Act").
- [4] The Liquidator rejected the Proof of Debt. Subsequently, the Minister assigned his interest in the Proof of Debt to the Applicant which has approached this Court to reverse the Liquidator's refusal to pay the Proof of Debt. The Applicant has asserted that the Proof of Debt be paid as a priority from the Bank's estate

¹ Paragraph 27 of affidavit of David Boyd filed 29th October 2012

pursuant to section 457 of the Companies Act; the debt arose within the twelve months next preceding the issuance of the Winding Up Order in relation to the Bank; and it is in the interest of public policy that the OBA be interpreted together with the provisions of the Companies Act.

- [5] While the Defendant has admitted that the items in the Proof of Debt can only be recovered as an ordinary debt from the Bank ² it submitted that section 457 of the Companies Act does not give the Minister a priority claim for the sums claimed in the Proof of Debt; the Letter of Engagement between the Bank and the Minister excludes expenses for acts of negligence and misconduct; and the Bank which was not a party to the Letter of Engagement is not bound by such terms.
- [6] The issues to be determined are:
 - (a) Can the Minister rely on section 457 of the Companies Act to recover the sums claimed in the Proof of Debt in priority to all other debts;
 - (b) If not, is there a statutory or common law duty for the Bank to indemnify the Minister for all sums in the Proof of Debt.
- [7] I agree with the Liquidator for rejecting the claim in the Proof of Debt for the following reasons:
 - (a) I have found that the sums claimed in the Proof of Debt are *not* recoverable as a preferred debt under section 457 of the Companies Act since this section does not apply to litigation expenses;
 - (b) While there is a bare indemnity conferred by the OBA on the Minister against the Bank, this indemnity does not extend to expenses incurred by the Controller for acts of misconduct or negligence which are expressly excluded by the terms of the Letter of Engagement. In any event, the claim with respect for expenses incurred by the Applicant in defending actions during his mandate as Controller is made premature since there has been no determination of the conduct of the Controller in the actions;

² Paragraph 33 of affidavit of Garvey Louison filed November 29, 2012

- (c) The Minister's indemnity does not extend to the expenses incurred by the Applicant in pursuing his indemnity at various levels of the court since this is not a fee, charge or expense under the Letter of Engagement; and
- (d) Under the common law there is no duty on the Bank to indemnify the Applicant for the expenses set out in the Proof of Debt since there is no contract between the Bank and the Applicant.

Can the Minister rely on section 457 of the Companies Act to recover the sums claimed in the Proof of Debt in priority to all other debts?

- [8] Counsel for the Applicant submitted that section 457 of the Companies Act permits the Government to recover the sums in the Proof of Debt as an "imposition" or "contribution".
- [9] The Liquidator instead submitted that the legislative intent of section 457 of the Companies Act does not include an interpretation as wide as that proposed by the Applicant since the indemnity given by the Minister to the Controller does not fall within section 457 of the Companies Act nor does it confer a priority upon the Applicant. The Defendant's position on this issue was reflected in his letter dated 11th May 2012 to the Applicant rejecting the claim for priority payment of the Proof of Debt.
- [10] It was common ground that the sums claimed in the Proof of Debt concern costs incurred by the Applicant (the Controller) in defending two specific actions which were commenced against the Applicant during its mandate and its litigation expense incurred in the unsuccessful pursuit of its indemnity actions against the Bank at various levels of the court. The actions against the Applicant during its mandate as Controller were an action instituted by Carla Bella Limited ("Carla Bella")³ against the Bank, the Applicant as Controller and the Minister, alleging *inter alia* various breaches of fiduciary duty and negligence by the Controller

³ 21st May 2003

during its mandate and claiming damages⁴. Carla Bella also engaged in proceedings against the Controller in the province of Alberta, Canada arising out of the same facts, alleging *inter alia* various breaches of fiduciary duty and negligence by the Controller during its mandate and claims general damages of CDN\$2,216,606.00 and special damages of CDN\$9,476,220.00.

- [11] The other action was instituted by Grenville Phillips, the Controller of Bank Crozier International Limited (BCIL)⁵ against the Applicant as Controller alleging *inter alia* various breaches of duty fiduciary and negligence by the Controller during its mandate and claiming damages of approximately US\$3,500,000.00⁶. Injunctive relief was also obtained. In all the actions concerning negligence or misconduct of the Applicant as a Controller, there was no evidence on the status of liability⁷.
- [12] The Proof of Debt seeks to recoup US\$1,619,656.36 for fees and costs incurred by the Controller to date in asserting security interest and defending claims contingently for an additional maximum sum of US\$11,692,826 plus applicable interest, representing damages claimed in the action brought by Carla Bella against the Controller in the Canada action and costs associated with its indemnity actions.
- [13] The Court of Appeal of the Eastern Caribbean Supreme Court⁸, in determining whether a Controller appointed pursuant to the OBA with like powers of a receiver is entitled to be indemnified out of the funds of the Bank in priority to the general body of creditors, held that only the Minister is entitled to such an indemnity under the OBA but the OBA does not give the Minister a right to be paid in priority⁹. While acknowledging that under the OBA the Minister has "a right to be indemnified or protected or relieved against a burden or obligation - in this case,

⁴ Claim No. GDA HCV 2003/0220

⁵ 30th May 2003

⁶ Claim No. GDA HCV 2003/0028

⁷ Paragraph 27 of the affidavit of Garvey Louison filed 29th November 2012

⁸ Civil Appeal No. 1 of 2007

⁹ Paragraph 45 Civil Appeal 1 of 2007

the obligation to meet the expense of the Controller"¹⁰, the Court of Appeal was clear that "there is nothing in the OBA or in any other source that has been brought to this court's attention that enables the Minister or the Controller to recover the expense of the controllership from the assets of the Bank other than as an ordinary debt in the liquidation".¹¹

- [14] Both parties agree that the Companies Act and the Letter of Engagement were not before the Court of Appeal in its deliberations. The Applicant is therefore relying on section 457 as the other "source" for priority payment of the Proof of Debt.
- [15] Section 457 of the Companies Act states:

"In a winding up of a company there shall be paid in priority to all other debts:

 - (a) All rates, charges, taxes, assessments, impositions or contributions, whether imposed by the Government or any public authority under the provisions of any Act, and having become due and payable within twelve months next before the relevant date;"
- [16] While I agree with Counsel for the Applicant that the provisions of the OBA do not exist in a vacuum and must be considered together with the Companies Act, I do not share his view that the legislators intended for section 457 of the Companies Act to have the liberal interpretation suggested by him.
- [17] Instead, I agree with Counsel for the Liquidator that the section is not novel or unique to Acts of this nature. In the United Kingdom, section 33 of the Bankruptcy Act 1914 states:

"In the distribution of the property of a bankrupt there shall be paid in priority to all other debts:

¹⁰ Paragraph 45 Civil Appeal 1 of 2007

¹¹ Paragraph 44 Civil Appeal 1 of 2007

- (a) All parochial or other locals rates due from the bankrupt at the date of the receiving order and having become due and payable twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt up to the 15th day of April next before the date of the receiving order, and not exceeding on the whole, one year's assessment".
- [18] Section 35 of Chapter 48 of the Bankruptcy Act, Chapter 48 of the Laws of Fiji states:

"In the distribution of the property of a bankrupt there shall be paid in priority to all other debts -

One year's rates and taxes

- (a) All Crown taxes and local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that date not exceeding in the whole one year's assessment."
- [19] Closer to home, section 36(1) (a) of the Bankruptcy Ordinance, Chapter 202 of the laws of Belize provides that:
- (a) "All local rates, land and property or other tax due from the bankrupt -- at the date of the receiving order - having become due and payable within twelve months next before such time"
- [20] The aforesaid legislation in different jurisdictions have been interpreted as allowing Government or public bodies to recover its revenue in whatever form they exist such as income tax, value added tax, capital gains tax, betting and gaming dues.
- [21] The language of section 457 does not support the interpretation suggested by Counsel for the Applicant. It is settled law that words in a statute must be construed in their context. **Halsbury's Laws of England**¹² in addressing this issue states:

¹² 4th ed Vol 44 at paragraph 871

"Although the words of a statute are normally to be construed in their ordinary meaning, due regard must be had to their subject matter and object, and to the occasion on which and the circumstances with reference to which they are used, and they should be construed in the light of their context rather than in what may be either their strict etymological sense or their popular meaning apart from that context. If the sense of a word can be so determined, then recourse need not be had to its use in other sections of the statute or in other statute."

- [22] The legislative intention for the interpretation of the words "imposition" and "contribution" can be found from an examination of the language of the section. The words "rates", "charges", "taxes", "assessment", in my view all refer to sources of revenue to the Government and public authorities and it is in this context the words "impositions" or "contributions" are to be construed. It is clear to me that it could not have been in the contemplation of the legislators that the words "imposition" or "contribution" ought to be given such a liberal interpretation to include the recovery of litigation expenses by the Government or any public authority especially as a priority claim since the very nature of both are quite distinct. If the nature of the debt which the Minister is claiming from the Bank was in the form of revenue owed to the Government then I would agree with Counsel for the Applicant that it would be an "imposition" or a "contribution", but it is not. The sums the Minister (by extension the Applicant) are seeking to recover are expenses incurred by the Applicant as Controller in various types of litigation.
- [23] I therefore cannot accept Counsel for the Applicant's submission that if the Minister is not afforded the priority protection under section 457 of the Companies Act against any licensee (in this case the Bank), there is no certainty or security available to the insolvency practitioner who accepts the role of OBA Controller and exposes the Government to liability which cannot be recouped from the ultimate beneficiary of this process, the Bank ultimately weakening the insolvency and restructuring process of its credibility. To borrow the words of Barrow JA in **Daryl**

Sands Controller of Bank Crozier Limited v Garvey Louison Liquidator of Bank Crozier Limited (in Liquidation)¹³:

"Insolvency practitioners and others who accept appointment as receivers or controllers should see, before accepting appointment, that satisfactory provisions exist to remunerate and indemnify them. If prospective appointees do not do so, that is entirely their fault and they must not look to the court to relieve against their imprudence. It is hoped that the Controller's letter of engagement, which he has steadfastly refused to disclose, contained terms adequate to protect him."

- [24] In my view, the same can be said for a Minister who engages a person to act as a Controller to ensure that there is adequate statutory protection for the Minister to recoup, as a priority, any expenses which he is liable to indemnify a Controller whom he has appointed. It is not the role of the Court to attempt to fill such a void and interpret legislation which does not reflect the intention of the legislature.

Is there a statutory duty under the OBA for the Bank to indemnify the Minister for the sums in the Proof of Debt?

- [25] The Minister is seeking to recover from the Bank two types of litigation expenses. The first are litigation expenses which the Applicant incurred in defending actions against it during its mandate as Controller and secondly, litigation expenses he incurred in asserting its indemnity against the Bank after its mandate as Controller ended. The Court of Appeal in **Daryl Sands Controller of Bank Crozier Limited v Garvey Louison Liquidator of Bank Crozier Limited (in Liquidation)**¹⁴ established that the Minister is entitled to recover the expenses incurred by any Controller appointed by him as an ordinary debt under the OBA since the OBA confers a bare indemnity on the Minister. One must look to the terms of the Letter of Engagement between the Minister and the Applicant to see if the bare indemnity extends to acts of negligence or misconduct of the Applicant during the mandate of the Controller and to legal expenses incurred by the Applicant in pursuing this indemnity.

¹³ Civil Appeal No 1 of 2007 at paragraph 47

¹⁴ Civil Appeal No 1 of 2007 at paragraph 47

[26] The material aspects of the Letter of Engagement which I paraphrase are:

- a) Where necessary (i.e. there are insufficient funds available at the Bank), the Minister would provide the Controller with sufficient funds to cover any obligations properly incurred by the Controller in the course of his duties under his appointment¹⁵;
- b) As the appointee of the Minister, the Controller will endeavour to carry out this assignment in a prompt and cost efficient manner in the accordance with the best professional standards¹⁶;
- c) It is acknowledged by the Minister that the Controller's fee (including those of his staff), out of pocket expenses (including travel, accommodation, legal, agent and other fees), and operating costs (including costs for rent, salary and wages and other expenses) incurred in relation to his function as defined therein will be paid directly by the Bank. In the event that the Bank does not pay the fees, out of pocket expenses and operating costs of the Controller within 30 days of receiving an invoice in respect of same, the Government of Grenada agrees to immediately pay the outstanding amount(s) directly to the Controller¹⁷;
- d) The Minister will indemnify the Controller and his agents, servants and employees, and PricewaterhouseCoopers Inc., against claims brought by any third party¹⁸;
- e) The Contract shall be governed by and interpreted in accordance with the laws of Grenada¹⁹.

¹⁵ Letter dated 1st August 2002- Scope and Timing of our services

¹⁶ Letter dated 1st August 2002- Scope and Timing of our services

¹⁷ Letter dated 1st August 2002- Fees

¹⁸ Letter dated 1st August 2002- Terms and Conditions

¹⁹ Letter dated 1st August 2002- Governing Law and Jurisdiction

- f) The Controller and Pricewaterhouse Coopers Inc.'s liability to pay damages for all losses, including consequential damages, economic loss or failure to realize anticipated profits, savings or other benefits, incurred by the Minister as a direct result of breach of contract or negligence or any other tort by the Controller in connection with or arising out of the Engagement or any addition or variation thereto shall be limited to that proportion only of the Minister's actual loss which was directly and solely caused by the Controller.²⁰
 - g) Except for misconduct or negligence by the Comptroller, the Government of Grenada agrees to indemnify the Controller and his agents, servants and employees and Pricewaterhouse Cooper Inc. to the fullest extent permitted by law against all liabilities, losses, claims, demands and reasonable expenses, including but not limited to legal fees and expenses and internal management time and administrative costs brought against them by any party or person whatsoever, other than the Government of Grenada, with or arising out of the Letter of Engagement²¹.
- [27] The terms of the Letter of Engagement confirm that both parties contemplated that the Controller may be exposed to actions brought against it by third parties and that the Minister would indemnify the Controller for such expenses. It is also clear that there is an expressed exception to this indemnity which is "for misconduct or negligence by the Controller". At the hearing of this application there was no evidence that there has been a finding of negligence or misconduct by the Applicant in the Carla Bella and BCIL litigation. In this regard, I agree with Counsel for the Applicant that until there is a determination on this issue there remains only an allegation against the Applicant. In my view, the Proof of Debt submitted by the Applicant for the payment of the expenses incurred in the Carla Bella and BCIL actions is therefore premature at this stage and the Liquidator quite correctly refused to honour the payment of the said sums.

²⁰ Terms and Conditions attached to Letter dated 1st August 2002 – Limitation of our liability

²¹ Terms and Conditions attached to Letter dated 1st August 2002 – Indemnity against third party liability

- [28] However, if upon determination of the Carla Bella and BCIL actions there is a finding of negligence or misconduct by the Applicant during its mandate then the sums claimed with respect to these actions will fall within the exception and the Liquidator will not be able to honour them. In **Price (R A) Securities Ltd v Henderson**²², it was held that even a court appointed receiver (who has a wider indemnity than the Applicant in the instant case) is not entitled to an indemnity in respect of liability for negligence or default in the performance of his duties.
- [29] Further, there is no provision in the terms of the Letter of Engagement which allows the Minister to be indemnified for expenses the Controller incurred in actions against the Bank, which it unsuccessfully pursued to recognize its indemnity at various levels of the court. In my view the indemnity conferred by the OBA on the Minister does not extend to such expenses. If the Controller chose to pursue litigation action against the Bank, it cannot now call upon the Bank the successful party to indemnify it for such litigation expenses.

Under the common law of guarantee is there a duty by the Bank to indemnify the Minister for the sums in the Proof of Debt?

- [30] In a contract of guarantee the surety/guarantor promises the creditor to be responsible with the principal for the performance by the principal of his existing or future obligation to the creditor if the principal fails to perform²³. It is an accessory agreement whereby the guarantor agrees to be responsible to the creditor. The liability on the guarantor is not only to perform himself if the principal fails but to ensure that the principal performs his obligations.
- [31] There was no accessory contract between the Bank and the Applicant where the Bank promised the Applicant to be responsible, in addition to the Minister, for due

²² [1990] LRC (Comm) 520

²³ Law of Guarantees, 4th ed at page 3

performance by the Minister of his obligations under the Letter of Engagement if the Minister fails to perform. As such the Bank cannot be liable to the Applicant nor to the Minister for the breach of the Minister's obligation under the Letter of Engagement. Therefore, it follows that Bank's duty to indemnify the Minister is not confirmed by the common law duty of guarantee since there was no contractual relationship between the Bank and the Applicant. I therefore find that under the common law of guarantee there is also no right of indemnity for the Bank to indemnify the Applicant for the expenses in the Proof of Debt.

Order

- [32] The Applicant's application filed 29th May 2012 is dismissed with costs to be assessed if not agreed.

Margaret Y. Mohammed
Margaret Y. Mohammed
High Court Judge